



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 3079 OF 2002

IN THE MATTER OF THE ESTATE OF JOSEPH GICHUKI RIUNGE (DECEASED)

FRANCIS KIMANI GICHUKI.....1ST APPLICANT

DAVID MUNIU RIUNGE..... 2ND APPLICANT

VERSUS

THERESA WANJIRO RIUNGE.....1ST RESPONDENT

JOSEPHINE NJERI RIUNGE.....2ND RESPONDENT

RULING

1. The deceased Joseph Gichuki Riunge died intestate on 9th March 1981. A grant of letters of administration intestate was made to the applicants Francis Kimani Gichuki and David Muniu Riunge on 17th December 2014. An application dated 3rd August 2015 for the confirmation of the grant was heard and determined on 9th July 2018 when the estate was distributed to the beneficiaries.
2. The applicants were aggrieved by the decision. They appealed to the Court of Appeal through the notice of appeal dated 13th July 2018 and filed on 16th July 2018. On 7th September 2018 they filed the present application seeking the stay of the decree and orders that followed the ruling.
3. The deceased had two wives: Esther Wanjiku Gichuki and Sarah Njambi Gichuki. Each house had four children. The applicants are from the house of Esther Wanjiku Gichuki. The respondents Theresa Wanjiru Riunge and Josephine Njeri Riunge are from the house of Sarah Njambi Gichuki. The wives (widows) died after the deceased had died. The deceased left parcels of land, money in fixed deposits and shares in many companies.
4. According to the applicants the deceased always wanted the estate to be shared between the two houses equally. According to the respondents, the deceased wanted the estate to be shared equally to the children. The other contention by the applicants was that their mother, although dead, was entitled to a share of the estate. The court heard the parties orally and decided to share the estate equally to the children of the deceased. It found that the applicants' mother, if she was alive, would have been entitled to a life interest. Now that she was dead before the distribution, her interest had become extinguished. These are the matters the applicants are taking up on appeal. They argue that they have a good appeal. The respondents are of a different opinion.
5. Under **Order 42 rule 6(2)** of the **Civil Procedure Rules** the court can order stay of execution if it is satisfied that substantial loss may be occasioned to the applicant unless the order is made; that the application has been brought without unreasonable delay; and the applicant has provided such security for the due performance of such decree or order as may ultimately be binding on him (**Labh Singh Harnam Singh Ltd – v- Attorney General & 2 Others 2016 eKLR**).
6. The appeal was filed about 7 days after the ruling. The application was brought about two months following the appeal. That was not prompt, but one cannot say there was unreasonable delay in bringing the application. Secondly, no security was offered by the applicants.
7. As to whether the applicants will suffer substantial loss if the application is not granted, I consider that, in substantial terms, equal sharing of the estate between the two houses and equal sharing among all the children of the deceased would amount to a similar result. This is considering that each house has the same number of children, and the right of each child to equal sharing is entrenched in **sections 38 and 40**

of the **Law of Succession Act (Cap.160)**.

8. The court considers that in such an application the competing interests are the rights of the respondents (and the parties not aggrieved) to the decree which they are entitled to execute and the right of the applicants to appeal the decision which has aggrieved them (**Richard Muthusi –v- Patrick Gituma Ngomo & Another [2017]eKLR**). The court has the responsibility to make sure that the appeal, if successful, is not rendered nugatory.

9. I have considered the peculiar circumstances of this application against the principles of law applicable. I have come to the conclusion that the applicants do not deserve stay. I consequently dismiss the application with costs.

DATED and SIGNED at NAIROBI this 5TH day of FEBRUARY 2019.

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 12TH day of FEBRUARY 2019.

ALI-ARONI

JUDGE