

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**SUCCESSION CAUSE NO. 176 OF 1996**

**IN THE MATTER OF THE ESTATE OF CHEMWOK CHEMITEI (DECEASED)**

**VINCENT KIPROTICH.....1<sup>ST</sup>**  
**PETITIONER/APPLICANT**

**SUSAN JEPKOSGEI C.....2<sup>ND</sup>**  
**PETITIONER/APPLICANT**

**JOHN TANUI CHEMWOK.....3<sup>RD</sup>**  
**PETITIONER/APPLICANT**

**PHILIP KIMUTAI CHEMWOK.....4<sup>TH</sup>**  
**PETITIONER/APPLICANT**

**VERSUS**

**MARY CHERUTO CHEMWOK.....**  
**RESPONDENT**

**Coram: Before Justice R. Nyakundi**

**M/s Chemwok & Co. Advocates**

**M/s Kiboi Tuwai & Co. Advocates**

**RULING**

1. This ruling determines the Petitioner's/Applicant's Notice of Motion application dated 11<sup>th</sup> day of March 2026 brought under Section 3A of the Civil Procedure Act Cap 21 and Order 42 Rule 6(2) of the Civil Procedure Rules Law of Kenya and all enabling provisions of the Law. The application seeks the following orders:

*a. Spent.*

- b. *That pending the hearing and determination of the application inter-parties, there be a stay of execution of judgment delivered by the Honorable Court at the Eldoret High Court in Succession Cause No. 176 of 1996 and all consequential orders.*
  - c. *That pending the hearing of this application inter-parties, this Honourable Court be pleased to issue interim orders of injunction in respect of the Estate of Chemwok Chemitei.*
  - d. *That pending the hearing and determination of the appeal, there be a stay of execution of judgment delivered by the Honorable Court at Eldoret High Court in Succession Cause No.176 of 1996 and all consequential orders.*
  - e. *That costs of this application be in the cause.*
2. This application is based upon the grounds that: -
- a. *That this Honourable Court delivered its judgment on the 16<sup>th</sup> January 2026 dismissing the Applicants'/petitioners 'application for confirmation of summons of grants dated 9<sup>th</sup> November 1998 and the same was rendered inoperative and granted the letters of administration intestate to the Respondent.*
  - b. *That the said judgment further directed that physical land transfers and subdivision of portions of land between the houses of the deceased be undertaken by a licensed surveyor.*
  - c. *That the Applicants are dissatisfied with the said decision and intends to file an appeal against the entire judgment.*
  - d. *That unless the stay of execution is granted, the Respondent may proceed to implement the orders of the Court thereby transferring and subdividing the estate property, which will substantially alter the status of the estate.*
  - e. *That if the said orders are implemented before the appeal is heard and determined, the appeal will be rendered nugatory.*
  - f. *That the Applicant has filed this application without unreasonable delay.*

- g. That it is in the interest of justice that the status quo of the estate property be preserved pending the hearing and determination of the intended appeal.*
  - h. That the Applicants are willing to comply with any conditions that this Honourable Court may impose.*
  - i. That the Respondent in unlikely event that the appeal does not succeed can be compensated by way of costs.*
3. In support of the application is the annexed affidavit of one Philip Chemwok who deponed as follows:
- a. That I am the 4<sup>th</sup> Applicant and therefore familiar with the facts of this suit and competent to swear this affidavit.*
  - b. That this Honourable Court delivered its judgment on 16<sup>th</sup> January 2026, in which the Applicants' application for confirmation of summons for grant was dismissed.*
  - c. That the Court further directed that there be a physical transfer and subdivision of portions of land belonging to the estates between the houses of the deceased of which to be undertaken by a licensed surveyor.*
  - d. That I am dissatisfied with the judgment and intends to file an appeal against the entire decision.*
  - e. That unless this Honourable Court grants a stay of execution of the said orders, the Respondent may proceed to implement the orders by transferring and subdividing the estate property.*
  - f. That the implementation of the said orders will substantially alter the status of the estate of the property and may result in irreversible changes to the land.*
  - g. That if the said land transfers and subdivisions are carried out before the appeal is heard and determined, the intended appeal will be rendered nugatory.*
  - h. That this application has been brought without unreasonable delay.*



- vii. Rael*
- viii. Josphat Kiptanui*
- c) The 3<sup>rd</sup> House of Tapkigen Chemwok (Now Deceased) who had the following children;*
  - i. Mary Kutto*
  - ii. Josphine Chemwok*
- d) The 4<sup>th</sup> House of Juliana Chemwok (Now Deceased) who had the following children;*
  - i. John Tanui*
  - ii. Christopher Kipruto*
  - iii. Michael Kipkoror*
  - iv. Francis Kibet*
  - v. Ben Kimutai*
  - vi. Andrew Changwony*
  - vii. Jonathan Kipkosgei*
  - viii. Milka Jepkemoi*
- e) The 5<sup>th</sup> House of Maria Cherop (now deceased) who had the following children;*
  - i. Irene Jepkorir*
  - ii. Stella Jeruto who is deceased and had children*
  - iii. Eunice Jelimo*
  - iv. Sally Jemutai*
  - v. Eric Kiplagat*
  - vi. Philip Kimutai.*
- e. That prior to his death, the Deceased herein Chemwok Chemitei had a total of 31 children as stated above.*
- f. That prior to his death, the Deceased herein Chemwok Chemitei had the following properties which form the known estate herein.*
  - i. Elgeyo/Marakwet/Lelan/Kaptalamwa/83 measuring 35.2 Ha (87.0) acres or thereabout.*

- ii. *Elgeyo/Marakwet/Lelan/Kaptalamwa/258 measuring 21.01 Ha (51.92) acres or thereabout.*
  - iii. *Elgeyo/Marakwet/Lelan/Kaptalamwa/149 measuring 37.6 Ha (92.91) acres or thereabout.*
  - iv. *Cherangani/Kondabilet/48 measuring 9.2 Ha (22.73) acres or thereabout.*
- g. *That the total known Acreage of the estate of the deceased comprised of the above estate is about 116.54 Ha (287.97) Acres of land.*
- h. *That the Court gave grant of letters of Administration intestate dated 9.11.1998 to;*
  - i. *Kimoi Taparbuch Chemwok (1st Widow)*
  - ii. *Juliana Chemwok (4th Widow)*
  - iii. *Maria J. Chemwok (5th Widow)*
  - iv. *Taplilei Chemwok (2nd Widow)*
- i. *That as a matter of facts, the above mentioned Administratixs passed on and were replaced.*
- j. *That this matter proceeded to full hearing and the Court made the Judgment as annexed to the Applications*
- k. *That the estate herein was distributed by the Court on equal basis among all the 31 beneficiaries/dependants of the estate so that each gets a share of about 8.18 acres of the deceased estate herein.*
- l. *That the Applicants had their proposal presented by the Applicant on the sharing of the estate as stated in prayers 2 (i), 2(ii), 2(iv), in the summons dated 14.3.2024 and paragraphs 9, 10, 11 of the supporting affidavit thereto that was not accepted by the Court.*
- m. *That the Applicants have not justified any stay orders being granted to them.*
- n. *That the right of each beneficiary has been unjustified in the Judgment putting into consideration that this matter was filed in the year 1996.*
- o. *That I pray that the Application be disallowed with cost to us.*

*p. That we make this affidavit in utmost good faith in respond and oppositions to the instant Applications.*

5. I have read the application by the Applicant together with his affidavit in support and the corresponding replying affidavit with the annexure from the correspondence. I must take judicial notice that this succession cause has been in Court since 1996 with no rays of hope, how long is enough for this family to inherit the land of their father the deceased, as for this Court for once that is what is under the bridge as there is already a judgement giving the roadmap on distribution of the estate.

### **Decision**

6. The application beforehand by the Applicant falls within the scope of Order 42 Rule 6 & 1 on stay of execution on the judgement of this Court. At the hearing of the motion the replying affidavit opposes any leave or say as being sought by the Applicants. The major principles upon which can exercise its discretion to stay of execution of the judgment pending an appeal is as follows:
- i. There must be a pending appeal;*
  - ii. The appeal must be competent and arguable on its merits;*
  - iii. A stay of proceedings will be granted to preserve the res;*
  - iv. Where a stay of proceedings will cause greater hardship than when it is refused, the Court will not grant it;*
  - v. Where a stay is likely to render the rights sought to be protected null and void, it will be refused;*
  - vi. Where an appeal raises issue of jurisdiction, it is a strong factor in support;*
7. Where an appeal has been intimated to be filed and is set to be pending before the Court of appeal this Court may hear and determined such an application of stay incidental to the appeal but involving itself with impugned decisions. From the comparative law of perspective, the approach adopted by the Court on an application for a stay of execution is

outlined in several decisions of the Court of Appeal including the cases of **Marie Makhoul** and **Marguerita Desir v Sabina James Alcide SLUHCVAP No. 30/2011**, in Marie Makhoul Madam George Creque JA (as she then was) stated the principles in paragraph 3 to 5 of the judgment as follows: "3. *The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly, there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favor, particularly after a full trial on the merits.*

4. *The modern authority on the guiding principles the Court employs in exercising its discretion to grant a stay is the case of Linotype-Hell Finance Ltd v Baker where Staughton L.J. opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasized that it is not enough to merely make a bald assertion to the effect that an Applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.*

5. *The authority of Hammond Suddard Solicitors v Agrichem International Holdings is grounded in the same principle though formulated differently. In that case the Court pointed out that the evidence in support of a stay needs to be full, frank and clear. They went on to state the principle thus: u ... whether the Court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the Respondent will be unable to enforce the judgment? On the other 6 SLUHCVAP No. 30/2011 6 hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the Respondent?"*

Similarly, in the Marguerite Desir case the Court held inter alia as follows: *"The Court's jurisdiction to grant a stay is based upon the principle that justice requires that the Court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the Court is whether there is a risk of injustice to one or both parties if it grants or refused a stay. Further, the evidence in support of the application for stay of execution should be full, frank and clear. The normal rule is for no stay and if a Court is to consider a stay, the Applicant has to make out a case by evidence which shows special circumstances for granting one. The mere existence of arguable grounds of appeal is not by itself a good enough reason."*

8. This same principles have also been articulated in the case of **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal held that:-
- a. *The power of the Court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.*
  - b. *Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal Court reverse the judge's discretion.*
  - c. *Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.*
  - d. *Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The Court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.*
9. In my considered view the application dated 11<sup>th</sup> March 2026 is hereby allowed on the following terms:

- a. The stay of execution pending hearing and determination of the appeal before the Court of Appeal is hereby granted on condition that there be temporarily execution of the impugned judgment to await the outcome of the appeal.
- b. The costs of this application to abide the orders on the superior Court

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 10<sup>TH</sup> DAY OF  
APRIL 2026.**

.....

**R. NYAKUNDI**

**JUDGE**