



**REPUBLIC OF KENYA**

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

**Succession Cause 1141 of 2009**

**IN THE MATTER OF THE ESTATE OF MURIUKI KAGO *alias* MURIUKI S/O  
KAGO.....DECEASED**

**AND**

**MAINA**

**MURIUKI.....PETITIONER**

**RULING**

Maina Muriuki, the applicant herein, took out the motion dated 31<sup>st</sup> October 2011 in which he applied for an order for stay of execution of this court's order made on 14/10/2011 pending appeal. The applicant filed an affidavit he swore in support of the motion. Hezron Muranga Muriuki, the Respondent herein filed a replying affidavit to oppose the motion.

I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the motion. The applicant avers that his appeal has overwhelming chances of success. It is his submission that unless the order for stay is given, the appeal will be rendered useless hence making him suffer substantial loss. The Respondent is of the view that the appeal is incompetent since the Law of Succession Act does not provide an aggrieved person with an automatic right of appeal. The Respondent pointed out that the applicant has not sought for leave hence there is no competent appeal. The Respondent further argued that the motion is incompetent in that the same is not provided for by the Law of Succession Act. There is no dispute that this court made an order confirming the grant on the basis that the estate be distributed in accordance with the affidavit of protest. If the order for stay is not given the order will be executed and L.R. No.Konyu/Gachuku/205 will have been subdivided and transmitted to the respective beneficiaries before the appeal is heard and determined. The beneficiaries will be at liberty to dispose of their portions to third parties whose right will be protected under Section 93 of the Law of Succession Act. In other words, the land will not be easily recovered by the Applicant. I think this will be a substantial loss to the Applicant. The Respondent does not contest this fact. The Respondent's main ground argued against the motion is that there is no competent appeal since leave has not been sought to appeal. With respect, the law does not prevent an aggrieved party from appealing to the court of Appeal against the decision of the High Court over succession matters made in its original jurisdiction. Even if it turns out that leave must be obtained prior to the filing the appeal, there is serious debate whether leave must be obtained first before lodging a notice of appeal or before filing the substantive appeal. The Respondent has also argued that the Law of Succession Act and the rules therein do not recognize a notice of motion. He seems to allude to the fact that the law of Succession Act and the probate and Administration Rules only recognizes summonses as the only form of filing applications. With respect, that is the correct position under the Law of Succession Act and the rules therein. However, the failure to adopt that format, in my view is not fatal. I do not see what prejudice the Respondent will suffer if the motion is treated as though it is a summons. I will overrule the objection in favour of the broad interest of justice.

In the end I allow the motion by granting the order for stay of execution pending appeal. Costs of the motion to abide the outcome of the appeal.

**Dated and delivered this 17th day of August 2012.**

**J.K. SERGON**  
**JUDGE**