



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Gitucha Magochi (Deceased) (Succession Cause 100 of 2004)
[2023] KEHC 1559 (KLR) (Family) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 100 OF 2004
MA ODERO, J
FEBRUARY 24, 2023
IN THE MATTER OF THE ESTATE OF GITUCHA
MAGOCHI ALIAS KANJA NJUGUNA (DECEASED)**

BETWEEN

STEPHEN MWATHA KANJA APPLICANT

AND

BETH MIRIGO KINUNU 1ST RESPONDENT

PETER NJUGUNA KIARIE 2ND RESPONDENT

RULING

1. Before this court for determination is the summons dated October 4, 2022 by which the applicant Stephen Mwatha Kanja seeks the following orders:-

- “ 1. Spent.
2. That this honourable court be pleased to issue an order of stay of execution of the confirmed grant dated July 15, 2022 as per the mode of distribution.
3. That this honourable court be pleased to issue an order of injunction restraining the respondents, their employees, agents, assigns and/or anyone claiming under them from in any manner dealing with advertising, auctioning, transferring, disposing of or in any other manner interfering with the Estate of Gituchu Magochi.
4. That the cost of this application be provided for.



2. The application was premised upon Sections 47, 48 of the *law of Succession Act*, Sections 1A, 3, 3B of the *Civil Procedure Act, 2010*, order 51 of the *Civil Procedure Rules 2010* and was supported by the affidavit of even date sworn by the applicant.
3. The respondents Beth Mirigo and Peter Kiarie both opposed the application through the replying affidavit dated October 25, 2022 sworn by both the respondents.
4. The matter was canvassed by way of written submissions. The applicant filed written submissions dated December 6, 2022 whilst the respondents relied upon their written submissions dated December 9, 2022.
5. Vide a ruling delivered on July 15, 2022 this court allowed the summons dated March 11, 2022 seeking to restrain the applicant from interfering with the administrators (respondents) access, entry or surveying of the parcel of land known as Juja 10090/7 (hereinafter ‘the suit land’).
6. The applicant avers that the respondents are now in the process of executing the orders issued on July 15, 2022. The applicant avers that he has an arguable appeal and seeks a stay in order to avoid the unlawful and unfair distribution of the estate of the deceased. That if no stay is granted then his appeal is likely to be rendered nugatory.
7. In opposing this application the respondents aver that the applicant and his siblings have unlawfully subdivided and developed structures on the suit land. That the applicant has allowed a third party to put up a structure on the said property and that the applicants actions are aimed at denying each household access to subdivide the suit property as directed by the court.
8. The respondents further submit that this court is ‘*functus officio*’ as the issue of subdivision was already heard and determined *vide* the ruling of July 16, 2021 and to date no appeal has been filed against the said ruling. The respondents pray that the instant application be dismissed with costs.

Analysis and Determination

9. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties.
10. The only issue for determination is whether the prayer for stay of execution the certificate of confirmation of grant ought to be allowed.
11. Order 42 Rule 6(2) of the *Civil Procedure Rules 2010* provides for the conditions upon which a stay of execution may be granted as follows:-

“No order for stay of execution shall be made under subsection (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”.
12. The applicant submitted that distribution of the estate is imminent and that such distribution will occasion him substantial loss. The respondents counter that it is in the interest of all the beneficiaries that the estate be distributed in accordance with the confirmed grant.



13. The grant herein was confirmed way back on July 16, 2021. To date the estate remains undistributed mainly due to the numerous applications filed by the applicant. The respondent and the other beneficiaries are entitled to the fruits of their litigation.
14. I fail to see what prejudice the applicant stands to suffer if the estate is distributed. The applicants himself is included in the proposed mode of distribution of the estate. Whilst the applicant has the legal right to pursue an appeal, the court will not countenance any further delay in finalizing this estate. This is a matter that was filed way back in the year 2004. It is now almost twenty (20) years hence and the estate still remains undistributed.
15. The applicant seems determined to stall the distribution of this estate. Ligation it is said must come to an end. It is not in the interests of the estate or of the other beneficiaries to grant the stay prayed for.
16. Further I note that the applicant has not sought leave to appeal in this matter. In any event, I am not persuaded that failure to grant a stay will render any intended appeal nugatory.
17. Finally, I find no merit in this application. I decline to grant a stay of the confirmed grant issued on July 16, 2021. I direct that the administrators proceed with the distribution of the estate. The applicant will pay the costs of this application.

DATED IN NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

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MAUREEN A. ODERO

JUDGE

