



REPUBLIC OF KENYA



**In re Estate of Mwaniki Kinyua (Deceased) (Probate & Administration Appeal E004 of 2024) [2024] KEHC 16682 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16682 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
PROBATE & ADMINISTRATION APPEAL E004 OF 2024  
DO CHEPKWONY, J  
DECEMBER 20, 2024  
ESTATE OF MWANIKI KINYUA- DECEASED**

**BETWEEN**

**ALEX WAINAINA GITAU ..... 1<sup>ST</sup> APPELLANT**

**PETER KIMANI GITAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSEPH NGIGE GITAU ..... 1<sup>ST</sup> RESPONDENT**

**EDWARD KIARIE GITAU ..... 2<sup>ND</sup> RESPONDENT**

**FRANCIS KAMAU GITAU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before this court for determination is the Chamber Summons application dated 20<sup>th</sup> March, 2024 which seeks the following orders:-
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That pending the hearing and determination the appeal, this Honourable Court be pleased to stay execution of the Ruling delivered on the 8<sup>th</sup> February, 2024 in the Senior Principle Magistrate Court at Githunguri Succession Cause No. 50 of 1995.
  - e. That the costs of this application be in the cause.
2. The Application is based on the grounds as set out on the face of it and the Supporting Affidavit sworn by Alex Wainaina Gitau and Peter Kimani Gitau on 20<sup>th</sup> March, 2024. The Applicants stated



that they are the grandsons of the Mwaniki Kinyua- deceased who had bequeathed, their father, Gitau Gothi a parcel of land known as Gatamaiyu/ Nyanduma/625 (hereinafter subject land ). That they later inherited the same parcel of land from their father and have since settled therein. They stated that they have filed a succession cause in respect of their deceased's father but were shocked to learn that the 2<sup>nd</sup> Respondent had also filed another succession cause being Kiambu CMCC No. E217 of 2022 with respect to the Estate of Mwaniki Kinyua their deceased grandfather. They averred that the 2<sup>nd</sup> Respondent subdivided the subject land. According to the Applicants they then moved the courts in Githunguri seeking revocation of the grant issued to the 2<sup>nd</sup> Respondent. Subsequently, a Ruling was delivered on 8<sup>th</sup> February, 2024 in favour of the Respondents to the effect that the grant issued to the Applicants was revoked and directions issued for the subject land be registered in the names of Edward Kiarie Gitau and Alex Wainaina Gitau be held in trust of the Estate of Gitau Gothi, their father.

3. The Applicants aver that they are aggrieved with the decision and they lodged the present appeal and if the execution of the Ruling is not stayed the Respondents will proceed with execution and possibly render the appeal nugatory. The Applicants argue that as a result they stand to suffer irreparable loss and another and urge the court to allow the application for stay in the interest of Justice.
4. The Respondents jointly swore the Replying Affidavit of 3<sup>rd</sup> April, 2024 opposing the application. They also claim to be sons of the late Gitau Gothi and grandsons of the late Mwaniki Kinyua. They aver that the application fails to disclose material facts particularly that though their father Gitau Gothi was the heir of the subject land, his estate and properties have always devolved between his two families being his first wife Njeri where the Applicants descend from and the second wife Wambui who is the Respondent's mother. They argued that their father died intestate without having formally distributed the parcel of land contrary to the arguments by the Applicants.
5. That in any event, the Applicants have contradicted themselves by stating that their father was aware of the succession proceedings yet he was mentally incapacitated. They argue that their family was not involved in the succession proceedings filed by the Applicants. They however clarified that in the Succession Cause with respect to their father's estate, the Estate of Gitau Gothi the subject land was devolved into two being 3.5 acres and 2 acres where two title deeds being Gatamaiyu/ Nyanduma/4134 and Gatamaiyu/Nyanduma/4135 were issued.
6. The Respondents asserted that a Ruling was delivered on 8<sup>th</sup> February, 2024 in their favour confirming that the subject land was to devolve into the two households. Thus, there is no execution to stay hence the court cannot issue orders in vain. They further argued that the memorandum of appeal does not disclose any valid grounds of appeal. According to the Respondents, the matters raised in the Appeal were satisfactorily answered during trial culminating into the Ruling. They therefore, craved for the court to dismiss the application with costs.

### **Analysis and Determination**

7. The court has read and considered the submissions filed by the applicant as well as that by the Respondent dated 9<sup>th</sup> May, 2024 and 15<sup>th</sup> May, 2024 respectively. The main issue for determination is whether the orders of stay of execution should issue to the Respondents.
8. It is trite that the purpose of stay of execution orders is to preserve the subject matter pending appeal. The court in the case of *RWW -vs- EKW* [2019] eKLR, observed that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.



However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Thus court in granting the orders of stay of execution as sought must weigh the pros and cons of awarding the same, must consider whether the application has been filed in a timely manner, whether substantial loss is likely to occur which may render the appeal nugatory if allowed and lastly, if the issue of security has been satisfied.
10. In this case it is not in doubt that the application was filed without delay, however the Applicant avers that they stand to be evicted from their parcel of land where they have lived for over 25 years and will be rendered homeless if execution is to proceed. For this reason also the appeal will be rendered nugatory, if the Applicants are evicted. These grounds in my view satisfactorily explain that the Applicants shall suffer substantial loss beyond pecuniary compensation.
11. The court has considered the application that it would be in the interest of justice that it grants the application sought as the Applicants have raised arguable appeal. Although the court is not required to consider the merits of the appeal at this juncture to determine whether it will succeed or not, it ought to establish whether the appeal is arguable or not. The court of Appeal in *Joseph Gitabi Gachau & Another –vs- Pioneer Holdings (A) Limited & 2 Others* [2009] eKLR on arguable appeals held:-

“...On our part, after considering the rival submissions by the parties, the ruling of the learned Judge below together with pleadings we are satisfied that the appeal is indeed arguable. This, in essence, does not mean an appeal which must necessarily succeed, but of course, one which ought to be argued fully before the Court.”
12. In this case looking at the grounds of appeal and the circumstances the court finds that the appeal to be arguable and it will render the appeal nugatory if the stay orders are not granted. The upshot is that the Chamber Summons application dated 20<sup>th</sup> March, 2024 has merits and the same is allowed in terms of Prayer No.(d). Costs of the Application shall be in cause.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20<sup>TH</sup> DAY OF DECEMBER , 2024.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Kiratu Kamunya for Respondent

Mburu Machua for Applicant

Court Assistant – Martin

