



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KERUGOYA**  
**IN THE MATTER OF THE ESTATE OF ESTHER WAMINA MUGO (DECEASED)**  
**CIVIL APPEAL NO. 76 OF 2018**

EUNICE KARIKO MUGO .....1<sup>ST</sup> APPELLANT/APPLICANT

STANLEY MURITHI MUGO .....2<sup>ND</sup> APPELLANT/APPLICANT

MARY WANJIRU MAINA .....3<sup>RD</sup> APPELLANT/APPLICANT

FRANCIS MUNENE MUGO.....4<sup>TH</sup> APPELLANT/APPLICANT

JOHN CALEB NYAMU MUGO .....5<sup>TH</sup> APPELLANT/APPLICANT

V E R S U S

RICHARD MUGO MBOGO .....RESPONDENT

**RULING**

1. The application pending before the Court is dated 16/01/2019 seeking the following;

- a. Stay of execution of the ruling of Hon. S.M.S Soita delivered on 06/12/2018
- b. Order of inhibition on any dealings on the deceased properties 250/57A Kirinyaga, Plot No. 15 Sagana, Inoi/Kariko/1170 and 1171, Kiine/Sagana/704 pending hearing and determination of the appeal.
- c. Summons for confirmation by the respondent be stayed pending hearing and determination of the appeal.

**Applicants' case**

That they are children of the deceased while the respondent is the husband of the deceased. The respondent petitioned for letters of administration intestate and filed citation. The applicants filed their objection and cross-petition for grant. The petition was heard by Hon. S.M.S Soita and in his ruling delivered on 06/12/2018 granted the respondent orders to be the sole administrator of the estate.

2. That they are not against the respondent as an administrator but he is 93 years old and not fit and proper person to be sole administrator. That the ruling did not consider the reservation of the citees who were dependants and heirs of the deceased in granting orders of sole administration. They have appealed against the ruling but the respondent is seeking confirmation of grant anytime and with no stay, execution is foreseeable soon.

**Respondent's case**

In his response, he stated that he was not only found fit but he is fit and capable of administering the estate. That having filed summons for confirmation of grant for inter-partes hearing on 23/01/2019, the stay orders were overtaken by events and were an afterthought. That no prejudice will be suffered by the applicants since they have a window of challenging the distribution at confirmation stage. That all the appellants were catered for and provided for equally. That there is nothing lawful to stop him from administering the estate of his deceased wife which he has done with a lot of diligence.

3. That he has already distributed the estate equitably to all beneficiaries and nothing is pending for distribution.

**Issues arising;**

**1. Stay of Execution pending appeal**

The principles of granting stay of execution in High Court are provided for under **Order 42, rule 6 of the Civil Procedure Rules.**

**Order 42, rule 6**

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.

4. The applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

**a. Substantial loss occurring**

This is a succession cause whereby the respondent was granted sole administration of the estate of his deceased wife. The applicants are his children and they claimed that the respondent was intermeddling with the estate, had cut trees, was collecting rents and proceeds from coffee and tea sales and failed to pay rates and debts. The trial court found that there was no outstanding rates and debts owed by the estate and no evidence of any part of the estate is in danger of wastage or mismanagement. In addition, he has not sold his property registered under the deceased's name.

In the present application, the applicants claim that if respondent proceeds with confirmation of grant, execution is foreseeable soon hence their apprehension of harm on the management of the estate.

**James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR**

The Court held;

**No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.**

**The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:**

**“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

**b. Requisite security**

The applicants have stated that they are able and willing to provide security that the court may deem necessary.

**c. Was there undue delay?**

The applicants being aggrieved with the ruling delivered on 06/12/2018 proceeded to file the memorandum of appeal on 27/12/2018 and application for stay of execution on 17/01/2019. Therefore, the same was filed within reasonable time.

The applicants despite bringing the application within reasonable time, have not demonstrated that they will suffer substantial loss.

**2. Inhibition**

The applicants are seeking the following properties which the respondent has distributed as follows;

**250/57A Kirinyaga - distributed to the respondent**

**Plot No. 15 Sagana** – distributed to the applicants

**Inoi/Kariko/1170** - distributed to the respondent, the 5<sup>th</sup> applicant and 2 others

**1171, Kiine/Sagana/704** – distributed to all dependants including the applicants

5. The respondents though failing to attach the certificate of confirmation of grant states in paragraph 15 of his supporting affidavit that there being no protest, the court proceeded to confirm the grant and all applicants were duly provided for equally. At paragraph 18, he states that that the distribution was confirmed on 05/02/2019.

6. In that regard, there is nothing to inhibit and prayer 2 and 3 have been overtaken by events.

7. I find that the application has no merits and is dismissed with costs.

**Dated at Kerugoya this 29<sup>th</sup> day of July 2019.**

**L. W. GITARI**

**JUDGE**