



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION APPEAL NO. E002 OF 2021

IN THE MATTER OF THE ESTATE OF GEOFFREY KIARIE NJOROGE (DECEASED)

FRANCIS KANG'ETHE KIARIE.....1ST APPELLANT/APPLICANT

JOHN NDUNG'U KIARIE.....2ND APPELLANT/APPLICANT

HANNAH NJERI WANG'ONDU.....3RD APPELLANT/APPLICANT

JANE WACEKE NG'ANG'A.....4TH APPELLANT/APPLICANT

GEOFFREY KIARIE KANG'ETHE.....5TH APPELLANT/APPLICANT

VERSUS

PAUL WAINAINA KIARIE.....RESPONDENT

AND

JANE GATHONI MURAYA.....INTERESTED PARTY

RULING

1. By application dated 30th July, 2021 the Applicant seeks orders for stay of ruling orders delivered on 30th July, 2021 pending appearing and determination of the appeal herein.
2. The same is supported by the affidavit sworn by the Appellant and his supplementary affidavit sworn on 28th October, 2021.
3. The Respondent has opposed the same application via his affidavit sworn on 19th August, 2021.
4. The parties were directed to canvass application via written submissions but only Applicant has filed same.

THE APPLICANTS' CASE AND SUBMISSIONS:

5. The Applicants basically seek for stay of execution of the ruling delivered on the 30th June, 2016 in *Nyahururu Succ Cause No. 55 of 2005* where a grant was issue on the 29th July, 2009 and confirmed on the 19th February, 2010 was revoked.
6. Upon revocation, the trial court directed the parties to make fresh proposals on the mode of distribution of the estate which was to be agreeable and consented to by all the beneficiaries.
7. The Respondent has already filed his preferred mode of distribution as admitted in his replying affidavit and the proposed mode is at variance with the distribution contained in the certificate of confirmation of grant dated 15th April, 2010 which is the mode of preferred by the Appellants.
8. The principles for a grant of stay are as set out under *Order 42 Rule 6 of the Civil Procedure Rules 2010* and they can be summarized as follows:

- i. That substantial loss may result to the Applicant unless the order is made;*

ii. That the application has been made without unreasonable delay; and

iii. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.

9. The summons for revocation of grant that gave rise to the impugned ruling was filed a period of 7 years from the date of confirmation of grant at which time most properties had already been transferred and titles and some third parties who were not involved in the revocation process had acquired some titles by way of purchase.

10. On such a party is the Interested Party in this appeal whose title deed was automatically cancelled upon revocation of the grant. The delay was complained of before the trial court but the same was not addressed or considered in the impugned ruling. The non-joinder of innocent buyers was also ignored.

11. The ongoing process in the lower court might result to a different mode of distribution which in essence shall render the appeal nugatory if the appeal is to succeed and cause substantial loss to the Appellants and the interested parties as their titles shall be cancelled and redistributed afresh and may be sold or alienated by the time the appeal is heard and determined.

12. In the case of *Musa Kipkoror Arap Baringila v Mangoor Nandlal [2006] eKLR*, the Court of Appeal held that:

“In this regard, therefore, it is in the best interest of Justice that the estate of the deceased be preserved pending the determination of the intended appeal. It is obvious that the intended appeal, if successful, would be rendered nugatory if the property is disposed of, wasted or depleted before the determination of the intended appeal.”

13. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

14. The Respondent on the other hand stands not to suffer any prejudice as although he has stated that the matter it is an old, he contributed to the delay as he sought for revocation 7 years after the grant was confirmed despite being an administrator who was duty bound to ensure that the estate is administered diligently.

15. On the issue of delay, the appeal and the application for stay were filed on 21st July, 2021 and 30th July, 2021 less than 30 days from the date of the impugned ruling and the delay is not inordinate.

THE RESPONDENT'S CASE:

16. That prior to his death, the deceased, Geoffrey Kiarie Njoroge had organized his family and the portions each of them was to inherit and subdivided his land accordingly leaving only a portion to be subdivided later. His land was *Nyandarua/Wanjohi/615* measuring approximately 14.5 acres.

17. That his late father had explained his plan to them during a meeting held at a place called 'Kwa Mutenguri' near their home on the 11th March, 1995 where he invited his brother, **Joseph Kang'ethe Njoroge** and the surveyor, Kiragu Murage.

18. That the said plan and mode of sharing was outlined in respondent affidavit in support of his application dated 22nd June, 2017 before the lower court.

19. That when they applied for a grant, the same was made to him and to his brother, the 1st Appellant herein.

20. That when the time to apply for confirmation came, his brother excluded him and secretly made an application, forged some signatures and obtained others by deceit and filed it in court.

21. That as the court will see from the ruling now being complained of, the family members were not present in court when confirmation was being done and some of the property was given out to one who was not named as a beneficiary.

22. That as the court will note, in fact he even brought strangers to court during the confirmation process in the person of **Joseph Ngugi Kiarie** who is not a member of the family.

23. That as such the confirmation was wrong and the court below was correct in setting aside.

24. That the issues herein have gone on a very long time, since the year 2005 when it was first filed.

25. That it is only fair that the same be concluded as soon as practicable as the same is causing great anxiety and disturbances amongst family members.

26. That moreover, the better way to deal with the issue is not to stay execution but to respond to the application respondent have filed for re-distribution dated 7th July, 2021 and which was scheduled for mention on 8th September, 2021 vide Attached annexure '**PWKI**'.

27. That as will be clear from the said application and the proposals made therein, the buyer, **Jane Gathoni Muraya**, named herein as an

interested party, is not affected by the re-distribution. It would also make sense for the Appellant and all other family members to respond to the proposed method of re-distribution rather than stay execution.

DETERMINATION

28. The principles for a grant of stay of execution pending appeal are as set out under **Order 42 Rule 6 of the Civil Procedure Rules 2010** and they can be summarized as follows:

- i. That substantial loss may result to the Applicant unless the order is made;*
- ii. That the application has been made without unreasonable delay; and*
- iii. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.*

29. The record shows that, the summons for revocation of grant that gave rise to the impugned ruling was filed a period of 7 years from the date of confirmation of grant at which time most properties had already been transferred and titles and some third parties who were not involved in the revocation process had acquired some titles by way of purchase.

30. Thus the potential Interested Party in this appeal who have acquired title deed may have same automatically cancelled upon revocation of the grant.

31. There is allegation that delay was complained of before the trial court but the same was not addressed or considered in the impugned ruling. The non-joinder of innocent buyers was also ignored.

32. The ongoing process in the lower court may lead to a different mode of distribution which in essence may render the instant appeal nugatory if the appeal is to succeed and thus cause substantial loss to the Appellants and the interested parties as their titles may be cancelled and redistributed afresh and may be sold or alienated by the time the appeal is heard and determined.

33. In the case of **Musa Kipkoror Arap Baringila v Mangoor Nandlal [2006] eKLR**, the Court of Appeal held that:

“In this regard, therefore, it is in the best interest of Justice that the estate of the deceased be preserved pending the determination of the intended appeal. It is obvious that the intended appeal, if successful, would be rendered nugatory if the property is disposed of, wasted or depleted before the determination of the intended appeal.”

34. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

35. The Respondent on the other hand stands not to suffer any prejudice as although he has stated that the matter is an old one, he contributed to the delay as he sought for revocation 7 years after the grant was confirmed despite being an administrator who was duty bound to ensure that the estate was administered diligently.

36. On the issue of delay, the court finds that, the appeal and the application for stay were filed on 21st July, 2021 and 30th July, 2021 less than 30 days from the date of the impugned ruling and the delay is not inordinate.

37. Thus the court finds merit in the application and makes the orders;

- i. Stay of ruling and /or orders delivered on 30th July, 2021 pending hearing and determination of the appeal herein.*
- ii. Costs in the cause.*

DATED AND SIGNED AT NYAHURURU THIS 31ST DAY OF JANUARY, 2022.

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CHARLES KARIUKI

JUDGE