REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2783 OF 1997

IN THE MATTER OF THE ESTATE OF GITAU NJOROGE

"B" alias GITAU NJOROGE (DECEASED)

DAVID NJOROGE GITAU.....APPLICANT

VERSUS

RICHARD KARURU GITAU.....1ST RESPONDENT

CHARLES KAMWERU GITAU.....2ND RESPONDENT

RULING

1. The deceased Gitau Njoroge 'B' died on 17th June, 1997. On 19th December 1997 his sons Peter Njoroge Gitau (now dead) and David Njoroge Gitau (the applicant) petitioned the court for the grant of letters of administration testate on the basis of a Will dated 17th September 1993. The grant was issued on 3rd March 1998 and confirmed on 30th April 1999. On 10th January 2003 two of the deceased's other children filed an application seeking the revocation of the grant on the basis that it had been fraudulently obtained as it concealed from the court the fact that the deceased had made a Will dated 20th January 1995 which had revoked the earlier Will of 7th September 1993. The two children are the respondents Richard Karuru Gitau and Charles Kamweru Gitau. In a judgment delivered on 21st June 2018 the court found that the Will dated 20th January 1995 revoked the Will made on 7th September 1993, and asked that the estate be distributed on the basis of the Will dated 20th January 1995. The grant on Probate issued on 3rd March 1998 was revoked and the certificate of confirmation issued on 31st April 1999 was set aside. Any and all transactions carried out on the strength of the grant and certificate of confirmation were declared null and void. A fresh grant of probate and the basis of the 20th January 1995 Will was issued to Thuo Nganga and Muiruri Wainaina to who a certificate of confirmation was ordered to issue.

2. Aggrieved by the judgment, the applicant filed a Notice of Appeal on 28th June 2018 seeking to challenge the decision at the Court of Appeal. On 9th July 2018 he filed the present application seeking that the execution of the grant and the decree be stayed pending the hearing and determination of the appeal. His fear was that the grant and certificate of confirmation as going to be given to Thuo Nganga and Muiruri Wainaina who were going to distribute the estate in accordance with the Will dated 20th January 1995 which he had unsuccessfully challenged in the proceedings leading to the judgment.

3. The deceased had two wives: Peris Gichiru Gitau had Esther Kiringa Gitau. The late Peter Njoroge Gitau was the eldest son in the house of Peris Gichiru Gitau. In the house were 10 children in all. The applicant was the eldest son in the house of Esther Kiringa Gitau which had 6 children in all. The deceased's estate comprised land parcel Githunguri/Muthike/171 measuring 48 acres, Plot No. 627 Mwihike Farmers Co. Ltd and 785 KPCU redeemable shares. In the Will dated 7th September 1993 the house of Peris Gichiru Gitau was given 25 acres and it was indicated that they were to be shared among the children. The house of Esther Kiringa was given 23 acres, and the share of each child shown. The applicant was to get shares. In the Will dated 20th January 1995 the deceased gave each son (except Macharia Gitau) 4.20 acres. The wives were to get one acre each, same as each unmarried daughters. However, one daughter was to get 2 acres. A sketch map was drawn to show where each child was to be located.

4. It is the applicant's case that:-

"15. THAT each house was settled on their side and buried their siblings on their side and that the contents of the alleged

second Will had the effect of disrupting the *status quo* on the ground and that its implementation would lead to digging up and transfer of graves and movement of homesteads of the second house and the same would cause strife in the family."

5. Regarding the particulars of the disruption, the applicant swore that:-

a) he would be forced to move his house from where it is to where his mother currently resides;

b) his mother would be forced to move her permanent house to a new site;

c) the grave of the son of his brother Kamau would have to be dug out and moved to a new site where his land is supposed to be; and

d) the grave of the late Charles Kamweru would have to be moved to a new site where his land is supposed to be.

6. The 1st respondent swore a replying affidavit to oppose the application. His case was that the deceased had not shown the two houses where to settle. He stated that bodies buried on the estate land are their brothers, sisters, nieces and nephews and this affects both houses as follows:-

a) Peter Njoroge Gitau died and is from the first house and his body is buried at the far part of the land so that if the estate is distributed in accordance with the judgment his portion would fall within where his grave is;

b) Charles Kamweru Gitau died and is form the first house, and where the body is buried is within the portion of Geoffrey Njogu Gitau from that house;

c) the child of Allan Kanau Gitau of the second house died, and the body was buried next to the deceased's grave which is a common area and no one will be affected by the grave; and

d) the first widow Peris Gichiru Gitau died and her body was buried within the portion allocated to that house.

7. On the issue of where the parties have built, and the allegation that the distribution will affect permanent dwellings, the 1st respondent stated that there are only three permanent houses: one belonging to Esther Karinga Gitau (2nd widow) which is on the portion allocated to that house; the second belonging to applicant's brother Richard Karuru who has no problem with the distribution; and the last one belonging to Peter Njoroge's son which falls within the area that his father will own as per the distribution. In any case, the respondent swore, any distribution is bound to disrupt members of the family, and therefore a level of accommodation is expected if life has to move on.

8. It is material that the applicant swore a further affidavit challenging what the 1st respondent had stated, and reiterated that the proposed distribution will be quite disruptive.

9. I have considered the written submissions and the authorities cited.

10. The main issue for determination is whether the applicant has met the necessary conditions to warrant a stay of execution pending the hearing and determination of the preferred appeal.

11. Under **Order 42 rule 6(2) of the Civil Procedure Rules**, before a court can order stay of execution it has to be satisfied that substantial loss may result to the applicant unless the order is made; the application has been made 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.

12. There is no claim that the application was brought late. It is also true that there was no security that the applicant offered.

13. The applicant is seeking to exercise his undoubted right of appeal. It is important that the appeal, if successful, should not be rendered nugatory. The competing issue is that the respondents have a judgment whose decree they are entitled to execute, so that they can realize its fruits.

14. The application invokes the discretionary powers of the court which must be exercised judiciously (**Butt –v- Rent Restrict Tribunal [1982]KLR 417**). The court will, among other things, consider the special or unique circumstances of each case, and consider security upon the application of either party or on its own motion.

15. In the case of **Machira t/a Machira & Co. Advocates –v- East African Standard [2002]eKLR** it was stated that, where the applicant alleges that he will suffer substantial loss if stay is not granted, he must specify the kind of loss, giving details and particulars thereof for the court to examine the application and reach the conclusion that, indeed, he will suffer substantial injury if the respondent is allowed to proceed with the execution of the decree before the appeal is heard and determined.

16. The 1st respondent swore that the applicant does not have a good appeal; that the one filed is defective because the applicant was appointed administrator with Peter Njoroge Gitau who died, and therefore the grant became inoperative under **Section 76 of the Law of Succession Act**, and therefore the applicant cannot use the grant to file the appeal. The competence of the appeal, however, can only be determined by the Court of Appeal.

17. I consider that the deceased died in 1997. This dispute began then. The estate has many beneficiaries. There is no indication that the

appeal that the applicant has filed is on behalf of all these beneficiaries. The estate land is 48 acres. At a personal level, the applicant was to get 6 acres from the Will dated 7th September 1993 and 4.20 acres in the Will dated 20th January 1995. I am also mindful that both the distribution of the 48 acres among the many members of the family, and deciding where each member will settle in relation to the others, is bound to be dislocation, disruption and inconvenience. Not all beneficiaries will be satisfied with whatever distribution.

18. I have considered all the facts of this application. I determine that the applicant will not suffer substantial loss if the execution is allowed to proceed even as he pursues his right of appeal. I consequently dismiss the application with costs.

DATED and DELIVERED at NAIROBI this 17TH day of JULY, 2019.

A.O. MUCHELULE

JUDGE