



In re Estate of Thomas Kisenga Katumo (Deceased) (Probate & Administration 170 of 2011) [2025] KEHC 7857 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PROBATE & ADMINISTRATION 170 OF 2011**

RC RUTTO, J

MAY 29, 2025

BETWEEN

HENRY MULI KISENGA APPLICANT

AND

JAMES KISENGA 1ST RESPONDENT

JACKSON KISENGA 2ND RESPONDENT

BENJAMIN KISENGA 3RD RESPONDENT

AND

GABRIEL MAINGI CONTEMNOR

BENJAMIN WAMBUA MAILU CONTEMNOR

STEPHEN KYALO KAVENDI CONTEMNOR

AGNES KAVENDI KISENGA CONTEMNOR

RULING

1. Before this court for determination are two applications.
2. The first application is a Notice of Motion Application dated 20th December 2024 in which the Applicant seeks an order for stay of execution of the Ruling of this court delivered on 21st May 2024. The application is based on the grounds set out on the face of the motion and the supporting affidavit sworn by himself. The gist of the application is that the Ruling was rendered summarily while the main suit was still pending, particularly given that Makueni County Government had filed an application seeking to be enjoined in the succession proceedings as an interested party. The Applicant contends that parties were neither given a chance to call all their witnesses, nor to close their respective cases and



to file final submissions. Being aggrieved by the court's determination, the applicant states that he has lodged an appeal.

3. Further, the Applicant asserts that one of the beneficiaries, Esther Mukulu was awarded Plot No. 1696 without consideration of the developments and occupation by other beneficiaries. The Applicant claims that the plot comprises nearly 50% of the deceased estate, thereby leaving the remaining six beneficiaries to share the remainder portion. The Applicant states that the Respondents and other beneficiaries of the estate have commenced the implementation of the orders issued on 21st May 2024 to his detriment and that his portion on Plot No 1696 which he developed over the years is at risk of being taken over by Esther Mukulu and her children. The Applicant maintains that he has raised weighty grounds of appeal hence the need to safeguard the estate by staying the judgment delivered on 21st May 2024.
4. The second application is a Summons dated 13th January 2024 in which the Applicant seeks orders citing the 4th to 6th contemnors herein for intermeddling and contempt of court for alleged non-compliance with the order/decreed issued on 21st May 2024. The Applicant also seeks an order restraining the respondents from entering, occupying, interfering with, alienating and fencing off any parcel of land in his use. Additionally, he prays for an order directing the Agricultural Extension Officer of Mukaa Sub County to access and compute damages allegedly caused by the Respondents, their agents or servants, on all parcels previously occupied by the applicant. The application is based on the grounds set out on the face of the summons and the Applicant's sworn affidavit. The crux of the application is that the judgment delivered by this court on 21st May 2024 partially distributed the estate of the deceased and directed that in effecting distribution, regard should be made to the developments, constructions and areas in active cultivation by the beneficiaries. The Applicant avers that being dissatisfied with the judgment, he has lodged an appeal and filed the application dated 20th December 2024 seeking stay of execution of the judgment.
5. The Applicant further alleges that the Respondents in cahoots with the County Surveyor of Makueni County, one Gabriel Maingi commenced the implementation of the partial grant on 30th December 2024 without verifying the contents of the court order and grant. He contends that they proceeded to sub-divide parcel Kitaingo/Uvete 3551 and 1696 in his absence as one of the beneficiaries and an administrator and which is contrary to the judgment of 21st May 2024. The Applicant asserts that the subdivision was undertaken without regard to the developments, cultivation and structures in place and consequently his portion of land was hived off and fenced in by the Respondents. He claims this has denied him access to crops and fruit trees that were in season and that he now stands to suffer irreparable harm and loss.
6. In opposition to both applications, Agnes Kavendi, one of the children and beneficiaries of the deceased's estate filed a Replying Affidavit sworn on 14th March 2025. She opposed both the Notice of Motion dated 20th December 2024 and the Summons dated 13th January 2025. In her affidavit, she deposed that following the Ruling delivered on 21st May 2024, all the administrators and beneficiaries of the estate accepted the Court's decision and lived harmoniously for a period of seven months while awaiting issuance of the Certificate of Partial Confirmation of Grant. She stated that no member of the Kisenga family expressed an intention to appeal against the Ruling, which was viewed as fair and just by all parties. Agnes further averred that she was not surprised by the Applicant's filing of the instant applications since he has consistently resisted the inclusion of women and his sisters in the inheritance of their late father's estate, particularly in relation to land. She stated that the Applicant has historically employed various tactics aimed at disinheriting the daughters and female members of the Kisenga family.



7. She also stated that, prior to the distribution exercise, a family meeting was convened on 29th December 2024 by the administrators, Benjamin Muli and Jackson Masavu, during which all members of the Kisenga family were present except the Applicant. That at the meeting, all the children and grandchildren were taken through the contents of the Ruling, and the proposed distribution was explained in detail. According to her, all households were represented and consensus was reached, following which the distribution was carried out. She stated that the Applicant joined the meeting briefly but left shortly thereafter. Agnes concluded by stating that the distribution was peaceful, equal, and equitable, and was carried out in full compliance with the court's ruling. She denied that any crops were destroyed or that any buildings or developments were interfered with during the process.
8. Benjamin Mailu Kisenga also opposed both applications through a Replying Affidavit sworn on 14th March 2025. He deposed that the distribution of the estate was not carried out to the exclusion of the Applicant, as alleged. He asserted that the Applicant was duly informed and invited to participate in the process, just like all the other administrators and beneficiaries, through a letter issued via the Chief's office. According to Benjamin, the Applicant was well aware of the planned distribution and its execution. He further denied that the court's orders were disobeyed, maintaining that the Respondents were acting in compliance with the Ruling of 21st May 2024. He contended that the Applicant has consistently held the belief that women and in particular, his sisters Esther Mukulu, Agnes Kavendi, and Mary Syukwaa should not inherit or own any part of the deceased's estate. In support of this, he referenced Machakos CMCC No. 231 of 2011, Esther Mukulu Kisenga v. Henry Muli Kisenga, where the Applicant was found culpable of destroying the property belonging to his eldest sister, Esther Mukulu.
9. Benjamin characterized the current applications as a ploy aimed at frustrating the implementation of the court's ruling and ensuring that the Applicant's sisters do not acquire land for grazing or cultivation. He confirmed that a family meeting was held on 29th December 2024, to which the Applicant was duly notified. Although the Applicant did not attend the meeting personally, he sent his apologies through his son, Alex Mutua Masavu. He further noted that the distribution exercise conducted on 30th December 2024 was carried out with the Applicant's full knowledge, and questioned why the Applicant proceeded to instruct his lawyers in Machakos on the same day if he was allegedly unaware of the process. Regarding the claim of crop destruction, Benjamin submitted that if indeed any crops had been damaged, the Applicant would have annexed photographic evidence or lodged a complaint with the Chief or police authorities none of which was done. He also criticized the Applicant's unilateral joinder of third parties as contemnors without leave of the court, terming it as unprocedural and an attempt to mislead the court. He concluded by urging the court to dismiss both applications with costs.
10. In further opposition to both applications, Jackson Masavu Kisenga, the 3rd Administrator of the estate filed a Replying Affidavit sworn on 14th May 2025. He deposed that together with the two other administrators, namely Esther Mukulu Kisenga and Benjamin Mailu Kisenga, they are elderly and do not wish to be subjected to another protracted and costly round of litigation. He averred that the Applicant had, on numerous occasions, expressed an unwillingness to abide by any court decision that did not go in his favour. Jackson stated that the distribution of the estate was conducted in the presence of two out of the three administrators, and that the Applicant, being one of the administrators, was duly notified. He confirmed that the Applicant was present at the land on the day designated for the distribution, but left before the exercise was concluded. He further affirmed that a family meeting was convened on 29th December 2024, where all beneficiaries resolved to comply with the court's ruling. Although the Applicant did not attend the meeting personally, he sent his apologies through his son.



11. According to Jackson, the Applicant's claims that he was not notified of the exercise are unfounded, as he was present on 29th December 2024 during the initial stages of the distribution before voluntarily leaving the scene. He denied that any court orders were disobeyed or that any of the Respondents were in contempt, explaining that proper notice was issued on 23rd December 2024 summoning all administrators and beneficiaries for the meeting that preceded the distribution exercise. He further stated that the Applicant has consistently opposed the inclusion of their sisters in the distribution of the estate, based solely on their gender. Jackson contended that the Applicant has unlawfully converted a portion of Plot No. 1696 allocated as a gift to their sister Esther Mukulu Kisenga for his own use as grazing and cultivation land, in blatant defiance of the court's ruling. He emphasized that this conduct was particularly concerning given that the Applicant had been allocated the largest share on Plot No. 51, which was not interfered with during the distribution. Finally, Jackson dismissed the Applicant's allegations of crop damage and trespass as unsubstantiated, noting that the photographs annexed to the application did not show any visible destruction or interference with crops or animals. He urged the court to dismiss both applications for lack of merit.
12. Pursuant to the directions issued by this Court, both applications were canvassed by way of written submissions. The Applicant filed his submissions dated 11th March 2025, while the 1st, 2nd and 3rd Administrators/Respondent's filed their submissions dated 14th March 2025.

Applicant's Submissions

13. The Applicant addressed both applications in his written submissions. He outlined the brief background of the case and identified two key issues for determination: first, whether the Court should issue stay orders to halt further implementation of the grant pending appeal; and second, whether the Respondents, named as contemnors, should be cited for contempt of court.
14. On the first issue, counsel for the Applicant submitted that the application was made under Order 42 Rule 6 of the *Civil Procedure Rules*. While acknowledging a delay in filing the application, counsel argued that the delay was not unreasonable and was justified by subsequent developments on the ground. It was submitted that the Applicant stands to suffer substantial loss if stay is not granted, as the Respondents have commenced implementation of the impugned judgment and grant, an action which he argued, would result in the Applicant's eviction from land he has lived on and cultivated for his entire life. Counsel contended that this potential dispossession constitutes substantial loss warranting the grant of stay. It was his position that the Applicant had satisfied all the requisite conditions for the grant of stay of execution pending appeal, both in relation to the judgment delivered on 21st May 2024 and the subsequent certificate of partial confirmation of grant.
15. On the second issue, the Applicant submitted that the Respondents should be cited for contempt of court. In support of this position, he relied on the case of *Econet Wireless Kenya Limited v Minister for Information & Communication of Kenya & Another* [2005] eKLR and the Indian Supreme Court decision in *T.N. Gadavarma Thiru Mulpad v Ashok Khot & Another* [2006] 5 SCC. Counsel submitted that the Applicant had established all the three essential elements of civil contempt, namely: the existence of a valid court order, knowledge of that order by the alleged contemnors, and willful disobedience thereof. He argued, firstly, that the court's order was clear and unambiguous, and that the alleged contemnors, being represented by counsel, were fully aware of its contents. Secondly, he contended that the Respondents had actual knowledge of the order, evidenced by the fact that one of them had previously sought leave from the court to graze livestock on the subject properties, an act which demonstrated their awareness of the subsisting orders. Thirdly, the Applicant submitted that the Respondents' actions were deliberate and calculated to defeat the authority of the court. He alleged that the estate was unlawfully subdivided and occupied to his detriment, and that the subdivision



caused damage to his seasonal crops. He maintained that the said actions were carried out in bad faith and in clear violation of the distribution provisions set out in the certificate of partial confirmation of grant.

16. The Applicant concluded his submissions by stating that the orders in both applications be allowed.

1st, 2nd, 3rd Administrators/Respondents' submissions

17. The Respondents addressed both applications in their written submissions. Counsel for the Respondents submitted that the application for stay of execution pending appeal ought to have been made before the Court of Appeal pursuant to Rule 5[2][b] of the Court of Appeal Rules, and not before the High Court. It was argued that the legal provisions cited on the Applicant's Notice of Motion dated 20th December 2024 were both inapplicable and legally irrelevant. They submitted that the Applicant cited Section 7 of the Appellate Jurisdiction Act, which relates to applications for leave to appeal out of time, yet no such prayer for leave was sought. Additionally, the Applicant cited Section 41 of the same Act, a provision which the Respondents pointed out does not exist. Counsel further contended that although the Applicant relied on Order 42 Rule 6 of the Civil Procedure Rules, that provision is inapplicable in the context of an intended appeal to the Court of Appeal from a decision of the High Court. It was submitted that the applicable provision in such cases is Rule 5[2][b] of the Court of Appeal Rules, which sets out a distinct legal framework for stay of execution, stay of proceedings, or injunctive relief pending appeal. Counsel emphasized that the principles governing applications under Rule 5[2][b] differ from those applicable under Order 42 Rule 6, which is confined to appeals from subordinate courts to the High Court.

18. Relying on the decision in Anne Wanjiku Kibeh v Clement Kungu Waibara & IEBC [2020] eKLR, counsel submitted that for an applicant to succeed under Rule 5[2][b], they must demonstrate, first, that the intended appeal is arguable and not frivolous, and second, that unless a stay is granted, the intended appeal would be rendered nugatory. The Respondents also submitted that no proper appeal had been lodged at the Court of Appeal against the Ruling delivered on 21st May 2024. They argued that the Notice of Appeal was filed seven months after delivery of the ruling, contrary to Rule 77[2] of the Court of Appeal Rules, which requires the notice to be filed within fourteen [14] days. No leave to appeal out of time was sought or obtained, and therefore, the Respondents maintained that the Notice of Appeal was irregular and incompetent.

19. The Respondents further submitted that the annexed Memorandum of Appeal bears no case number, and no record of appeal has been filed. They contended that the grounds of appeal as stated do not challenge the process of distribution or the implementation of the survey exercise. Instead, the Applicant appears only to be aggrieved by the form and nature of the Ruling delivered on 21st May 2024. The Respondents argued that the orders sought in the Summons dated 13th January 2025 are interim in nature and are not expressly linked to the determination of any properly instituted appeal. In particular, they pointed out that Order No. 6 is ambiguous, as it does not clearly indicate whether it seeks a stay order, injunction, or restraining order, nor does it specify whether the relief is sought pending the hearing and determination of the application or the intended appeal.

20. The Respondents further submitted that the Applicant has made misguided and misleading allegations to the effect that one beneficiary, Mary Syukwaa, was not allocated any portion of the estate. They noted that the Applicant has not included Mary Syukwaa as a co-applicant or co-intended appellant, and that she has not sworn any affidavit to express dissatisfaction with the Ruling of 21st May 2024. Moreover, they pointed out that both the Ruling and the Certificate of Partial Confirmation of Grant clearly indicate that the parents' homestead was to be distributed equally among all the children of the deceased, including Mary Syukwaa, a distribution which has already been effected. The



Respondents submitted that the Court's Ruling of 21st May 2024 amounted to a partial confirmation of the grant, and that two outstanding matters were expressly reserved for determination by the Environment and Land Court. These included the issue of the borehole located on Plot No. 1696 and the resolution of sale agreements pertaining to portions of Plot No. 51. They noted that the Court had clearly indicated in both the Ruling and the Certificate of Partial Confirmation of Grant that those matters fell outside the jurisdiction of the succession proceedings.

21. On the application for stay of execution pending appeal, the Respondents maintained that the Applicant had premised his case on the wrong legal framework and had failed to establish a proper factual or legal basis for the orders sought. They submitted that the grounds relied upon were general and unsubstantiated, lacking credible evidence of any prejudice that would result from enforcement of the court's orders. The Respondents emphasized that the Applicant was duly invited to a family meeting through a letter dated 23rd December 2024, for a meeting scheduled on 29th December 2024, and that he was well aware of the impending distribution exercise, which he briefly attended before voluntarily withdrawing. They further submitted that the photographs annexed to the Applicant's affidavit do not demonstrate any visible damage to crops, nor do they show any encroachment, destruction of property, or interference with structures. In their view, the Applicant's simultaneous request for the Agricultural Officer to assess the alleged damage was inconsistent with his claims submitting that if there were actual and visible destruction, it would be apparent prima facie, thereby negating the need for further assessment.
22. Regarding the contempt application, the Respondents submitted that they cannot be held in contempt for merely enforcing court orders that were lawfully issued and properly extracted in their capacity as administrators and beneficiaries of the deceased's estate. They argued that the application for contempt lacked any legal foundation, as the Applicant did not cite any relevant provisions of the *Judicature Act*, the Civil Procedure Rules, or any other governing legal framework for contempt proceedings. Moreover, the Respondents submitted that the Applicant failed to establish the requisite legal threshold or factual basis necessary to sustain a contempt charge against persons who were lawfully executing the court's directives. On the issue of stay pending appeal, the Respondents reiterated that the legal principles cited by the Applicant, specifically those under Order 42 Rule 6 of the Civil Procedure Rules are only applicable in appeals from subordinate courts to the High Court. In contrast, since the present application seeks to stay a ruling of the High Court pending an intended appeal to the Court of Appeal, the relevant provision would be Rule 5[2][b] of the *Court of Appeal Rules*. They submitted that the Applicant had not demonstrated the existence of an arguable appeal, nor shown that the appeal would be rendered nugatory in the absence of stay orders. Accordingly, the Respondents maintained that both the legal and evidentiary thresholds for the grant of stay had not been met.
23. The Respondent's concluded by urging the court to dismiss with costs both the Applications filed by the Applicant.

Analysis and Determination

24. I have carefully considered both applications herein, the affidavits by parties and submissions filed as well as the authorities relied upon and it is my view that there are two issues for determination;
 - a. Whether the Applicant has met the legal threshold for stay of execution pending appeal.
 - b. Whether the 4th to 7th Respondents/Contemnors should be cited for contempt of court orders.



Whether the Applicant has met the legal threshold for stay of execution pending appeal.

25. Before I address this issue, it is important to address a preliminary issue raised by the Respondents in their submissions that, the Applicant’s application dated 20th December 2024 ought to have been filed in the Court of Appeal and not the High Court and that the provisions cited in the Application are wrongly cited as they relate to the Court of Appeal and not the High Court.
26. Although the Application dated 20th December 2023 is based on incorrect legal provisions, this does not render it invalid. Such an error is not fatal and can be remedied under Article 159[2][d] of *the Constitution*, which mandates courts to adjudicate cases without undue reliance on technicalities. Furthermore, under Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules*, the High Court possesses broad discretionary powers to hear and determine any application in a succession case and issue orders necessary to serve the interests of justice. In the case of *Wangari Gichuki v Daniel Wanjigo Muchemi* [2014] eKLR the court held that;
- “I hold that the failure of the applicant herein to follow the right form and refer to the correct section and rules cannot be a basis to deny her a hearing and determination of her application on merit”.
27. Based on the cited authority, the failure to specifically reference the correct legal provision or citing an incorrect one does not invalidate an application. The key consideration is the realization of substantive justice rather than procedural formalities. In succession matters, Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* serve as safeguard provisions, allowing flexibility in procedural compliance. Therefore, I will proceed to evaluate the application based on its merits. Order 42 Rule 6 of the *Civil Procedure Rules* provide for stay of execution and it states as follows:
- 6.[1] No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- [2] No order for stay of execution shall be made under sub rule [1] unless— [a] the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- [b] Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
28. From the foregoing provision, it is evident that the High Court, which issued the impugned orders on 21st May 2024, retains jurisdiction to hear and grant an application for stay of execution, provided the requisite conditions for granting such stay are satisfied. Furthermore, any party aggrieved by a refusal to grant stay has the statutory right to pursue a fresh application for stay in the appellate court. Accordingly, should this Court find it appropriate to dismiss the Applicant’s current application for stay, the Applicant remains at liberty to file a subsequent application for stay in the Court of Appeal. Therefore, the application for stay presently before this Court is proper. The principles which guide the court in the exercise of its discretion in deciding whether or not to grant stay of execution pending



appeal are well settled. They are set out in Order 42 Rule 6 [2] of the *Civil Procedure Rules* above and include

- a. Substantial loss may result to him unless the order is made;
- b. That the application has been made without unreasonable delay; and
- c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

29. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1979] eKLR where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said 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.

30. Thus, in order to make a determination, this court needs to address itself to the following issues. Was the Application made without unreasonable delay? The ruling sought to be stayed was delivered on 21st May 2024. The Applicant filed the stay application on 20th December 2024 which is seven months later. Although the Applicant claims that he only acted when the Respondents began to implement the judgment and subdivide the land, this does not excuse the delay. The delay is not properly explained and is unreasonable, particularly in succession matters where prompt conclusion is vital.

31. Will the Applicant suffer substantial loss if stay is not granted? The Applicant alleges that he will be evicted from land he has occupied and cultivated for decades and that his crops have been or are at the risk of destruction and that the distribution is being enforced unfairly. The Court notes that from the Ruling, the Applicant continues to remain in possession of his awarded portion, Plot No. 51. Further, multiple affidavits confirm that the Applicant was invited to the process which he was aware of but left voluntarily and no credible evidence has been provided to prove damage or eviction. The alleged loss is therefore speculative and not substantiated with evidence. Courts have time and again stated that it is not enough to merely state that substantial loss will result. The kind of loss likely to be sustained must be specified, particularized, and proved.

32. Further, the court notes that the jurisdiction of the Court of Appeal cannot be invoked without leave being granted. In this instant leave to appeal was granted and as such to invoke the jurisdiction of the Court of Appeal, the applicant ought to have proceeded to file a Notice of Appeal within 14 days of the date of the decision being appealed upon. A party who is unable to file such a Notice within the 14 days, is at liberty to apply for extension of time to file an appeal out of time. Only when the



Court considers and grants the extension of time, is the application deemed to have been duly filed out of time. In this instance the Notice of Appeal was filed seven months after delivery of the ruling, without leave which as correctly stated by the respondents is contrary to Rule 77[2] of the *Court of Appeal Rules*, which requires the notice to be filed within fourteen [14] days.

33. Therefore, even if the court were to grant a stay, there would be no valid legal foundation upon which it could be based. In light of these factors, the Applicant has failed to substantiate that he will suffer substantial loss if the stay order is not granted. Has the Applicant therefore offered security for due performance of the decree? There is no offer or mention of security in the Applicant's application. Even if the court might have discretion to waive strict application of security in certain cases, there must be some indication of willingness to comply with this requirement which the Applicant did not give.
34. I therefore do find that the Applicant has not satisfied the threshold under Order 42 Rule 6 [2] of the *Civil Procedure Rules* for grant of stay of execution. Accordingly, the Application dated 20th December 2024 is dismissed.

Whether the 4th to 7th Respondents/Contemnors should be cited for contempt of court orders.

35. The Applicant contends that vide the Ruling delivered on 21st May 2024, the court issued directions on the partial confirmation and distribution of the deceased's estate, and that despite the pendency of an appeal and an application for stay, the 4th to 7th Respondents proceeded to implement the said judgment in a manner that amounted to contempt of court. It is alleged that their actions included subdivision and occupation of portions of the estate to the exclusion of the Applicant and destruction of crops and structures on the disputed land. The Applicant submitted that the Respondents were fully aware of the existence of the Ruling and its implications, and that their subsequent actions were deliberate and unlawful, warranting citation for contempt. The application seeks penal sanctions and an order restraining the said Respondents from further intermeddling with the estate.
36. Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish for contempt. The section provides that:
 - [1] The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.
 - [2] An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
37. The applicable standard of proof for contempt proceedings is above a balance of probabilities, given the criminal nature of contempt proceedings. Refer to the case of *Mutitika v Babarini Farm Ltd* [1985] KLR 229, 234, where the Court of Appeal had this to say:

“...In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi- criminal in nature.”
38. The main features of disobeying court are that the contemnor must be aware of the existence of the court order. There must be an existing court order capable of being disobeyed and lastly that breach thereof must be proved. Further the threshold required is not just on a balance of probabilities but the threshold that is required for contempt proceedings is that required in criminal proceedings which



is beyond reasonable doubt. In *Milka Wangoi Kamau & another v Habby Misoga Lugadiru* [2014] eKLR it was held that:

“As much as civil contempt is an aspect of civil litigations it has got criminal implications/ inclinations and hence its threshold is not merely founded on balance of probability but at times it must be proved beyond reasonable doubt. Therefore, the committal law is to the effect that the standard of proof required at committal proceedings is the criminal standard”.

39. For a finding of civil contempt, the Applicant must demonstrate three key elements, that is, the existence of a valid court order, knowledge of the order by the alleged contemnors and deliberate disobedience of the order.
40. It is not in dispute that this Court delivered a Ruling on 21st May 2024 that partially confirmed the grant and issued directions on the distribution of the deceased’s estate. The Court did not issue a stay of execution or restraining orders barring implementation of its ruling. The 4th to 7th Respondents are beneficiaries and administrators of the estate. They were all aware of the Ruling, and the actions taken thereafter were pursuant to the Court’s directives on distribution. The Applicant alleges that the Respondents acted contrary to the court’s orders by subdividing and occupying land in a manner prejudicial to his interests. However, the evidence on record paints a different picture. The Respondents’ Replying Affidavits confirm that a family meeting was convened on 29th December 2024, to which the Applicant was invited via a Chief’s letter dated 23rd December 2024. The Applicant’s own son, Alex Mutua Masavu, attended and relayed apologies on his behalf. The Applicant was present during the initial stages of the distribution exercise on 30th December 2024 but left midway. There is no evidence of forceful eviction, damage to property, or encroachment is tendered as no photographs, police reports, or valuation reports accompany the application. Moreover, the actions complained of were executed under the authority of the very ruling the Applicant seeks to appeal from. There is no indication that the Respondents overstepped what was lawfully allowed by the confirmed grant.
41. The Applicant has not met the threshold for contempt. The actions of the 4th to 7th Respondents were carried out within the parameters of a valid court order with full disclosure to the Applicant. There is no evidence of willful defiance of the court’s directive. Therefore, any claim of contempt under these circumstances of the case is unfounded and should be dismissed.
42. Based on the above therefore, this court finds that both the Notice of Motion dated 20th December 2024 and the Summons dated 13th January 2025 lack merit and are dismissed with costs.
43. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 29TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for the Applicant

.....for the Respondent

.....for the Contemnor

Sam Court Assistant

