



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. E030 OF 2020**

**IN THE MATTER OF WOLLES KARIUKI KANG'ETHE alias WALLACE KARIUKI KANG'ETHE alias KARIUKI KANG'ETHE**

**ANTHONY KANG'ETHE KARIUKI.....APPLICANT**

**VERSUS**

**PAUL NGIGI KARIUKI.....RESPONDENT**

**RULING**

(1) Before this Court is the Summons dated 25<sup>th</sup> February 2021 by which ANTHONY KANG'ETHE KARIUKI (hereinafter 'the Applicant') seeks the following orders:-

**“(a) SPENT**

**(b) The Honourable Court be pleased to issue a stay of execution of the Ruling and all subsequent orders issued by Honourable C. N. Mugo (SRM) in Limuru Succ. Cause 219 of 2016 on 14<sup>th</sup> July 2020 pending the hearing and determination of this application.**

**(c) The Honourable Court be pleased to set aside the Ruling dated 14<sup>th</sup> July 2020 appointing the Respondent as the sole administrator of the estate together with all consequential orders arising therefrom.**

**(d) SPENT**

**(e) SPENT**

**(f) The costs be in the cause.”**

(2) The Application is premised upon the grounds on the face of the application and is supported by the Affidavit dated 24<sup>th</sup> February 2021 sworn by the Applicant the two Supporting Affidavits dated 25<sup>th</sup> February 2021 sworn by HANNAH WANGUI KARIUKI and GLADYS NJERI KARIUKI both described as beneficiaries to the estate of the Deceased.

(3) Despite service of the Application upon Counsel for the Respondent PAUL NGIGI KARIUKI (the Respondent herein) no Repling Affidavit was filed and as such the Application remained unopposed.

**BACKGROUND**

(4) This matter relates to the administration of the estate of WOLLES KARIUKI KANG'ETHE alias WALLACE KARIUKI KANG'ETHE alias KARIUKI KANG'ETHE (the Deceased). On 14<sup>th</sup> July 2020 the learned trial Magistrate sitting at the Limuru Law Courts issued to the Respondent herein a Confirmed Grant to administer the estate of the Deceased.

(5) The Applicant, Hannah Wangui Kariuki, and Gladys Njeri Kariuki, who claim to be beneficiaries to the estate of the Deceased allege that the learned trial Magistrate failed and/or declined to grant them the opportunity to be heard before the orders appointing the Administrator were made.

(6) It is further alleged that the Respondent has benefitted from funds misappropriated from the Deceased's bank account Number **xxxxx** held at **K-Unity Bank, Limuru Branch**, which funds the Respondent has failed to account for. That the Respondent is in the process of disposing Title Numbers **Limuru/Bibirioni/3301** and **Naivasha Mwachiringiri/Block 1/4523** to the detriment of the Applicant and the other beneficiaries. Lastly it is alleged that the Respondent has since **October 2017** been collecting rent totaling **Kshs. 615,000/-** from the Deceased's property in **Limuru** and has declined to distribute said rental income equally to all the beneficiaries.

(7) It is for this reason that the Applicant has filed this present application seeking a stay of the orders confirming the Grant pending the hearing and determination of the application. As stated earlier the application was not opposed by the Respondent.

#### **ANALYSIS AND DETERMINATION**

(8) I have carefully considered the present application the Affidavits in support as well as the annexures thereto. **Order 42 Rule 6** of the **Civil Procedure Rules** grants the Court discretion to order a stay of execution of its own Ruling / Judgment or the decision of a Subordinate Court pending Appeal. The principles to be applied in the exercise of that discretion to grant a stay were set out in the case of **BUTT –VS- RENT RESTRICTION TRIBUNAL [1982] KLR**, where the Court of Appeal held as follows:-

**“(a) The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**

**(b) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that Appeal Court reverse the Judge's discretion.**

**(c) A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.**

**(d) The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the Appellant had an undoubted right of Appeal.”**

(9) The main consideration which must be borne in mind therefore is whether there exists compelling reason to grant a stay so as not to render the intended Appeal nugatory. The Applicants herein allege that they were not granted an opportunity to be heard by the trial Court before the Confirmed Grant of Letters of Administration were issued in the name of the Respondent. The Respondent was served on **5<sup>th</sup> March 2021** vide the Affidavit of Service dated **8<sup>th</sup> March 2021** and in the absence of any reply by the Respondent to this application, there is nothing to controvert this allegation. There exists the very real risk that the Respondent may proceed to dispose of assets of the estate without the knowledge and / or input of the other beneficiaries of the estate. In the circumstances I am satisfied that there exists a case for a stay so as to preserve the estate pending the outcome of the Appeal.

(10) Accordingly I do allow this present application and grant a stay in terms of prayer (b) of the Notice of Motion dated **25<sup>th</sup> February 2021**. I further direct the Applicant shall file and serve a Record of Appeal within **sixty (60) days** of the date of this Ruling failing which the stay orders will automatically lapse with no further reference to the Applicant. As this is a family matter I make no orders on costs.

**DATED IN NAIROBI THIS 11TH DAY OF JUNE, 2021.**

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**MAUREEN A. ODERO**

**JUDGE**