

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 560 OF 2008

**IN THE MATTER OF THE ESTATE OF GAKURU KIMARU alias GAKURU S/O KIMARU –
DECEASED**

ELIJAH MAHIGA

GAKURU.....PETITIONER

VERSUS

MARY WAMBUI

MACHARIA.....PROTESTOR

RULING

Pursuant to the provisions of *Order 51 rule 1*, *Order 42 rule 6* of the Civil Procedure rules and *Section 3A* of the Civil Procedure Act, Elijah Mahiga Gakuru, the Petitioner herein, took out the Motion dated 14th February 2011 in which he sought for an order of stay of execution of the judgment of this Court delivered on 16th April 2010 pending Appeal. The Petitioner swore an affidavit he filed in support of the Motion. Mary Wambui Macharia, the Protestor herein, filed a replying affidavit she swore to oppose the Motion.

When the Motion came up for interpartes hearing, Miss Keli, learned advocate for the Petitioner urged this court to allow the Motion so that the status quo is maintained pending appeal. The Petitioner stated that he has an appeal with great chances of success which may be rendered useless if a stay order is not granted. Mr. Kamwenji, learned advocate for the protestor was of the view that the motion should be struck out on the basis that the Court's jurisdiction was not properly invoked. It is his submission that *Order 51* (formerly *Order L*) and *Order 42* (formerly *Order XLI*) of the Civil Procedure rules are not applicable in view of *rule 63* of the Probate and Administration Rules. The Protestor further stated that the Motion was filed as an afterthought and in bad faith with the sole purpose of delaying the conclusion of the matter.

I have considered the grounds set out on the face of the Motion and the facts deponed in the affidavits against the Motion. I have further considered the oral submissions of learned counsels. What provoked the filing of the Motion is this court's judgment delivered on 16th April 2010. The aforesaid judgment was the result of the summons for confirmation of grant dated 5th August 2007 and the subsequent protest. In the aforesaid judgment, this Court confirmed the grant in terms of the schedule of distribution proposed in the affidavit of Protest of Mary Wambui Macharia. The effect of that judgment is to the effect that L.R. NO. KONYU/GACHUKU/163 would be shared between the Petitioner and the Protestor in the ratio of 1.7 acres and 1.2 acres respectively. What the Protestor has raised in objecting to Motion appears to be preliminary issues. The law enjoins me to determine the preliminary issues first before taking into account the merits of the Motion. Basically it is stated that the Petitioner has not properly invoked the

jurisdiction of this Court. I have perused rule 63 of the Probate and Administration Rules and it is clear that *Order 51* (formerly Order L) and *Order 42* (formerly Order XLI) are not applicable in succession proceedings. With respect, I agree with the submissions of Mr. Kamwenji that the Petitioner has cited the provisions of the law which are inapplicable. I am convinced that the Motion therefore is incompetent and improperly before this court. Without taking into account the merits of the Motion, the same is ordered struck out with costs to the Protestor.

Dated and delivered at Nyeri this 17th day of June 2011.

J. K. SERGON

JUDGE

In open court in the presence of Miss Wambui holding brief Miss Keli for Applicant. No appearance for Kamwenji for the Respondent.