



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CASE NO 3 OF 2017

IN THE MATTER OF THE ESTATE OF KESIAH WANJIKU (DECEASED)

SAMUEL NJORA GITAU.....1ST APPLICANT

SIMON GITAU MURICHU.....2ND APPLICANT

PAULINE GACHOKI NGUGI.....3RD APPLICANT

VERSUS

MARIA WANGARI GITHERE.....1ST RESPONDENT

JOHN KURIA WAGEMA.....2ND RESPONDENT

MARY NYAKINYUA MURICHU.....3RD RESPONDENT

RULING

1. For determination is the General Summons filed on 22nd March, 2019 by the three Applicants herein primarily seeking an order to stay execution of the judgment by **Musyoka J.** dated the 29th day of January, 2019 and delivered by **Ongeri J.** on the 15th day of February 2019.
2. The key grounds upon which the application is premised is that the Applicants being aggrieved with the said judgment have filed an appeal in the Court of Appeal, and that unless stay orders are issued, the Respondents are likely to execute the judgment and thus render the intended appeal in the Court of Appeal a nullity.
3. **SAMUEL NJORA GITAU**, the 1st Applicant swore the affidavits in support of the Summons. He deposed that he is the only surviving Administrator of the estate of his late father, **GITAU MUIGAI** following the death of his two co-administrators and widows of the deceased, namely, **KEZIA WANJIKU GITAU** and **EUNICE WAMBUI GITAU**, the latter who was his own mother. By way of background, he further deposed that subsequent to their mother's death the Respondents herein had filed a succession cause in respect of the estate of **Keziah Wanjiku Gitau** and wrongfully incorporated therein the estate of **Gitau Muigai**.
4. The 1st Applicant further complained that by the impugned judgment by Musyoka J. the life interest vesting in Keziah Wanjiku Gitau in respect of the shares due to her from the estate of his father had been vested absolutely in the Respondents, to the detriment of the Applicants. As a result of which, the distribution of the estate of **Gitau Muigai** has been rendered impossible. He stated that being thereby aggrieved, he and his Co-Applicants had filed a Notice of Appeal in the Court of Appeal and urged the court to issue the order sought herein.
5. In opposition to the Summons, the 1st Respondent **MARIA WANGARI GITHERE** filed a replying affidavit on 14th November, 2019. Therein, she deposed that the estate of **Gitau Muigai** had been equally distributed in Thika Succession Cause No. 170 of 1982 between his two wives, **Eunice Wambui Gitau** and **Keziah Wanjiku Gitau** and that upon her demise, the deponent was appointed an administrator and heir of her estate, comprising of one half share in Muigai Gitau's estate, which belonged to her mother Keziah Wanjiku Gitau.
6. The 1st Respondent admitted in her depositions that **Eunice Wambui Gitau** is the mother to the Applicants herein and asserted that on their part, the Applicants have equally received the other half share belonging to their mother and made developments thereon. It is the position of this deponent that the estate of **Gitau Muigai** had respectively devolved upon the estates of **Keziah Wanjiku Gitau** and of **Eunice Wambui Gitau**. Contending that her mother held the estate in trust for her family, she stated that granting the order sought would delay the conclusion of the administration of the estate herein.
7. By a supplementary replying affidavit filed on 23rd September, 2019, the 1st Respondent deposed that the administrators of her father's

estate have refused to distribute the estate in contempt of court orders and that the said administrators continue to lease out the estate despite injunctive orders prohibiting such activity. She urged the court to dismiss the application.

8. The application was canvassed by way of oral arguments. Ms. Muigai, for the Applicants submitted they have an arguable appeal and will suffer irreparably if the order for stay is not granted. She pointed out that the Respondents had already proceeded to subdivide land forming part of the estate of the Applicants' father.

9. The 2nd Respondent submitted on his own behalf and on behalf of his Co- Respondents. He asserted that the dispute herein has been ongoing for over a decade and that stay should not be granted as it will delay this matter further. He pointed out that both parties have their respective portions of the asset and the Land's office should issue with title deeds.

10. The court has considered the material canvassed in respect of the application. The application is expressed to be brought under, "**Rule 49 of the subsidiary rules Law of Succession ... Sections 1A (1) and (2), (3), 1B 1(a) to (d), 3 and 3A the Civil Procedure Act**" *inter alia*. I presume the reference to Rule 49 of the "Subsidiary rules" is to Rule 49 of the 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".

11. Similarly Section 47 of the Law of Succession Act empowers the High Court to entertain any application and to make such orders as may be expedient, while Rule 73 of the Probate and Administration Rules saves 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**". Evidently, the Law of Succession Act does not expressly provide for appeals from the High Court to the Court of Appeal. Moreover, the provisions of Order 42 Rule 1 of the Civil Procedure Rules that provide for applications to stay execution pending appeal in the Court of Appeal, have not been applied by Rule 63 of the Probate and Administration Rules to succession causes. Indeed, none of the sections of the Civil Procedure Act invoked on the face of the Summons before me are applied to succession causes by that rule.

12. Nonetheless the Court of Appeal has in numerous decisions affirmed the jurisdiction of the Court of Appeal to entertain appeals from the High Court in succession matters, based on the provisions *inter alia* of Sections 3, 3A and 3B of the Appellate Jurisdiction Act and Rules 1(2), 4 and 47(1) and (2) of the Court of Appeal Rules, and with regard to interlocutory applications, Rules 5(2)(b) of the Court of Appeal Rules the latter which states that:

"(b) in any civil proceedings, where notice of appeal has been lodged in accordance with rule 75 (the court may) order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just".

13. In the case of **George Gathuru Karanja v George Gathuru Thuo & 2 Others [2019] e KLR**, the Court of Appeal in dealing with an application to stay execution of the orders of the High Court in a succession cause, stated that the jurisdiction is discretionary and is intended for the preservation of the subject matter of appeal where an appeal has been filed or is intended, and that the jurisdiction arises where the Applicant has lodged Notice of Appeal as stated in **Safaricom Ltd v Ocean View Beach Ltd and 2 Others Civil Application No.327 of 2009 (UR)**.

14. In setting out the applicable principles, the Court of Appeal further stated in **George Gathuru Karanja's** case above that:

"As a matter of both law and practice, the applicant is obligated to satisfy the twin principles enshrined in this provision in order to earn a relief under the said rule. These are, first, that the appeal or the intended appeal is arguable and second, that if the stay sought is not granted, the appeal/intended appeal as the case may be, will be rendered nugatory. See the Githunguri case (supra). By arguable is not meant an appeal or intended appeal which must succeed but one which raises a bona fide issue worthy of consideration by the Court. See Kenya Tea Growers Association and Another versus Kenya Planters Agricultural Workers' Union, Civil Application No. Nai 72 of 2001 (UR).

15. The Court continued to clarify that:

"An arguable appeal need not raise a multiplicity or any number of such points. A single arguable point is sufficient to earn an applicant such a relief. See Damji Premji Mandavia versus Sara Lee Household & Body Care (K) Limited Civil Application No. Nai.345 of 2005 (UR); Kenya Railways versus Ederman Properties Ltd, Civil Appeal No. Nai 176 of 2012 and Ahmed Musa Isamel versus Kumba ole Ntamorua & 4 others, Civil Appeal No. Nai 256 of 2013.

As for the second limb, an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of Stanley Kangethe Kinyanjui versus Tony Ketter & 5 others, C.A. No. 31 of 2012 where in this Court stated *inter alia* thus:

"Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."

Both limbs must be established before a party can earn a relief under Rule 5 (2)(b) of the Court of appeal Rules, 2010. See Republic v Kenya Anti-Corruption Commission and 2 Others v 2009 KLR 31..."

16. This court will apply the foregoing principles in considering the application before it. The 1ST Applicant has asserted that he has already

filed a Notice of Appeal, a copy of which is annexed to his affidavit alongside the draft memorandum of appeal (annexures marked “SNG 2” & “SNG 3”, respectively). So far as this court can discern, the copy of the Notice of Appeal annexed to the affidavit does not appear to have been lodged in the Court of Appeal. I say so because it does not bear the stamp of that court on its face. And coincidentally, the main prayer in the motion is drafted in terms that “**the judgment issued by W. Musyoka J. on 15th day of February 2019 be stayed**”. An Applicant seeking stay of execution pending appeal should demonstrate the subsistence of an appeal or lodging of a Notice of Appeal not leave the matter to guess work as the present Applicants have seemingly done.

17. The court has also considered the history of this matter as elaborately captured in the judgment of **Musyoka J.** The Applicant by his and two affidavits and draft memorandum of appeal raised several points for argument. A key argument relates to the question whether there existed an estate of the deceased herein capable of being distributed, that is separate from the estate of **Gitau Muigai** distributed in Thika Magistrates Court Succession Cause 170 of 1982. A second point relates to the law applicable to the disputed estate of the deceased in this case. No doubt these, together with others raised by the draft memorandum of appeal are arguable points.

18. On the second consideration, the key events described at paragraph 9 of the supporting affidavit having occurred, i.e. the completed subdivision of the asset **LR NO GITHUNGURI/GITHUNGURI/400**, the horse has pretty much bolted from the stable. Indeed, relevant green cards have already issued in the names of the Respondents in respect of half share of that parcel. There is no evidence to demonstrate that the Respondents have evinced any intention to sell the suit parcels to third parties as alleged by the Applicant.

19. Besides, from the material before the court, one half share of the asset **LR No. GITHUNGURI/GITHUNGURI/400** measuring 3.5 acres that is due to the house of **Eunice Wambui Gitau** the first wife of **Gitau Muigai** and mother of the Applicants, under the decree in the Thika Succession Cause remains intact, and the only portion transmitted or to be transmitted to the Respondents is the share measuring 3.5 acres in respect of the share to the house of **Keziah Wanjiku Gitau**, the deceased herein. (See paragraphs 10 – 14 of the Replying affidavit of Maria Wangari Githere sworn in opposition to the motion).

20. It appears that, upon the order of **Musyoka J** on 27th January 2015 directing the Land Registrar, Kiambu to remove the caution placed by the Applicants’ house on the suit land, the Respondents proceeded with subdivision of the parcel into two halves and in accordance with the confirmed grant herein, further subdivided their house’s share. Whereupon, the old title was closed on 23.2.15 and new subdivision numbers issued. In his address before the court and by his letter to this court filed on 21st March 2019, the 2nd Respondent asserts that the Respondents have made payments in respect of their respective titles. 22. In these admitted circumstances, it is difficult to see how the intended or filed appeal will be rendered nugatory for the Applicants herein and Eunice Wambui’s house in general. If the appeal were to resolve in the Applicants’ favour, transmissions to the Respondents can be reversed, or they can be called upon to compensate the Applicants by way of damages. See **Stanley Kang’ethe Kinyanjui v Tony Ketter and 5 Others [2012] e KLR**.

23. For the foregoing reasons, I am not persuaded that the Applicants have satisfied the second requirement to demonstrate that the appeal will be rendered nugatory if stay of execution is not granted. Moreover, as earlier noted, the Applicants did not furnish evidence that indeed they have lodged an appeal to the Court of Appeal. In the circumstances, the application filed on 22nd March 2019 must fail and is dismissed with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 13TH DAY OF FEBRUARY 2020

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C. MEOLI

JUDGE

In the presence of:

Ms Muigai for the Applicants

Respondents – Present in person

Court Assistant – Ndege/Nancy