



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1088 OF 2005

IN THE MATTER OF THE ESTATE OF JOSEPH GICHANGA KIMANI (DECEASED)

RISPER WAMAITHA GICHANGA.....APPLICANT

VERSUS

ALEXANDER KIMANI GICHANGA.....1ST RESPONDENT

YVONNE ASEBE MBURU (substitute of

DANIEL MBURU GICHANGA (DECEASED)).....2ND RESPONDENT

RULING

1. The deceased Joseph Gichanga Kimani died on 26th March 2005. He had two houses. The first house was that of the late Leah Njoki Kimani whose children are Alexander Kimani Gichanga (1st respondent/co-administrator), Edwin Kiarie Gichanga, Leonard Gichuru Gichanga, the late Daniel Mburu Gichanga and Andrew Gitau Gichanga. The second house was that of Risper Wamaitha Gichanga (the applicant/co-administratrix) whose children are Lawrence Kimani Gichanga, Elizabeth Gichanga, Keziah Gathoni Gichanga and Felix Kariuki Gichanga.

2. The estate of the deceased comprised the following properties: -

- (a) Kajiado/Kipeto/425 measuring 4.05 Ha;
- (b) Ngong/Ngong/21013 measuring 0.05 Ha;
- (c) Kajiado/Kisaju/641 measuring 4.05 Ha;
- (d) Ngong/Ngong/27934 measuring 1.31 Ha;
- (e) Ngong/Ngong/18619 measuring 0.0280 Ha;
- (f) Ngong/Ngong/27935 measuring 4.60 Ha;
- (g) Ngong/Ngong/18618 measuring 0.0281 Ha;
- (h) Kajiado/Ngong/23331 measuring 0.4047 Ha;
- (i) Ngong/Ngong/19848 measuring 0.10 Ha;
- (j) Ngong/Ngong/21005 measuring 0.05 Ha;

- (k) Kajiado/Olchoro-Onyore/2175 measuring 2.43 Ha;
- (l) Ngong/Ngong/23382;
- (m) 145/Business Ongata Rongai;
- (n) 141/ Business Ongata Rongai;
- (o) Dagoretti/Kinoo/1030;
- (p) Plot No. 10/Industrial-Inkukuon T. Centre;
- (q) vehicle KAS 667H;
- (r) vehicle KAK 201G;
- (s) Plot No. 196 Kasasi;
- (t) bank A/C No. 059 -160101363 KCB Ongata Rongai; and
- (u) bank A/C 059 -198 Ongata Rongai.

3. On 15th June 2020 this court distributed the estate of the deceased to the beneficiaries. This distribution did not go down well with the applicant who on 22nd June 2020 filed an appeal to the Court of Appeal. On 30th June 2020 she filed this application under **sections 3, 3A and 63(e)** of the **Civil Procedure Act** and **Orders 42 rule 6, 22 rule 22 and 51 rule 1** of the **Civil Procedure Rules** for the stay of the orders contained in the ruling and any other consequential orders pending the hearing and determination of the appeal.

4. It is notable that the ruling of 15th June 2020 resulted into a certificate of confirmation issued on the same day. It is the basis of the intended execution.

5. The applicant is challenging the distribution contained in the certificate of confirmation. Her case is that if the distribution is let to proceed without the sought stay, and she succeeds on appeal, she will suffer substantial loss, and the appeal rendered nugatory.

6. The application was opposed by Yvonne Asabe Mburu (2nd respondent) on behalf of the estate of her late husband Daniel Mburu Gichanga who was one of the children of the deceased in the first house. She wants the estate distributed as ruled by the court. She stated that this estate has been undistributed since the deceased died in 2005, and that any further delay will prejudice her. Her case is that the applicant has always been in control of the whole estate, and it is therefore not in her interest to have it shared to the rest of the beneficiaries. Lastly, she stated that the application does not meet the stringent provisions of **Order 42 rule 6** of the **Civil Procedure Rules**.

7. The statutory foundation of this application is **Order 42 rule 6** which provides as follows:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 hereon 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 subrule (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.”

8. The applicant is entitled to appeal the decision of this court, and it is the duty of this court to prevent the appeal, if successful, from being rendered nugatory (**Butt –v- Rent Restriction Tribunal [1979]eKLR**). It should at the same time be remembered that the respondents have a ruling and certificate of confirmation whose fruits they are entitled to enjoy.

9. This court cannot deal with the merits of the intended appeal. That is for the Court of Appeal. It is, however, clear that most of the estate of the deceased comprises land. The effect of distribution is that each beneficiary will be entitled to deal with his or her benefit in any manner, including disposal. At the same time, this is a distribution of an intestate of the deceased who had two houses each with several children. In my experience as a Judge, any distribution to such family will leave some members satisfied and others not satisfied. Some may choose to let go and move on while others will fight to the highest level possible. A court exercising its discretion under **Order 42 rule 6** should bear this in mind, and consider the age of the matter and what is best for the larger family. The court has to try to balance the loss that

the applicant will suffer if stay is not granted and the loss that will be suffered by the rest of the beneficiaries, including the respondents, if stay is granted.

10. In the particular circumstances of the case, I order stay of execution for 90 days. This will allow the applicant to pursue stay in the Court of Appeal. If by the end of the 90 days there is no stay from the Court of Appeal, the certificate of confirmation issued by this court on 15th June 2020 shall be executed.

11. The applicant has been indulged. She will pay the costs of the application.

DATED and DELIVERED NAIROBI this 23RD day of FEBRUARY 2021.

A.O. MUCHELULE

JUDGE