



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 130 OF 2005**

**IN THE MATTER OF THE ESTATE OF GEOFFREY MWAURA NGOIMA (DECEASED)**

**BETWEEN**

**NJENGA MWAURA NGOIMA.....1<sup>ST</sup> ADMINISTRATOR/APPLICANT**

**GEOFFREY KANGETHE NGOIMA.....2<sup>ND</sup> ADMINISTRATOR/APPLICANT**

**AND**

**ALISON HUTCHINSON ARLENE HUTCHINSON....2<sup>ND</sup> APPLICANTS/INTERESTED PARTIES**

**AND**

**PHOEBE WAMBETI NGOIMA.....3<sup>RD</sup> ADMINISTRATOR/APPLICANT**

**EDITH WAITHERA NGOIMA.....4<sup>TH</sup> ADMINISTRATOR/APPLICANT**

**RULING**

1. This ruling relates to three (3) applications filed hereto via summons dated 30<sup>th</sup> October, 2018, 23<sup>rd</sup> January, 2019 and 14<sup>th</sup> February, 2019. On 3<sup>rd</sup> December, 2019 the court directed that all three applications be canvassed together and be disposed of by way of written submissions. Learned Counsel Mr. Njeru filed written submissions dated 21<sup>st</sup> February, 2020 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Administrators/Applicants in support of the summons dated 30<sup>th</sup> October, 2018 and in opposition to the summons dated 23<sup>rd</sup> January, 2019 and 14<sup>th</sup> February, 2019. Also on record are written submissions dated 26<sup>th</sup> May, 2020 filed by learned Counsel Ms. Rotich on behalf of one Ngoima wa Mwaura.

2. **The first application dated 30<sup>th</sup> October, 2018** and filed on 6<sup>th</sup> November, 2018 seeks a stay of execution of proceedings until the appeal is heard and determined. It is brought under **rule 73** of the **Probate and Administration Rules** and supported by two affidavits, one by Njenga Mwaura Ngoima and another by Geoffrey Kangethe Ngoima, both of which were sworn on 30<sup>th</sup> October, 2018.

3. The Applicants depose that they instructed their advocates on record to lodge an appeal against the judgment of 17<sup>th</sup> September, 2018 and that a notice of appeal has since been filed and served upon the Respondents. They urged that the ruling has numerous errors some of which are typographical but majority of which go to substantial issues which can only be addressed on appeal. That as such, if the stay is not granted, the appeal will be rendered nugatory.

4. In response to the application, Edith Waitthera Ngoima swore a replying affidavit on 14<sup>th</sup> February, 2019 in which she deposes that the Applicants are not deserving of the orders of stay sought as they are currently in contempt of the orders of the court made on 17<sup>th</sup> September, 2018 for preservation of the deceased's estate under **section 45** of the **Law of Succession Act**. Further that the Applicants have failed to meet the requirements for an application for stay to be granted. That the application is merely a ploy to delay justice from being achieved.

5. Later on 15<sup>th</sup> February, 2019 Phoebe Wambeti filed seven grounds in opposition to the application, the gist of which is that the summons is frivolous, vexatious, fatally defective, misconceived, and an abuse of court process since no sufficient grounds have been adduced to warrant a grant of Stay of Execution. Further that the Respondents have not come to court with clean hands as they are intermeddling in the deceased's estate.

6. The applicable law for stay of enforcement of an order or decree pending appeal is **Order 42, rule 6 of the Civil Procedure Rules**. The guiding principles set there under are that the court must be satisfied that substantial loss may result to the Applicant unless the order is made; the application has been made without unreasonable delay; and such security as the court orders for the due performance of the decree or order has been deposited by the Applicant.

7. The Applicants, Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima, are seeking that proceedings herein be stayed until the appeal they have preferred against the judgment delivered on 17<sup>th</sup> September, 2018 is heard and determined. The Applicants' case is that the judgment appealed against has errors which touch on substantial issues and failure to grant stay will render the appeal nugatory.

8. I note however that there is no notice of appeal on record nor did the Applicants indicate the case number of their appeal, or file proof of service of the appeal upon the Respondents. The Respondents did not however deny knowledge of the appeal but opposed the application stating that the Applicants had failed to demonstrate the substantial loss that would be occasioned upon them and that the application is a ploy to disinherit the deceased's beneficiaries. It does not help that the Respondents did not file submissions hereto. Instead, they filed a fresh summons dated 12<sup>th</sup> March, 2020 seeking for confirmation of the grant issued on 17<sup>th</sup> September, 2018 pursuant to the judgment which the Applicants purport to have appealed against.

9. Whereas the application was filed without unreasonable delay being one month after the judgment was delivered, to grant the orders sought without evidence of an existing appeal would occasion injustice and unreasonable delay in concluding this cause. In any case, in the judgment of 17<sup>th</sup> September, 2018 the learned judge ordered that the status quo be maintained until the grant is confirmed and which has not been done as at the date of this ruling. Paragraph 6 of the disposition stipulates thus:

*“6. The status quo shall be maintained; there shall be no eviction, change or movement of boundaries, demolitions or any form of scuffle or damage to property until the grant is confirmed.”*

10. **The second application is dated 23<sup>rd</sup> January, 2019** and seeks partial confirmation of the grant issued to Njenga Mwaura Ngoima, Ngoima Mwaura Ngoima, Phoebe Wambeti Ngoima and Edith Waithera Ngoima on 17<sup>th</sup> September, 2018. It is supported by an affidavit sworn by Arlene Joy Nyambura Hutchinson on 23<sup>rd</sup> January, 2019 in which she deposes that in a Judgment delivered on 17<sup>th</sup> September, 2018 Muigai, J held that the property known as L.R. No. Githunguri/Githiga/1073 was wrongly listed as part of the assets of the deceased herein and ordered an immediate redistribution of the property to the Estate of Jean Wanjiku Hutchinson (deceased). Further that all the beneficiaries of the deceased herein have no dispute or claim with regard to the portion of land that had been gifted to the late Jean Wanjiku Hutchinson. Arlene is one of the administrators of the estate of the late Jean Wanjiku Hutchinson.

11. On 31<sup>st</sup> January, 2019 Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima, the 1<sup>st</sup> and 2<sup>nd</sup> Administrator/Respondent filed five (5) grounds of opposition to the summons dated 23<sup>rd</sup> January, 2019 the gist of which is that the court is *functus officio* having held in its judgment of 17<sup>th</sup> September, 2018 that partial confirmation of grant is not provided under the Law of Succession Act and directed that the status quo be maintained until the grant is confirmed. Further that they had previously filed summons dated 30<sup>th</sup> October, 2018 for stay of proceedings to which the Applicants/Interested Parties are not parties and have no locus.

12. Submitting on the application, Mr. Njeru stated that the orders sought therein are contrary to the orders made in the judgment delivered on 17<sup>th</sup> September, 2018. That any party dissatisfied with the decision can therefore only address their grievance in a higher court. Counsel contended that once a court has rendered judgment, it can only go back on its pronouncement on review on grounds of a mistake or error apparent on the face of the record. Further that since the matters in respect of the suit property are ongoing, the property should be preserved under the doctrine of *lis pendens*, **section 45 of the Law of Succession Act** and as ordered in the judgment dated 17<sup>th</sup> September, 2018.

13. Mr. Njeru asserted that there is neither a statutory provision nor precedent on partial confirmation of grant and for this reason the application dated 23<sup>rd</sup> January, 2019 should fail.

14. I note that in the judgment of 17<sup>th</sup> September, 2018 Muigai, J held that it was not in dispute that the late Jean Hutchinson was gifted a portion of land from the deceased's lands and issued with a title deed in 1988. Further that having been so gifted under **section 42 of the Law of Succession Act** the land ceased to belong to the deceased and is therefore not part of the deceased's estate. The learned judge directed that the deceased's estate be redistributed in an equitable manner and stated at paragraph 3 of the disposition that the redistribution *“shall exclude Jean Wanjiku Hutchinson's gift from the deceased 3 acres or so.”*

15. Annexed to the application is a certified copy of a title deed to the property known as Githunguri/Githiga/1073. It was issued on 9<sup>th</sup> May, 2013 and indicates that the property measures approximately 1.23 Hectares which translates to approximately 3 acres.

16. In light of the finding that the property known as Githunguri/Githiga/1073 was the property solely of the late Jean Wanjiku Hutchinson and in whose name it is registered, the property cannot therefore form part of the deceased's estate. The decision has not been overturned and as such there is no reason the Applicants should continue participating in these proceedings since they are not laying any claim to the estate of the deceased herein. Since Githunguri/Githiga/1073 does not belong to the estate of the deceased herein but rather to the estate of Jean Wanjiku Hutchinson (deceased) to which both Applicants are administrators, in order to deal with the property, they will require a confirmed grant in the estate of Jean Hutchinson Wanjiku (deceased) and not the partial confirmation of grant in the estate of Geoffrey Mwaura Ngoima (deceased) as sought.

17. It is noteworthy that a grant in relation to the estate of a deceased person is only confirmed in relation to the assets which comprise the estate of the deceased. In this case, Githunguri/Githiga/1073 is not registered in the deceased's name and does not therefore comprise the deceased's estate. It was gifted to the late Jean Wanjiku Hutchinson *inter vivos* and in whose name it is registered. To this end, Muigai, J directed that the redistribution of the estate of the deceased herein exclude this property. It is nonetheless considered a previous benefit in

terms of the distribution of the assets of the deceased herein.

**18. The third application dated 14<sup>th</sup> February, 2019** is for contempt of court. It was brought by Phoebe Wambeti and Edith Waithera Ngoima, the 3<sup>rd</sup> and 4<sup>th</sup> Administrators under **sections 45 and 47** of the **Law of Succession Act** seeking that the court hold Geoffrey Kang'ethe Ngoima, Fredrick Njoroge Ngoima, Njenga Mwaura Ngoima and Mwaura Ngoima in contempt of the court order issued on 17<sup>th</sup> September, 2018. Further that the court direct that a valuation of the property known as Githunguri/Githiga 1073, 1074, 1075 and 1076 be undertaken by an Independent Valuer from the Ministry of Lands, Kiambu; the Kiambu County Surveyor draw up a sub-division plan to assist with the subdivision process of the property; the Deputy Registrar execute all documents to facilitate subdivision and the OCS Kiambu Police Station to provide security and oversee the implementation of the orders granted by the court.

**19.** The application is supported by an affidavit sworn by Edith Waithera Ngoima on 14<sup>th</sup> February, 2019 in which she deposes that the Respondents have been utilising the deceased's property, and subdivided and leased some portions of it in total disregard of the express orders of the court. She accused the Respondents of developing the portions which sit on prime areas of the estate to the exception of other beneficiaries who have been left with the area around a swamp which she says can neither be developed nor cultivated. That there is therefore no doubt that the Respondents are intermeddling with the deceased's estate.

**20.** In response to the application, Ngoima wa Mwaura swore an affidavit on 4<sup>th</sup> April, 2019 in which he denied being in contempt of court orders and stated that the orders are being challenged in the Court of Appeal. With respect to the dealings on the property, he stated that the activities were ongoing before the orders of 17<sup>th</sup> September, 2018 were granted and directing that the status quo be maintained, was to the effect that the beneficiaries continue with the activities they were undertaking on the property before the orders were granted. That as such, he has not violated any court orders as alleged. He instead accused the Applicant of not taking any steps to ensure the deceased's estate is administered in a proper manner since her appointment as administrator.

**21.** Learned Counsel Ms. Rotich submitting on behalf of Ngoima wa Mwaura alluded to a letter dated 13<sup>th</sup> March, 2020 authored by M/s Judy Thongori and Company Advocates withdrawing the second prayer in the application dated 14<sup>th</sup> February, 2019. Ngoima wa Mwaura was one of those said to have been in contempt under prayer number (2) of the application wherein he is named as "*Mwaura Ngoima*".

**22.** Counsel asserted that since Ngoima wa Mwaura was not sued directly in the application and is not a party to the suit or to other pending applications, he ceases to have the *locus standi* to respond to or submit on the remaining aspects of the application. Further that the Applicants be condemned to pay the costs of the withdrawn application.

**23.** A copy of the letter alluded to is however not on record. Additionally, the proceedings do not indicate that the Applicants were granted leave to amend or withdraw the application dated 14<sup>th</sup> February, 2019. It is noteworthy that since the pleadings had closed and the matter had been set down for hearing as at 13<sup>th</sup> March, 2020 the Parties could not withdraw the application or adjust its contents without the leave of court. Additionally, as at the mention date of 24<sup>th</sup> February, 2020 directions to file submissions had been issued which directions some of the parties had already complied with.

**24.** In Kenya, the applicable law in contempt proceedings is imported from the procedure for contempt of court followed by the High Court of Justice in England by virtue of **section 5** of the **Judicature Act**. This is following the decision in **Constitutional Petition No. 87 of 2017 Kenya Human Rights Commission vs. Attorney General & another [2018] eKLR** in which Mwita, J declared the **Contempt of Court Act, 2016** invalid in its entirety.

**25.** The applications and proceedings in relation to contempt of court applicable in England were restated by the Court of Appeal in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR**. The Appellate Court stated that the applicable law is the Civil Procedure (Amendment No. 2) Rules, 2012 whose PART 81 replaced the previously applicable Order 52 RSC in its entirety. This Court is therefore guided by Part 81 of the English Civil Procedure Rules.

**26.** In the affidavit sworn in support of the application, Edith Waithera Ngoima stated that the Respondents have leased part of the deceased's property, constructed greenhouses and a dam therein and are cultivating it. She accused the Respondents of developing their portions of the land which she says sit on prime areas of the estate, to the detriment of the other beneficiaries. At paragraph 15 of the Affidavit, Edith admits that some of the developments on the property were made prior to the issuance of the orders of September, 2018.

**27.** I note that whereas the Applicants have attached photographs of the portions of the property that are purportedly being utilized by the Respondents, from the averments in the affidavit sworn by Edith Waithera, it is evident that some of the dealings on the property commenced during the deceased's lifetime and others prior to the issuance of the orders of 17<sup>th</sup> September, 2018.

**28.** A wholesome reading of the judgment of 17<sup>th</sup> September, 2018 reveals that while the court directed that the status quo be maintained prior to confirmation of the grant, it also noted that the beneficiaries had undertaken developments on the various parcels of land so allocated. The learned Judge also took cognisance of the fact that 30 years later, there are irreversible changes on the use of land and directed that the redistribution take into account each beneficiary's gift, part of land one has sold and part of the land one has developed, cultivated or settled on in the equitable distribution.

**29.** In their defence, the Respondents indicated that they had only dealt with the land in the manner which they did prior to the order of status quo being issued.

**30.** In contempt of court cases the standard of proof applicable is that of criminal cases which is beyond reasonable doubt. In **Re Bramblevale (1970) 1 Ch. 128** Lord Denning affirmed this position when he stated thus:

**“Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt.”**

The person wishing to cite another for Contempt of Court has to prove beyond reasonable doubt that the Contemnor wilfully disobeyed the Court orders cited. This in my view the Applicants have failed to do.

31. I note further that in directing that the status quo be maintained Muigai, J further stated that there shall be no eviction, change or movement of boundaries, demolitions or any form of scuffle or damage to property until the grant is confirmed. The Applicants have not demonstrated that the Respondents have done any such acts. As such, the application for contempt fails. In the circumstances I decline to grant the additional prayers sought in the application. In my considered view, these prayers ought to be considered once the summons for confirmation of grant filed hereto is set down for hearing.

32. The upshot of the above is that all three (3) applications dated 30<sup>th</sup> October, 2018, 23<sup>rd</sup> January, 2019 and 14<sup>th</sup> February, 2019 respectively are found to be unmerited and are hereby dismissed. Each party shall bear their own costs. It is so ordered.

**DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 22<sup>ND</sup> DAY OF JUNE, 2020.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Advocate for the beneficiaries of the estate of Jean Hutchinson.**

**In the presence of.....Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Administrators.**

**In the presence of.....Advocate for the 3<sup>rd</sup> Administrator.**

**In the presence of.....Advocate for the 4<sup>th</sup> Administrator.**

**In the presence of.....Advocate for Ngoima Mwaura.**