REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Succession Cause 508 of 1999

IN THE MATTER OF THE ESTATE OF MISHECK NYINGI GAITER – DECEASED

FRANCIS WANJOHI NYINGI
JAMES MIUGO NYINGI. ……..……...…APPLICANTS/APPELLANTS
MARY NYAWIRA WANJOHI

VERSUS

PAUL KIRUHI NYINGI..……1ST RESPONDENT
JOHN WANJOHI NYINGI…….2ND RESPONDENT

RULING

Pursuant to the provisions of Section 47 of the Law of Succession Act and Rules 58, 59 and 73 of the Probate and Administration Rules, **FRANCIS WANJOHI NYINGI, JAMES MIUGO NYINGI** and **MARY NYAWIRA WANJOHI**, the Appellants/applicants herein, took out the Summons dated 2nd June 2010 in which they prayed for the following orders:

1. ***"That there be a stay of execution of the orders confirming the grant herein on 22nd July, 2009 pending the hearing and determination of Court of Appeal Civil Appeal Number 246 of 2009 (NYI)***

2. ***That the costs of this application be provided for."***

The Summons is supported by the affidavit of Francis Wanjohi Nyingi sworn on 2nd June 2010. **PAUL KIRUHI NYINGI** and **JOHN WANJOHI NYINGI**, the Respondents herein, opposed the summons by filing a replying affidavit of Paul Kiruhi Nyingi sworn on 13th July 2010. The Respondents also raised a preliminary objection vide the notice dated 12th July 2010. both Francis Mugo Nyingi and Paul Kiruhi Nyingi were each granted leave to file further affidavits which they did.

I have considered the material placed before this court plus the oral submissions made by learned counsels. It is the submission of the Applicants' counsel that the Appellants have an arguable appeal hence they should be given a stay of execution of the confirmed grant pending the hearing and determination of the appeal before the Court of Appeal. It is said that the Appellants are likely to show the Court of Appeal that the proposed distribution given by the Respondents does not comply with the provisions of *Section 40 (1)* of the Law of Succession Act. The Appellants beseeched this Court to issue the order to avoid the appeal being rendered nugatory.

The respondents have strenuously opposed the application on the basis of the following grounds: First, is that the appeal will not be rendered nugatory in that the confirmed grant will not be used to convey properties which do not belong to the deceased's Estate. Secondly, it is said that the application has introduced new issues which were not within the knowledge of the trial judge yet this is not an application for review. Thirdly that the Appellants have not been candid to this court in that they failed to disclose to this Court that they had lodged restrictions against the landed property with the registrar. Fourthly, that the application is made in bad faith to delay the expeditious conclusion of this matter. I have carefully taken into account the rival submissions. There is no dispute that this Court confirmed the grant on 22nd July 2009. It is also not in dispute that the Appellants have filed an appeal to challenge the order of confirmation of grant before the Court of appeal. The main order sought vide the summons dated 2nd June 2010 is for a stay f execution of the order confirming the grant pending the hearing and determination of the appeal before the Court of Appeal. In determining such applications, the principles are well settled. First, one must show that he has an arguable appeal. Secondly that if the order for stay of execution is denied, the appeal will be rendered useless. In other words one must show the substantial loss. Thirdly, one must also show that the application for stay was timeously filed. Let me apply the above principles to this case. I will begin with the last principle. The record shows that the order which confirmed the grant was issued on 22nd July 2009. On 28th July 2009, the Appellants issued a notice of appeal to indicate their intention to challenge the decision. On 29th July, 2009, the Appellants applied for typed proceedings. It would appear the proceedings were not ready until 28th September 2009. There is a certificate of delay issued by the Deputy registrar dated 28th September 2009. On 29th September 2009, the Memorandum of appeal was filed. The Summons dated 2nd June 2010 was filed on 2nd June 2010. There was a delay of about 8 months in filing the application. There was no direct arguments on this issue, however, there is a ground set out in the replying affidavit which states that the application does not meet the threshold established by law. In my view I find the delay to be inordinate. The Appellants should have

explained the cause of the delay.

The second principle is whether there is an arguable appeal. There is no doubt that a critical examination of the grounds set out on the Memorandum of Appeal will reveal that the appeal raises serious arguable points of law which include the questions as to whether or not the confirmed grant complies with the provisions of Section 40 (1) of the Law of Succession Act. The other issue is whether or not the Court erred when it relied on a document written in Kikuyu language and not translated in English Language.

The last principle to be considered is whether or not the Applicants have shown the substantial loss they would suffer if the order for stay is given. It is obvious that the grant has already been confirmed with properties already distributed to the beneficiaries. If the order of stay is not given the resultant consequence is that the confirmed grant will take effect in that the properties will have been transmitted to the beneficiaries. Those beneficiaries may dispose of the same before the Appeal is heard and determined. The properties conveyed to third parties is protected by the law hence may not be easily recovered. This alone may render the appeal nugatory. I am convinced the Appellants have shown the substantial loss they would suffer.

In the end the summons only meets two of the three principles required. It has failed the test of time, in that it was filed too late in the day. Perhaps the best I can do in the circumstances is to condemn the Appellants to pay costs of the application instead so that the overriding objective of the case can be achieved. Consequently I allow the Summons dated 2nd June 2010 as save that the Appellants shall pay the costs of the application.

Dated and delivered at Nyeri this 7th day of October 2010.

J. K. SERGON
JUDGE
In open court in the presence of Mr. Karweru for the respondent and Waruinge holding brief Wahome for the Applicant.