



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**(FAMILY DIVISION)**  
**SUCCESSION CAUSE NO 83 OF 2006**  
**IN THE MATTER OF THE ESTATE OF CHARLES KARIUKI GACHERU (DECEASED)**

JAMES GICHUHI KARIUKI.....1<sup>ST</sup> PETITIONER

ELIZABETH MURUGI KARIUKI.....2<sup>ND</sup> PETITIONER

MARY RUGURU KARIUKI.....3<sup>RD</sup> PETITIONER

VERUS

STEPHEN NJOROGE KARIUKI.....1<sup>ST</sup> OBJECTOR

JOHN KIHICO KARIUKI.....2<sup>ND</sup> OBJECTOR

MARTHA WAITHERA GACHERU.....3<sup>RD</sup> OBJECTOR

**RULING**

1. The application subject of this ruling is a summons dated 14<sup>th</sup> December, 2018 brought pursuant to **Section 47** of the Law of **Succession Act**, **Rules 47** and **73** of **Probate and Administration Rules**.

Two prayers are spent. The only pending prayers is a stay of execution of Hon. Lady Justice Muigai's orders of 31<sup>st</sup> March, 2016.

2. The application is based on the following grounds:

- **The court granted the applicant leave to appeal on the 18<sup>th</sup> of October, 2018.**
- **A notice of Appeal was filed on the 30<sup>th</sup> of October, 2018.**
- **Certified copies of the proceedings were applied for on the 1<sup>st</sup> of November 2018.**
- **The said order subject of appeal if enforced will be prejudicial to the applicant and**
- **The orders will inevitably necessitate the exhumation of several bodies within Muguga/Gitaru/1833**
- **The Applicant has an arguable appeal.**
- **If the order is not allowed the substrum of the intended appeal will be eroded.**

3. The application was objected to by the affidavit of Stephen Njoroge Kariuki sworn on 28<sup>th</sup> of January 2019 where he contends that the application has been brought in bad faith, no record of appeal has so far been filed, the same is intended to delay distribution, that the applicant though aggrieved by the ruling of 31<sup>st</sup> of March 2016 did not seek leave to appeal in the first instance but instead chose to seek for review.

4. Hon. Lady Justice Muigai is no longer in this Division and this court now has the task of deciding on this application.
5. The single question for determination is whether to grant a stay pending an intended appeal in regard to the orders issued by Muigai J on 31<sup>st</sup> March 2016.
6. **Order 45(1)(a) and (b)** of the Civil Procedure rules set (rules) out conditions upon which an applicant may seek a review the same also speak to either the option of appeal or review so does order 45 (2) of the rules.

In **ELC Misc Application No. 5 of 2018 Kisii Stephen Nyasani Menge versus Rispah Onsase** the court stated:

**“In my view a proper reading of Section 80 of the Act and Order 45 rule 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case the applicant exhausted the process of review upto appeal and now rushes to go back to the same order she sought review of and failed and try her luck with an appeal. The applicant wants to have a second bit at the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of court process and the same must surely fail. The applicant had her day in court when she chose to seek review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application.**

**Litigation cannot be conducted on the basis of trial and error.”**

The above extract was from an application for stay pending appeal and where review had been denied as in this instance

7. In **Civil Appeal No. 100 of 2016 Malindi Mary Mambui Njuguna versus William Ole Nabale & 9 others** , the Court of Appeal had this to say as regards order 45(2);

**“We agree with the conclusion of the learned judge that it was not open to the applicant to pursue an appeal and at the same time a review of the same order. The Appeal could only lie on the outcome of the application for review.”**

8. I have considered the above authorities so as to address my mind as to whether the application for stay is meritorious. Although it is not for this court to considered whether or not the appeal is meritorious, In my view and based on the above authorities since the applicant sought a review of Muigai J’s orders in the first instance, the avenue for an appeal over the same order is not available. The applicant does not seem to have an arguable appeal therefore and any chances of success and giving a stay of a 2016 order will therefore be prejudicial and unfair to the Respondents.

9. Even without the above reason the application for stay is inordinately late and no good reason attributed to the same. It behoves a litigant to keep tab and pursue his/her matter in court so that a ruling of 31<sup>st</sup> March 2016 ought not to have been discovered after 1 year 6 months, even for the reasons given.

10. For the above reasons the application for stay is declined.

11. Costs in the cause.

**Dated and Delivered in Nairobi on this 7<sup>TH</sup> day of NOVEMBER 2019.**

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**ALI-ARONI**

**JUDGE**