REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 989 & 1110 OF 1999 (CONSOLIDATED)

IN THE MATTER OF THE ESTATE OF GERISHON JOHN MBOGO (DECEASED)

MARGARET RACHEL MUTHONI……...…….……..1ST APPLICANT

ARTHUR MUNENE MBOGO ……..……2ND APPLICANT

V E R S U S

VERONICA RWAMBA MBOGO ……...…….. RESPONDENT

RULING

1. The Motion dated 12th May 2014 seeks stay of execution of the certificate of confirmation of grant herein pending hearing and determination of intended appeal. It also seeks leave to appeal out of time and for orders to compel the respondent to hand over all the original title documents and share certificates to the administrators.

2. The grounds upon which the orders are sought are set out on the face of the application, as well as on the affidavit in support sworn on 13th May 2014 by Margaret Muthoni Mbogo.
3. The applicant's case is that she is dissatisfied with the mode of distribution made on 30th January 2004 and intends to appeal against the same. It is her case that there are typographical errors on the certificate of grant issued on 30th January 2014 which make it impossible to execute the same, and that the respondent acting on the alleged errors is seeking to have the beneficiaries evicted from the properties that they are in occupation of. She also states that the distribution was unfair to some of the beneficiaries as the court did not take into account the proposed schedules of distribution filed by both sides, and that what was read to the beneficiaries at the time of the confirmation of grant differed from what was on the certificate of confirmed grant. She avers to have an arguable appeal with high probability of success, to have filed the application for stay without unreasonable delay and evinces her readiness to give such security as the court may require pending the outcome of the intended appeal.

4. She pleads further that the respondent has declined to release all the original documents in her custody and that she has since embarked on the demarcation and transfer process based on a defective certificate of confirmation of grant.

5. The applicant has attached a number of documents to her affidavit to buttress her case. There is a

copy of summons for revocation of grant dated 24th March 2014. There is a bundle of correspondences between the lawyers for both sides on documents that the applicant was asking the respondent to release, culminating with a letter dated 14th May 2014 from the advocates' for the respondent forwarding a bundle of twenty six (26) original titles and share certificates.

6. Upon being served, the respondent replied to the application vide her affidavit sworn on 23rd June 2014. She points out that the matter has been litigated up to the Court of Appeal, and the confirmation of the grant followed the protracted litigation. She avers that the application is brought with bad faith as the applicants continue to enjoy rental proceeds from the estate's assets, all the beneficiaries save the respondent control their own bequests, the administrators have disposed of shares of the estate and are in control of the bequests. She also states that the jurisdiction of the court had not been properly invoked, and denies holding on to original documents. She attached to her affidavit the letter dated 14th May 2014 from her lawyers forwarding the original documents to the advocates for the applicant.

7. The rejoinder to the respondent's affidavit takes the form of an affidavit sworn on 30th May 2014 by the applicant's advocate, Mr. Francis K. Omenya. I doubt that the said advocate should be the right person to respond to the allegations of fact made in the respondent's affidavit. Generally, advocates who are actively involved in a litigation should not swear affidavits on matters of fact on which only the persons they represent have personal knowledge. I note that Mr. Omenya does not even purport to depone to these matters on information from the person he represents given that he cannot possibly have personal knowledge of the facts in issue. I shall pay little regard to the said affidavit, for advocates for the parties ought not descend with the area of conflict and should scrupulously stick to their role as advocates. Mr. Omenya would no doubt put himself in an incredibly embarrassing situation were the advocate for the respondent to insist on putting him on the witness stand to be cross-examined on the contents of his affidavit. An advocate should not wear the shoes of an advocate and a litigant at the same time.

8. Directions were given on 16th July 2014, that the application be disposed of by way of written submissions. The applicant's written submissions are dated 12th September 2014 and were filed in court on 18th September 2014, while the respondent's submissions are dated 17th September and were filed herein on even date.

9. In her submissions, the applicant has identified three (3) issues for determination. One is whether the application meets the threshold for grant of stay and leave to appeal out of time, two, whether the distribution the subject of the intended appeal was done fairly and in accordance with the law of succession, and three, who should have possession of the original title documents. She submits to have grounds of appeal with overwhelming chances of success. I note that the submissions refer to a draft Memorandum of Appeal, which was curiously not attached to any of the affidavits sworn and filed in support of her application. The contents of her affidavits did not allude in any way to the said grounds and their possibility of success.

10. It is submitted that the application was filed without undue delay. There is an explanation in the written submissions for the lapse between 30th January 2014 when the orders were made and 12th May 2014 when the application was filed in court. However, this bit of information should not be carried in written submissions. That explanation ought to have been made in the affidavits filed in support of the application. Written submissions should only have arguments, not averments.

11. There are also submissions on whether the mode of distribution of the estate was fair. The applicant, in her affidavit, alluded to the unfairness of the distribution, but she did not get details of the unfairness. These details are apparently given in the written submissions. I must state once again that there is no place in written submission for reference to factual situations that are not deponed to in the affidavits filed in the matter. The applicant has further submitted that as an administrator, she and her co-administrator ought to be the persons having custody of the documents of title. She accuses the respondent of being illegally in possession of the said

documents.

12. On her part, the respondent submits that the applicant has not established a case that meets the threshold set out in Order 42 rule 6(2) of the Civil Procedure Rules. She argues that the applicant has not shown that she would suffer substantial loss. She has gone on to give details of the rental income being collected by the applicant. Again, these details were not deponed to in the affidavit filed by the respondent in reply to the application, they cannot be set out in written submissions. On leave to appeal out of time, it is submitted that this court has no jurisdiction to grant such a prayer, and further that the existence of typographical errors on the face of a certificate of grant cannot be a ground of appeal. On the release of the original documents she submits that she has since released all the original documents to the applicant.

13. When the matter came up for hearing before me on 17th September 2014, counsel for the parties addressed me briefly on the application based on the written submissions that they had placed on record.

14. The first prayer that the applicant seeks is stay of execution pending appeal and the other prayer is for leave to appeal out of time. Ideally, the second prayer should come first so that once leave to appeal out of time is granted the court can consider whether to grant stay or not.

15. On whether I should grant leave to appeal out time, I should start by saying that the applicant has not pointed me to any provisions of the law which gives me the power to do so. There is power to grant leave to appeal, where an appeal does not lie as of right, but there is no jurisdiction to grant leave to appeal out of time. Jurisdiction in such case vests on the Court of Appeal and leave to appeal out of time should have been sought at that court.

16. Even if I had jurisdiction to grant leave to appeal out of time, I doubt whether a case has been made out for grant of such leave. A party who wishes to appeal is required under the Court of Appeal Rules to lodge notice of appeal within a specified period of time. I have carefully perused through the record before me, and I have not been privileged to come by a notice of appeal lodged in the matter.

17. The applicant has made a lot of play about having good grounds of appeal with reasonable probability of success. However, going through the affidavits in support of the application I have noted that the applicant did not attempt to demonstrate what these grounds of appeal were and why she thought she stood a good chance of succeeding on appeal.

18. An appeal to the Court of Appeal should be on a point of law. For me to consider whether I should grant leave to appeal, I must be satisfied that the applicant has an arguable case. I can only make such determination after such applicant places before me material upon which it can be said that serious points of law arise from the matter to warrant grant of leave to appeal. In the absence of such material there would be no basis at all for grant of such leave, for leave to appeal is not to be granted as a matter of course.

19. Quite apart from having substantial grounds of appeal, the applicant alleges that the certificate of confirmation of grant issued to her has typographical errors. That may be so, but existence of such grants is not ground for appeal. Such errors can be cured administratively or upon an application for review of the certificate.

20. Going by the above, I do not find any basis upon which an order can be made for grant of leave to appeal out of it. As a consequence of this finding, it would be imprudent to grant stay of execution, for such stay would be available only where there is an appeal on record or where leave to appeal has been granted or where a notice of appeal has been filed. There is therefore no basis for grant of stay of execution as proposed in the application.

21. On the release of the original documents of title in the possession of the respondent, I note that these documents were released as per the letter of the respondent's advocates dated 14th May

2014. The documents were received at the offices of the advocates for the applicant on 15th May 2014, by Mr. F. K. Omenya, Advocate. The prayer for the release of the documents is therefore spent.

22. In view of everything that I have said above, it is my conclusion that the application dated 12th May 2014 is wholly without merit. It is available for dismissal, and I do hereby dismiss the same, with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 31ST DAY OF JULY, 2015.

W. MUSYOKA

JUDGE

In the presence of Mr. Anambo for Mrs. Ajusi advocate for the applicant.

In the presence of Mr. Juwanda for Mrs. Wambugu advocate for the respondents.