

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 147 OF 1999

IN THE MATTER OF THE ESTATE OF KINYUA GITHAIGA – Deceased

ANNAH GATHONI MWANGI.....APPLICANT/PETITIONER

Versus

NGUNYI GITHAITA.....RESPONDENT/OBJECTOR

R U L I N G

Pursuant to the provisions of rules 49, 59 and 73 of the Probate and Administration Rules, **Annah Gathoni Mwangi**, the applicant/petitioner herein, took out the summons dated 19th December 2008 in which she sought for an order of stay of execution of the orders made by this court on 15th December, 2008 pending appeal. The application is supported by the affidavit sworn by the petitioner. **Ngunyi Githaiga**, the respondent/objector herein filed a replying – affidavit to oppose the summons. Before the filing of the aforesaid summons, **Ngunyi Githaiga** had taken out the summons dated 7th January 2009 in which he applied for an order authorizing the Deputy Registrar of this court to execute all the necessary documents in place of **Annah Gathoni Mwangi** in order to give effect to the certificate of confirmation of grant. The petitioner opposed the summons by filing the replying affidavit he swore on 22/4/2009. Though the application by the respondent/objector was filed first in time, the kind of orders sought in the application of the petitioner will obviously stay execution of the former. For that reason this court opted to deal with the later application which is the subject matter of this ruling.

Mr. Mukunya, learned advocate for the petitioner urged this court to grant the order for stay pending appeal. It is argued that if the order is not given, the applicant will suffer substantial loss in that the appeal will be rendered useless in that the order will have been effected. **Mr. Mukunya** further pointed out that the provisions of section 93 of the Law of Succession Act will have taken effect leaving the applicant with no remedy.

Miss Mwai, learned advocate for the respondent/objector urged this court to dismiss the application on the ground that there is no evidence that the applicant had filed a notice of appeal. She also pointed out that there is no evidence that the applicant offered any form of security. **Miss Mwai** went further to state that the applicant has not shown that he has a right of appeal. It is argued that the applicant must seek leave to appeal. **Mr. Mukunya** urged to ignore the argument that that leave is required to be argued before the court of appeal.

I have considered the material placed before me and the submissions of both learned counsels. On the 15th day of December, 2008, **Lady Justice Kasango**, delivered her judgment in which the honourable judge gave judgment in favour of **Ngunyi Githaiga** as against **Anna Gathoni Mwangi**. The grant was confirmed with an order directing that the parcel of land known as magutu/Gathehu/725 be registered in the name of **Ngunyi Githaiga**. The petitioner is now seeking for the stay of execution of that order pending appeal. I have perused the letter dated 19th December, 2008 which was presented from the bar by **Mr. Mukunya**, learned advocate for the applicant/petitioner. The letter is from the Deputy Registrar, court of Appeal, Nyeri and is addressed to the Deputy Registrar court of Appeal Nairobi. It is copied to the firm of **Kagonda & Mukunya & Co. Advocates** and that of **M/s Lucy Mwai & Co. Advocates**. In the aforesaid letter the Deputy Registrar, Court of Appeal, acknowledges receiving a notice of Appeal

lodged by the Applicant/Petitioner's Advocate on 15/12/2009. For some strange reason there is no copy in this court's file. I am convinced that the applicant/petitioner filed a notice of appeal. Having come to the conclusion that there was a competent notice of appeal, let me now address my mind as to whether or not leave is required for one to file an appeal. I have carefully perused the provisions of the Law of Succession Act and the rules therein. The Act and rules do not expressly state that a party must seek leave to appeal. In my view an aggrieved party has an automatic right of appeal.

The remaining issues to be determined are two fold. First, is whether the applicant will suffer substantial loss if the order for stay is not given. The respondent/objector's Advocate did not address me over this ground. It is obvious that if the order for stay is denied, then the parcel of land known as **Magutu/Gathehu/725** will be transferred to **Ngunyi Githaiga**. In that respect the appeal will be rendered nugatory hence the petitioner will suffer substantial loss. Secondly, security in such circumstances must be offered. **Mr. Mukunya**, did not make any offer in this respect. **Miss Mwai** urged this court to dismiss the application because of that Lacuna. What I know is that whether or not an offer for security is made, this court has a wide discretion to impose some. After a careful consideration of the matter I am convinced that security should be given in this case. It is difficult to give an estimate of amount security in monetary terms. I will order the petitioner to deposit in court a conservative sum of Ksh.20,000/= which amount will represent the expenses which may be incurred in having the decree performed. Consequently I grant the application for stay of execution pending appeal on condition that the applicant/petitioner deposits with the Deputy Registrar of this court a sum of Ksh.20,000/= within 30 days. In default the application shall stand dismissed. In view of my decision the summons dated 7th January, 2009 shall stand stayed pending appeal. Costs of the application shall be given to the respondent/objector in any event.

Dated and delivered at Nyeri this 13th day of October 2009.

J.K. SERGON

JUDGE