



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**SUCCESSION NO. 2699 OF 2013**

**IN THE MATTER OF THE ESTATE OF GLADYS WANJIKU GITHINJI (DESEASED)**

**PERMINUS MUKURIA GITHINJI.....1<sup>ST</sup> APPLICANT**

**DAVID NJOROGE GITHINJI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JULIUS NGANGA GITHINJI ..... RESPONDENT**

**RULING**

**INTRODUCTION**

In a Ruling delivered by this Court on **10<sup>th</sup> March 2015** by this Court, Perminus Mukuria Githinji and David Njoroge (hereafter ‘the Applicants’) have filed Summons dated 4<sup>th</sup> May 2015 in which they seek the following orders:

**1. ...**

**2. That pending the hearing and determination of this Application, this Honourable Court be pleased to stay the execution of the orders issued on 10<sup>th</sup> March 2015 and 27<sup>th</sup> April 2015, or any consequential orders or decrees emanating therefrom.**

**3. That the Honourable Court be pleased to extend time to the Applicants to file an Application for leave to appeal against the Ruling in this matter on 10<sup>th</sup> March 2015.**

**4. That the Honourable Court be pleased to grant leave to the Applicants to appeal against the orders issued on 10<sup>th</sup> March 2015.**

**5. That pending the hearing and determination of the Applicants’ intended appeal, there be a stay of execution of the orders issued on 10<sup>th</sup> March 2015 and 27<sup>th</sup> April 2015 and all the consequential orders thereto.**

**6. That in the alternative to prayer (5) above, the Honourable Court do direct that the status quo**

*obtaining as of 10<sup>th</sup> March 2015 regarding the property known as Title No. Maguga/Kahuho/449 be maintained pending the hearing and determination of the Applicant's intended appeal.*

*7. That the costs of this Application be provided for.*

### **THE APPLICANTS' CASE**

The Applicants' case is contained in the Affidavit sworn in support by Perminus Mukuria Githinji on 4<sup>th</sup> May 2015. The Ruling of this Court of 10<sup>th</sup> March 2015 aggrieves the Applicants. They were not informed that the Ruling was ready, the Ruling was scheduled on 6<sup>th</sup> March 2015, it was postponed to 13<sup>th</sup> March 2015 but on that date they found the Ruling was delivered on the 10<sup>th</sup> March 2015. The Applicants were not able to peruse the Court file as it was missing in the Registry.

It was their case that they have appointed the firm of W and M Advocates to represent them in these proceedings and that initially, they had filed an Application dated 22<sup>nd</sup> August 2014 seeking to have the Grant of Probate issued to their brother, one Julius Nganga Githinji, the Respondent, revoked.

That they were at that point representing themselves and hence, during the hearing of the said Application, they could not present a strong case before this Court.

The 1<sup>st</sup> Applicant deponed that he was not able to immediately peruse the Court file though he was on a later date informed by a clerk at the Registry that the Application had been dismissed. In that regard, the Applicants argued that they immediately instructed the firm of W and M Advocates to take up the matter with a view of preferring an appeal against the said Ruling. That the said Firm filed a Notice of Appeal and wrote a letter dated 26<sup>th</sup> March 2015 to the Deputy Registrar of the Family Division, requesting for uncertified copies of the proceedings and the Ruling.

The Applicant's asserted that Learned Counsel Ms. Carolle Maina, from the said Firm, perused the Court file on 30<sup>th</sup> April 2015 and discovered that the Ruling was delivered on 10<sup>th</sup> March 2015 and hence the filing of the Notice of Appeal was out of time. That when the said Notice of Appeal was filed, it was not clear whether the Ruling had been delivered on 10<sup>th</sup> March, 2015 or 13<sup>th</sup> March, 2015.

Further, that no leave to appeal was granted when the Ruling was delivered on 10<sup>th</sup> March 2015; Leave to appeal against the nature of the orders embodied in the Ruling is not automatic and an Application ought to be brought within 14 days of delivery of the Ruling.

According to the Applicants, since 14 days given by the Court have since lapsed and hence there is need to urgently move the Court and seek enlargement of time within which to file an Application for leave to appeal. Furthermore, they averred that the delay in filing the instant Application is not inordinate and was caused by the fact that the Court file could not be easily traced and the fact that they were not represented by an advocate and that the advocate who was personally handling this matter from 26<sup>th</sup> March 2015 lost a close relative and was therefore out of the office for better part of April.

The Applicants asserted further that the Ruling aggrieves them, together with their siblings, and that the deceased did not have capacity to dispose of the ancestral property as she was holding the same as a trustee of all the children. That in any event, if the deceased could not sell the property to a 3<sup>rd</sup> party, there is no way she could not as well dispose it by her Will.

It was the 1<sup>st</sup> Applicant's deposition that the Will by the deceased does not represent her wishes and that under Kikuyu customs, ancestral property that has a family grave cannot be disposed of. That a perusal of the Will shows that the deceased did not have an understanding of the nature of the business in which she was engaged or a recollection of the persons who are subjects of her bounty and she did not list her children on the Will or the reason why she disposed of her property to only three children and thereby

leaving out six.

The Applicants' other contention was that they and their siblings have been greatly disadvantaged by the Ruling and that the present matter was in this Court on 27<sup>th</sup> April 2015 whereby the Court allowed the distribution of the deceased's Estate in accordance with the deceased's Will. In their view, if the intended distribution is effected, the 1<sup>st</sup> Applicant's children and parents' grave will be destroyed and he shall be a trespasser to a place he has always called home.

For the foregoing reasons, the Applicants urged the Court to allow their Application and grant the orders sought therein and they contended further that unless orders of stay of execution are issued, Nelson Njenga Githinji, Francis Githinji Wairimu and Geoffrey Wangure Githinji will extract the orders issued on 27<sup>th</sup> April 2015 and enforce the same.

### **THE RESPONSE**

In response to the present Application, Julius Nganga Githinji (hereafter 'the Respondent') filed an Affidavit in reply sworn on 8<sup>th</sup> March 2016.

It was his response that the Applicant's Summons for revocation of Grant dated 22<sup>nd</sup> August 2014 was heard on 2<sup>nd</sup> February 2015 and the Ruling therein was delivered on 10<sup>th</sup> March 2015. That the Court dismissed the said Application and directed that he proceeds with the Application for Confirmation of Grant of Probate within the next 30 days after the Ruling. That the said Grant for Confirmation was heard on 27<sup>th</sup> April 2015 and the Grant of Probate was confirmed.

The Respondent asserted that following the delivery of the Ruling, the Applicants did not seek leave of the Court to appeal the decision but instead, filed the present Application barely two months after the delivery of the Ruling and well after the Court had issued a Certificate of Confirmation.

It was his other assertion that following the issuance of a Certificate of Confirmation, he made an application to the District Land Registrar, Kiambu, to be registered as proprietor of the parcel of land known as Maguga/Kahuho/449 by transmission and transfer of the said parcel by personal representative to persons entitled under the deceased's Will namely, Nelson Njenga Githinji, Francis Githinji Mungara and Geoffrey Wangure Githinji. That on 2<sup>nd</sup> November 2015, the District Land Registrar Kiambu issued a title deed to that effect.

The Respondent averred that he subsequently engaged the services of a Surveyor who surveyed and subdivided the said parcel of land as per the title deed issued. Accordingly, that the beneficiaries of the deceased's Estate as per her Will have been and are still in possession of their respective parcels of land and that he has completed his duties as the executor of the deceased's Will.

According to the Respondent, there is nothing to stay in the circumstances as the property that is the subject of the deceased's Will has been distributed to the beneficiaries. Furthermore, that there has been inordinate delay on the part of the Applicants in filing and prosecuting the present Application and no sufficient reasons have been advanced to warrant the Court granting the orders sought therein. In addition, the Applicants have not demonstrated that they will suffer irreparable loss if the order for stay of execution is not granted and in any event, they will not suffer any loss because they have never resided and/or lived on the subject land.

For the above reasons, the Respondent urged the Court to dismiss the instant Application with costs.

### **DETERMINATION**

With regard to the content of the Ruling, this Court is *functus officio* and cannot reopen the case unless it is a review. However, this Court notes that the Applicant has adduced evidence of having buried his children in the suit property, evidence that he did not adduce during the hearing of the application.

With regard to the circumstances that led to inordinate delay; I have read of the fact that the parties not being aware of the Ruling and the date it was delivered. The date was 6<sup>th</sup> March 2015 when this Ruling was to be delivered; I informed the Court Clerk that the next date of delivery would be 10<sup>th</sup> March 2015. Surely what transpired between the Court Clerk and the parties, this Court cannot comment on, as it was not privy to the communication. Suffice is to state that I delivered Ruling on 10<sup>th</sup> March 2015 and left the Court file with the Court file. Again what transpired thereafter; I cannot explain. What is strange is that from March 2015, the Applicants did not approach this Court to seek explanation on the whereabouts of the Court file. Yet this application was placed before this Court after the Court Clerk left this Court. It is unfortunate that this Court is held responsible for matters that took place after the Ruling was delivered. The Applicants did not pursue the matter with Deputy Registrar to confirm the movement of the Court file and or avail it for perusal and further action. Therefore, it may be true that the Applicants were inconvenienced by change of delivery of the Ruling by this Court and were not present in Court, the events thereafter cannot be attributed to this Court but to the respective Court Clerk. They can pursue the issue with him to its logical conclusion.

With regard to the application, the Applicants seek the extension of leave to appeal. I note the application was filed on 4<sup>th</sup> May 2015 and was not heard until 7<sup>th</sup> September 2016. It is plausible that the Applicants could not trace the Court file for whatever reason. What is reasonable is that it is not due to any fault or delay of the Applicants that they did not apply and be heard on extension of leave to appeal without inordinate delay. Therefore, I grant the Applicants extension to file application for leave to appeal and grant leave to the Applicants to appeal against the Ruling of 10<sup>th</sup> March 2015.

With regard to granting stay of execution of the Ruling of 10<sup>th</sup> March 2015 and maintaining status quo, it is on record that pursuant to the Ruling of 10<sup>th</sup> March 2015, the grant was confirmed on 27<sup>th</sup> April 2015 and as the Respondent informed Court through Counsel, the land Muguga Kahuho/449 was subdivided and new titles issued to the beneficiaries as per the deceased's Will after confirmation of grant.

Although **Order 42 Rule 6 (1) and (2) Civil Procedure Rules, 2010** provides for stay of execution, in the instant case the matter has been overtaken by events. Therefore this Court cannot grant a stay of execution or maintaining status quo as it will be an exercise in futility.

**DISPOSITION**

**The Court grants leave to appeal out of time against Ruling of 10<sup>th</sup> March 2015**

**DELIVERED SIGNED & DATED ON 16<sup>TH</sup> SEPTEMBER 2016**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

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