



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

Succession Cause 9 of 1999

IN THE MATTER OF THE ESTATE OF KIUGU MWANGI - DECEASED

**MWANGI KIUGU.....1ST PROTESTOR/APPLICANT
JOHN KARIUKI KIUGU.....2ND PROTESTOR/APPLICANT
CHRISTOPHER KINGORI KIUGU.....3RD PROTESTOR/APPLICANT**

VERSUS

**WAHIGA KIUGU.....1ST OBJECTOR/RESPONDENT
CECEDA GATHUNGU MBORA.....2ND OBJECTOR/RESPONDENT**

RULING

JOHN KARIUKI KIUGU, the 2nd Protestor/Applicant herein, took out the Motion dated 26th October 2009 in which he prayed for the following orders:

1. *That in the first instance court do certify matter urgent and dispense with service.*
2. *That court do order stay of execution of the order given on 26th February 2009 distributing estate herein.*
3. *That the respondent, their servants or agents be restrained from sub dividing and/or transferring Othaya/kihugiru/204 until appeal filed in the court of appeal is heard and determined.*
4. *That costs be provided for.*

The Motion is stated to have been taken out under *Order XLI rule 4* of the Civil Procedure Rules and *rule 73* of the Probate and Administration Rules. The Motion is supported by the affidavit of John Kariuki Kiugu. **WAHIGA KIUGU**, the Objector/Respondent herein, swore a Replying Affidavit to resist the Motion.

The history leading to the filing of this Motion is somewhat straightforward. **JOHN KARIUKI KIUGU** filed an affidavit of protest against the Summons for Confirmation of Grant dated 26th July 2005 filed by Wahiga Kiugu. Both the Protest and the Summons for Confirmation of Grant were heard by Lady Justice Kasango. It would appear the learned judge dismissed the Protest and proceeded to confirm the grant. In her judgment of 26th February 2009, the Honourable Judge made the following orders:

“In respect of the first house, I have identified them from the evidence the following as beneficiaries:

Mwangi Kiugu.

- *John Kariuki Kiugu.*
- *Lucy Gathoni Kingori.*

Those beneficiaries shall get half of Othaya Kihugiru/204 which they shall share equally.

2. *The other half of Othaya/Kihugiru/204 shall go to Wahiga Kiugu which she shall hold in trust for her children.*
3. *I order the Deputy Registrar to sign all the documents necessary to put into effect the judgment of this court.*
4. *There shall be no orders as to costs.”*

The aforesaid orders and or judgment is what the Applicant now seeks to stay pending appeal. He has already filed a Notice of Appeal to challenge the aforesaid judgment in the Court of Appeal. It is his submission that the appeal has high chances of success and that unless the order of stay is given the appeal will be rendered nugatory. The Applicant argued that the Respondent has already appeared before the Land Control Board to seek for consent to subdivide the land for purposes of transmission. He said the aforesaid will mean he may be evicted before appeal hence he will suffer substantial loss.

The Respondent opposed the Motion by relying on the Replying Affidavit she swore on 17th November 2009. She accused the Applicant for delaying to file the Motion. The Respondent further argued that the grant had already been executed hence there is nothing to stay. It is said that the application for consent to subdivide will not affect the portion she occupies.

The Law of succession Act and the Rules therein did not import the application of *Order XLI* of the Civil Procedure Rules to succession proceedings. The provisions of the civil procedures which were to be applied to succession proceedings are stated to be *Orders V, X, XI, XV, XVIII, XXV, XLIV* and *XLIX* under *rule 63* of the Probate and Administration Rules. *Order XLI* and *Sections 1A* and *3A* of the Civil Procedure Act are not mentioned. Perhaps the only relevant provisions which may lent jurisdiction to this Court to determine the Motion is *Section 47* of the Law of Succession Act and *Rule 73* of the Probate and Administration Rules. Basically this Court has been urged to exercise its inherent power to stay the execution of the judgment and or orders made on 26th February 2009. The Motion was filed on 2nd November 2009. No reasons were given for the delay to file the Motion yet there is evidence that the Notice of Appeal was lodged on 3rd March 2009. In the absence of any explanation to justify the delay, I do not think I should exercise my discretion in favour of an applicant who is not vigilant. In fact the Respondent has already entered the names of the beneficiaries into the register of the parcel of land known as **OTHAYA/KIHUGIRU/204**. That was done on 29th May 2009 in compliance with the judgment of Lady Justice Kasango. I agree with the Respondent that there is nothing to stay since the judgment of the Court has been implemented. For the above reasons the Motion is ordered dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 26th February day of 2010.

J. K. SERGON
JUDGE

In open court in the presence of Mr. Mugo for Respondent. Miss Nderitu holding brief Kariuki for Appellant.