



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2175 OF 2003**

**IN THE MATTER OF THE ESTATE OF GIKONYO MUTHIGE (DECEASED)**

**JOHN NGUGI GIKONYO.....1<sup>ST</sup> ADMINISTRATOR/ PROTESTOR**

**VERSUS**

**SIMON GIKONYO NGUGI.....2<sup>ND</sup> ADMINISTRATOR/ RESPONDENT**

**EUNICE WANJUHI NGUGI.....3<sup>RD</sup> ADMINISTRATOR/ RESPONDENT**

**DAVID NGUGI GIKONYO.....4<sup>TH</sup> ADMINISTRATOR/ RESPONDENT**

**RULING**

1. The deceased Gikonyo Muthige died in 1964. He was married to four wives each of whom had children. The wives are all dead. The administrators of the estate are John Muigai Gikonyo (4<sup>th</sup> house/respondent), Simon Gikonyo Ngugi (1<sup>st</sup> house/1<sup>st</sup> applicant), Eunice Wanjuhi Ngugi (2<sup>nd</sup> house/2<sup>nd</sup> applicant), and David Ngugi Gikonyo (3<sup>rd</sup> house/3<sup>rd</sup> applicant). The estate comprised land parcel Kabete/Karura/99 measuring 11.5 acres. On 11<sup>th</sup> February 2019 this court delivered a ruling distributing the estate to the beneficiaries of the estate. It was equal sharing of the estate to all the children of the deceased. The distribution was in accordance with **sections 35, 38 and 40** of the **Law of Succession Act (Cap 160)**.

2. The applicants were aggrieved by the decision because they wanted the estate to be shared in accordance with Kikuyu customary law. They filed a Notice of Appeal dated 25<sup>th</sup> February 2019 seeking to challenge the decision at the Court of Appeal. On 21<sup>st</sup> March 2019 they filed the present application seeking the stay of the execution of the ruling and orders pending the hearing and determination of the appeal. Their case was that if no stay is granted the respondent will proceed to have the deceased's estate shared in accordance with the ruling, and that will defeat the substratum of the appeal which will be rendered nugatory. The application was expressed to be brought under **Order 43 rule 6** of the **Civil Procedure Rules**, but the correct provisions are **Order 42 rule 6(2)** of the **Civil Procedure Rules**.

3. The respondent, in answer to the application, filed a preliminary objection to say that the court lacks the jurisdiction to grant the relief sought as the applicants already lodged an appeal.

4. In an application for stay of execution pending appeal under **Order 42 rule 6(2)** of the **Civil Procedure Rules**, it is upon the applicant to demonstrate that he stands to suffer substantial loss if stay is not granted and the appeal ultimately succeeds. The application has to be brought without unreasonable delay, and he has to provide security for the due performance of the decree that may ultimately be binding on him (**Century Oil Trading Company Ltd –v- Kenya Shell Limited [2003]IEA 41**). The court exercises a judicial discretion in granting or not granting stay of execution pending appeal. It considers that the respondent has a judgment or decree which he is entitled to execute, but also that the applicant seeks to exercise his right of appeal without running the risk of the appeal being rendered nugatory.

5. There is no claim that there was delay in bringing the application. The applicants acted expeditiously. It is true that if the application is not granted the respondent will extract a certificate of confirmation and continue to subdivide the deceased's parcel of land and to share it to the beneficiaries as ordered in the ruling. So that, by the time the appeal is decided the estate will have been shared. If the appeal succeeds, the applicants will be materially at a loss. It is therefore correct to say that, if the stay is not granted they will suffer substantial loss.

6. I note that no security was offered. But in the circumstances of this case, the entire estate of the deceased will remain intact to await the appeal. In conclusion, therefore, I allow the application. There shall be stay of execution of the ruling and orders issued by this court on 11<sup>th</sup>

February 2019. So that the applicants do not go to slumber, and do not push the appeal, the stay shall be for six (6) months from today.

7. The applicants have been indulged. They will pay the costs of this application.

**DATED and SIGNED at NAIROBI this 22<sup>ND</sup> day of MAY 2019**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 27<sup>TH</sup> day of MAY 2019**

**J.N. ONYIEGO**

**JUDGE**