



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mungai v Ngugi & another (Succession Cause 45 of 2017)  
[2024] KEHC 4105 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4105 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
SUCCESSION CAUSE 45 OF 2017  
SN MUTUKU, J  
MARCH 14, 2024  
IN THE ESTATE OF SAMUEL NGUGI MBUGUA (DECEASED)**

**BETWEEN**

**JANE NJERI MUNGAI ..... APPLICANT**

**AND**

**ANTHONY PETER MBUGUA NGUGI ..... 1<sup>ST</sup> RESPONDENT**

**SUSAN WANJIRU ALIAS SUSAN NAIPANOI LETUYA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Jane Njeri Mungai, the Applicant, has filed a Summons dated 20<sup>th</sup> February 2023 seeking the following orders:
  - i. Spent
  - ii. This Honourable Court be pleased to stay the distribution of the estate of Samuel Ngugi Mbugua, deceased, pending the hearing and determination of this application.
  - iii. This Honourable Court be pleased to stay the distribution of the estate of Samuel Ngugi Mbugua, deceased, pending the hearing and determination of Nairobi Civil Appeal no 311 of 2019 *Jane Njeri Mungai & 3 Others v Allan Gitau Mbugua & Another*.
  - iv. The costs of this application be provided for.
2. The Application is anchored on Rule 63 of the *Probate and Administration Rules* and Order 42 Rule 6 (2) of the *Civil Procedure Rules* and all enabling provisions of the law. The grounds in support of the application are found on the face of it and in the Supporting Affidavit sworn by the Applicant on 20<sup>th</sup> February 2023. The grounds in support of the applicant, in summary, are that the Applicant has filed an appeal at the Court of Appeal against the judgment of this court (Nyakundi, J) delivered on 18<sup>th</sup>



- April 2018. The Applicant was aggrieved by the said judgment for the reasons that the Court made a provision that the Applicant be given a portion of LR no Loitoktok/Enperon/171 measuring one (1) acre which she finds inadequate.
3. The Applicant has preferred an appeal in Nairobi Civil Appeal no 311 of 2019 *Jane Njeri Mungai & 3 Others v Allan Gitau Mbugua & Another*. She wants the distribution of the estate of the deceased in this Cause stayed pending the hearing and determination of that Appeal. Her apprehension is that her appeal may be rendered nugatory should the distribution of the estate be done before the appeal is determined.
  4. The Application was served on the Respondents who have not responded to it, or filed submissions as directed by the court. On 30<sup>th</sup> October 2023, Mr. G. Kamau appeared for the Respondents and sought leave to file Replying Affidavit and written submissions. This court allowed him 7 days to do so and fixed the matter for a mention to confirm compliance with those orders on 1<sup>st</sup> December 2023. However, on that date, the Respondents' counsel did not attend court. The Respondents have not filed Replying Affidavit and Submissions as at 1<sup>st</sup> December 2023.
  5. The Applicant filed submissions dated 16<sup>th</sup> November 2023. She has raised a singular issue for determination, whether stay of distribution should issue pending the determination of the Appeal.
  6. The Applicant invoked the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules on the conditions to be met by an applicant before stay is granted and submitted that the application before the court was filed without undue delay after learning of the issuance of the new grant and certificate of confirmation on 13<sup>th</sup> February 2023 and filed the application on 20<sup>th</sup> February 2023.
  7. She submitted that she would suffer substantial loss unless the orders sought are granted because her appeal, which has overwhelming chances of success, will be rendered nugatory. She relied on *Antoine Ndiaye v African Virtual University* [2015] eKLR; *Joseph S. Mukenya v Agnes Naliaka Cheseto* (2012) eKLR, among other authorities to support her submissions that she will suffer substantial loss.
  8. On the last condition to be met, the Applicant submitted that she is willing to abide by the conditions set by this court by offering the one (1) acre allocated to her by the court. She submitted that she has, therefore, met the conditions for grant of the orders sought in this application.
  9. I have considered the Application and the grounds in support of the same. The Applicant has not provided information as to the status of the pending Appeal which she says was filed in 2019. The communication, letter, from the Registrar, Court of Appeal, is dated 6<sup>th</sup> July 2020, about three years before this application was filed.
  10. I have noted that the Applicant has relied on Order 42 Rule 6(2) of the *Civil Procedure Rules* to support her application. Order 42 deals with stay of execution pending appeals. The Applicant has also relied on Rule 63 of the *Probate and Administration Rules*. Rule 63 (1) provides as follows:

Save as in 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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.
  11. The Orders of the *Civil Procedure Rules* that are applicable to Probate and Administration Causes as provided under Rule 63 of the *Probate and Administration Rules* deal with Service of Summons, Case Management and Conferences, Summons and Attendance of Witnesses, Affidavits, Security for



Costs, Temporary Injunctions and Interlocutory Orders, Review and Time, respectively. These Orders have been imported into the *Law of Succession Act* and are applicable in applications filed in respect of Succession matters.

12. Order 42 is not one of the Orders of the *Civil Procedure Rules* that have been imported into the *Law of Succession Act* by Rule 63 of the *Probate and Administration Rules*. This Order is therefore not available to the Applicant and cannot be invoked in aid of her application.
13. The Applicant has a pending appeal, although as stated above, she has not informed the court the status of the appeal as it stands currently. It may be beneficial to the Applicant to await the outcome of the pending appeal than to pursue this application.
14. My view, after careful consideration of the grounds in support of the application, the submissions and the authorities cited, is that the Applicant has not demonstrated that she deserves the orders she is seeking. The law she has relied on is not available to her. In my considered view, the Applicant has nothing to lose given that the matter is before the Court of Appeal and that court will pronounce itself on the issues she is raising. It is my view that she will not suffer substantial loss if this application is not granted given that the matter is pending determination in the Court of Appeal.
15. Consequently, this application is unmerited and is hereby dismissed. I direct that parties bear their own costs given that the Respondents have not filed any documents in opposition to the application.
16. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 14<sup>TH</sup> DAY OF MARCH, 2024.**

**S. N. MUTUKU**

**JUDGE**

