



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 3 of 2008**

**PAUL MUCHUKI GAKIBE.....,.....APPELLANT**

**versus**

**PHILIP KAMAU GAKIBE ..... RESPONDENT**

**RULING**

On 19<sup>th</sup> February 2009, the Senior Resident Magistrate at Thika delivered her judgment in a matter between **PHILIP KAMAU GAKIBE** and **PAUL MUCHUKI GAKIBE**.

The extracted decree read as follows: -

*“THIS CAUSE coming up for hearing on 31<sup>st</sup> January 2007 and on subsequent dates before L.W. GICHEHA (Mrs.) Senior Resident Magistrate in the presence of Mr. Karanja advocate for the petitioner and Mr. Kimani advocate for the objector herein.*

*AND UPON considering the pleadings by both parties to this cause.*

*AND FURTHER UPON hearing both the petitioner and objector together with their witnesses and submissions by both counsel it is hereby ORDERED and DECREED that: -*

- a) *L.R. No. Ngenda/Githunguchu/T.227 remains in the ownership of **PHILIP KAMAU GAKIBE***
- b) *L.R. No. Ngenda/Githunguchu/67 to be shared out as follows: -*
  - i) *PHILIP KAMAU GAKIBE be given the portion where his constructed*
  - ii) *The remaining portions be divided EQUALLY among:*
    - i) *ZACHARIAH MUIGAI GAKIBE*
    - ii) *JOHN KIMANI GAKIBE*
    - iii) *DAVID KIBE*

- iv) *RUFUS NJUGUNA to hold in trust for the family of RUTH NJOKI*
  - v) *ANTHONY WARUINGE to hold in trust for the family of RAHAB MAGIRI*
  - vi) *JANET NJAMBI KAGONGE*
  - vii) *MARY WAMBUI*
  - viii) *PAUL MUCHUKI GAKIBE*
- c) *There be no order as to costs.*

**GIVEN** under my hand and the seal of the court on 19<sup>th</sup> day of February 2008

**ISSUED** this 14<sup>th</sup> day of February 2008”

Being aggrieved by the said Judgment and the resultant decree, Paul preferred his appeal to this Court on 18/3/2008, and he filed this application on 7/4/2008, in which he seeks an order to stay the execution of that decree and further that there be an order for status quo to prevail on the subject parcels, until his appeal is heard and determined.

He bases his application on the grounds inter alia that unless the orders which he seeks are granted, his appeal will be rendered nugatory, and also that his appeal has high chance of success, and he goes on to depose that the respondent is keen on distributing their father’s estate despite the fact that he does not agree with the proposed mode of distribution and that if allowed the other beneficiaries stand to suffer great inconvenience and prejudice which would be irreversible.

Mr. Kimani, learned counsel for the applicant urged the court to grant his client the order which he sought in order to avert substantial loss because the respondent had commenced the process of the subdivision, which if allowed to proceed would render the appeal nugatory.

The application is however opposed, and it was Mr. Karanja’s view that the application is not only incompetent for having been brought under the wrong sections of the law, but that the applicant has not demonstrated what substantial loss he stands to suffer. He was also of the view that the applicant has no locus standi in this matter for he was not a party in the suit where this appeal emanates from, but in my humble opinion, he should have availed certified copies of the proceedings to prove his point, lack of which leaves this court with no reason to doubt the applicant’s counsel whose submission it was, that his client was a party in the cause in the subordinate court and that in the circumstances he has locus standi in the matter. Needless to say, his name appears on the decree and it is clear in my mind that he has locus standi in this matter.

The respondent deposes that not only is the appellant guilty of laches but that it is he who stands to suffer prejudice because he has already commenced the subdivision process of No. 67 by engaging a firm of surveyors to undertake the process. He is of the opinion that since the applicant has not demonstrated any willingness to supply security, neither has he demonstrated what substantial loss he stands to suffer.

The applicant relies on section 47 of the Succession Act Cap 160 of the Laws of Kenya (‘the Act’), which grants this court the jurisdiction to entertain any application and determine any dispute under the aforementioned Act. He also relies on rules 63 and 73 of the Probate and Administration Rules of the Act which provide that:

63. *‘(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.*

(2) *Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules’.*

73. *‘Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court’.*

I have considered this application, in my humble opinion; it cannot lie for it has been brought under the wrong provisions of the law for it is incumbent upon the applicant to cite the proper law under which an order of stay can issue. None of the provisions which he relies on and which I have cited above can aid him. It is evident that the Probate and Administration Rules do not specifically cater for applications for stay of executions, but Mr. Karanja was of the view and rightly so, that the applicant ought to have moved the court under rule 49 of Probate and Administration Rules, which provides that *“a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit’.*

In view of the above, the application is thus incompetent and I strike it out with costs.

Dated and delivered at Nairobi this 20<sup>th</sup> day of November 2008.

**JEANNE GACHECHE**

**Judge**

Delivered in the presence of: