



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT KERUGOYA**

**SUCCESSION CAUSE NO. 35 OF 2013**

**IN THE MATTER OF THE ESTATE OF KIRIUNGI KARANI (DECEASED)**

**PERIS WANJIRA KINYUA.....APPLICANT**

**V E R S U S**

**EPHANTUS KARANI MAKANGA.....RESPONDENT**

**RULING**

1. The application pending before the Court is dated 13/02/2019 seeking stay of execution of the judgment delivered on 07/02/2019 and the intended registration of the certificate of confirmation of grant at the lands office pending hearing and final determination of the appeal.
2. The application was based on the grounds that the applicant is one of the beneficiaries of the deceased's estate. That she was given a small share which is against the law and all beneficiaries should get equal share. That she wants to appeal against the whole decision and if stay is not granted, the other beneficiaries will register the certificate of confirmation at the lands office hence rendering the appeal nugatory.
3. No response has been filed.

**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 sub rule (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 appellants need to satisfy the court on the following conditions before they can be granted the stay orders:

- a) Substantial loss may result to the applicant unless the order is made,
- b) The application has been made without unreasonable delay, and
- c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

**a) Substantial loss occurring**

The judgment of the court was that the estate of the deceased **NGARIAMA/NYANGENI/195** shall be shared as follows;

- Ephantus Karani Makanga – 2.75 acres
- Francis Muriithi Makanga – 2.75 acres
- Phares Karani Makanga – 0.25 acres
- Philis Wanjira Kinyua – 0.25 acres
- Evangeline M. Kabiro – 0.25 acres
- Betha Kuthata Kinyua – 0.25 acres

5. The applicant has stated that she was given a small share which is against the law and all beneficiaries should get equal share.

Refer to **Charles Wahome Gethi v Angela Wairimu Gethi [2008] Eklr**

The Court of Appeal held the following view on the issue of substantial loss;

**The applicant does not claim that the respondent intends to sell the portion of land in dispute and that it will not be in existence by the time the appeal is determined..... In the circumstances of this case, the applicant would suffer substantial loss rendering the appeal, if successful nugatory only if the suit land is disposed of before the appeal is determined. The applicant does not claim that the suit land would be disposed of. The applicant has not in our view, established that unless stay is granted, he will suffer substantial loss and that the appeal, if successful would be rendered nugatory.**

6. The applicant does not claim that the respondent or any other beneficiary intends to sell the portion of land therefore, no substantial loss has been proven.

**b) Requisite security**

The applicant has not given option of security but it is appreciated that the court also has discretion to order the kind of security they should give.

**c) Was there undue delay?**

The applicant being aggrieved with the order of the trial court delivered on 07/02/2019 proceeded to file application for stay of execution on 14/02/2019. The applicant filed application after about a week therefore there was no undue delay.

7. The applicant despite bringing the application within reasonable time, has not demonstrated that she will suffer substantial loss. She does not claim that any party intends to dispose of the parcels of land if the Court does not grant the orders sought. The application is declined.

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

**L. W. GITARI**

**JUDGE**