



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 383B OF 1994**

**IN THE MATTER OF ESTATE OF SOLOMON NGUNJIRI  
KIMONDO.....DECEASED**

**AND**

**MURIUKI**

**KIMONDO .....PETITIONER**

**VERSUS**

**NGIMA SOLOMON**

**NGUNJIRI .....OBJECTOR**

**RULING**

Muriuki Kimondo, the Petitioner/Applicant herein, took out the Summons General dated 18<sup>th</sup> January 2010 in which he sought for an order for stay of execution of the judgment and decree of this court delivered on 22<sup>nd</sup> July 2009 pending Appeal. The application is supported by the affidavit of the applicant sworn on 18<sup>th</sup> January 2010. Esther Ngima Ngunjiri, the Objector/Respondent herein, filed a replying affidavit she swore on 18<sup>th</sup> March 2010 to oppose the application.

When the application came up for interpartes hearing learned counsels appearing in the matter recorded a consent order to have the application disposed of by written submissions. I have considered those written submissions filed by both sides plus the material placed before this court. The Applicant states that he has filed a notice of appeal with the intention to challenge the decision of this court before the court of Appeal. It is alleged that the Objector/Respondent intends to have the deceased's property transmitted to

her before the appeal is heard unless an order for stay is granted. He pointed out that the Objector has made an application to have the Deputy Registrar of this court to execute the necessary documents in his place when he refused to sign them. The Applicant avers that unless the order is issued the appeal will be rendered nugatory.

The Objector/Respondent opposed the application alleging that there is no competent appeal since the applicant did not seek for leave to appeal under section 50(1) of the Law of Succession Act. The applicant is of the view that no leave to appeal is required in an appeal against a decision of this court in exercise of its original jurisdiction.

I have considered the rival submissions. The background of the application appear to be short and straightforward. When Solomon Ngunjiri Kimondo passed away, Muriuki Kimondo (the Petitioner) applied for letters of administration to succeed the deceased. Ngima Solomon Kimondo, (the Objector) filed an objection against the Petitioner's petition. On 26<sup>th</sup> January 1997, the dispute was referred to arbitration. The elder's award filed in court and read to the parties on 12<sup>th</sup> October 1998 where upon the parties were allowed to inherit the portion they occupy. The Objector was unhappy with the elder's decision hence she sought for the same to be set aside. The award was set aside by consent thus paving the way for this court to hear the dispute. Temporary letters of administration was issued to the Petitioner on 14<sup>th</sup> September 2004. On 27<sup>th</sup> September 2005, the Petitioner applied for the grant to be confirmed whereupon he proposed to solely inherit the parcel of land known as L.R. No. Aguthi/Muruguru/818 whereas the Objector would retain L.R. No. Ruguru/Gachika/200. The Objector filed an affidavit of protest against the confirmation of grant. The dispute was heard by the Honourable Mr. Justice Makhandia who in the end dismissed the Petitioner's application for confirmation of grant and had the grant confirmed in terms of the affidavit of Protestor. In essence, the court confirmed the grant in which the two parcels of land i.e. L.R. No. Aguthi/Muruguru/818 and Ruguru/Gachika/200 were ordered to be transmitted to the Objector being the legal representative of the estate of Solomon Ngunjiri Kimondo, deceased. The Petitioner, being dissatisfied, has now lodged a notice of appeal to express his intention to appeal. He now wishes to have the order stayed pending appeal. The objector does not deny that she intends to have the decree and or order executed. Her main contention against the application for stay is that there is no competent appeal since the Petitioner has not sought for leave to appeal under section 50(1) of the Law of Succession Act. It is apparent that the decree and order sought to be impugned is as a result of a cause determined by this court in exercise of its original jurisdiction. The provisions of section 50(1) of the Law of Succession Act does not apply since the same relates to decisions of this court made in exercise of its appellate jurisdiction. With respect, I agree with the submissions of Mr. Ndirangu, learned advocate for the Petitioner that in the circumstances of this cause no leave is required to be obtained before a party can appeal. The Law of Succession Act is silent as to whether or not a party has a right of appeal in respect of this court decisions made in exercise of its original jurisdiction. In such a case the applicant has an automatic right of appeal to the court of appeal under section 3(1) of the Appellant Jurisdiction Act.

Having come to the conclusion that the Petitioner has an automatic right to the court of Appeal, let me now consider the merits of application for stay of execution pending appeal. The main issue to be considered is whether or not the appellant will suffer substantive loss if the order is denied. The applicant must also show that his appeal may be rendered nugatory if the order for stay is refused. The Petitioner avers that he would suffer substantial loss and or that his appeal will be rendered useless if the order for stay is denied. The Objector has not denied that her intention is to have the deceased's properties transmitted to her. She has even applied for the caution registered against the properties to be removed. She has also applied for the Deputy Registrar of this court to be authorized to sign the necessary documents to have the properties transmitted to her. I am convinced that if the Petitioner is denied the order for stay he will suffer substantial loss since the properties will have been transmitted to the deceased's legal representative. It is obvious that the appeal will be rendered nugatory. In the end I allow the Summons General dated 18<sup>th</sup> January 2010 in terms of prayer 1. Costs of the application shall abide the outcome of the appeal.

The Objector has taken out the Summons General dated 5<sup>th</sup> November 2009 in which she applied for the following orders:

1. ***That the Honourable Court be pleased to authorize its Deputy Registrar to sign all the necessary documents on behalf of the respondent to give effect to the Certificate of confirmed Grant issued on 22<sup>nd</sup> July 2009.***
  
2. ***That the Honourable Court be pleased to order the Nyeri District Land Registrar to remove the caution that was lodged in the title by the respondent on 8<sup>th</sup> September 1977.***
  
3. ***That the costs of this application be provided for.***

The consequence of this court's decisions on the above mentioned Summons General dated 18<sup>th</sup> January 2010 is that the Summons General dated 5<sup>th</sup> November 2009 must be stayed. The same is ordered stayed pending the outcome of the Petitioner's Appeal.

Dated and delivered this 11<sup>th</sup> day of February 2011.

**J.K. SERGON**

**JUDGE**

In open court in the presence of Mugo for the Respondent and Kingori h/b Ndirangu for Applicant.

**J.K. SERGON**

**JUDGE**