



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 486'A' OF 2009**

***In the matter of the Estate of JOSSIAH NDIGA Alias JOSIAH DISMAS (Deceased)***

**KENETH NGUNJIRI.....1ST RESPONDENT**

**ANTHONY MBUNDI.....2ND RESPONDENT**

**SAMUEL MURIITHI.....3RD RESPONDENT**

**STEPHEN KIURA.....4TH RESPONDENT**

**JAMES GACHINGA.....5TH RESPONDENT**

**MARY NJERI NYAMU.....6TH RESPONDENT**

**SOSPETE GACHOKI NJOGU.....7TH RESPONDENT**

**WILSON NJAGI MITHERU.....8TH RESPONDENT**

**JAMES GACHINGA GATUMU.....9TH RESPONDENT**

**JAMES MAGURU WAGICHERU.....10TH RESPONDENT**

**MARY WOTHAYA MURAGE.....11TH RESPONDENT**

**VERSUS**

**ANTHONY NGARURI NJUKI.....1ST APPLICANT**

**CHARLES KATHUTI MWOBE.....2ND APPLICANT**

**R U L I N G**

1. This is a ruling on the applications dated 7/12/2016 and 27/01/2017 which will be referred to as the first and the second application. Both parties have filed written submissions in respect of each of the application.
2. On 23/03/2017 this court set date for ruling for the second application which seeks for leave to file an appeal against the court's ruling delivered on 20/11/2016. The second application seeks for stay of execution of the same ruling. After perusing the two applications it is my considered view that the two applications are related in that they are based on the same facts and on the same grounds. The submissions of the applicant in the two motions are identical.
3. The best approach would have been for the applicants to combine the two applications seeking for one prayer for leave to appeal and the second one for stay of execution pending appeal.
4. Since both parties have been given an opportunity to be heard in respect of both applications, it will not cause any prejudice to have the two applications considered alongside each other and one ruling made to apply to both. It is noted that the applicants appeared in person and may not have understood the procedure to follow in pursuing his rights.
5. For the foregoing reasons, I order that the two applications be consolidated.

6. The applicant relies on grounds that he intends to appeal against the ruling of this court and that he has been advised that he requires leave to appeal. Secondly, that he wishes to have the estate of the deceased preserved pending the filing and determination of the appeal. The notice of appeal has already been filed in this regard.

7. The application was opposed by the respondents. In the replying affidavit of Stephen Kiura Warui, he challenges the application dated 27/01/2017 as being bad in law since it is brought by notice of motion instead of by summons as required in succession causes. He further states that Order 45 of the Civil procedure Act under which the application is brought is not applicable to succession proceedings.

8. It is further stated that the applicant has not explained the delay in filing this application which was about two months since the ruling was delivered. It is further contended that the draft memorandum of appeal has not been annexed to this application for consideration by this court.

9. The respondents submissions replicate the contents of the replying affidavit and seeks for dismissal of the application for being incompetent.

10. On the competence of the application, I note that the applicant relies on several provisions of the law which will be examined herein as well as other relevant ones.

11. As for the form of the application, Rule 59(1) of the Probate and Administration Rules provides that all applications shall be brought in form of summons. The form by notice of motion for the two applications is wrong.

12. However, the provisions of Article 159(2)(d) of the Constitution provides:-

*159(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-*

*(d) justice shall be administered without undue regard to procedural technicalities.*

13. This court has a duty under Section 1B of the Civil Procedure Act to consider the overriding objective in hearing all matters to ensure the just determination of proceedings as well as the efficient disposal of cases.

14. It is my considered view that by virtue of Article 159(2) (d) and the overriding objective, the court should be concerned more with the contents of the application other than the form. These provisions save the said application despite the flaws pointed out by the respondent.

15. The application is brought under Order 45 of the Civil Procedure Rules which deals with review of orders or decrees of the court. This again is the wrong provision. This court considered that the applicant is unrepresented and is likely to made some mistakes depending on where he sought assistance in drafting his application. Article 159(2)(d) is still available to rescue the applicant from the quagmire he finds himself in.

16. The application dated 7/12/2016 seeks for stay of execution of the ruling pending filing and determination of the appeal. The applicant in his affidavit states that he wants parcel No. L.R. Ngariama/Thirikwa/138 to remain as it is. This prayer that this court may not grant in that the said parcel was sub-divided into many portions long before the grant was revoked by Ong'udi, J. on 19/01/2012. A court of law should not issue orders in vain. It is my considered view that the applicant's submission that the original parcel should be preserved does not make sense. It is within his knowledge that the original parcel no longer exists.

17. The application dated 27/01/2017 seeks for leave to appeal against the court's ruling delivered on 28/11/2016. The applicant cites Sections 1A, 1B, 75 of the Civil Procedure Act and Order 45 of the Probate and Administration Rules. None of these provisions is related to the subject of leave to appeal.

18. However, I consider the fact that the applicant has expressed his dissatisfaction with the ruling of this court. He is entitled to challenge it since it is his constitutional right.

19. It must be appreciated that this succession cause is over 10 years old having commenced in 2007 in the Principal Magistrate's Court Kerugoya. There are several parties involved in this case who are purchasers in good faith. Most of them have extensively developed their portions or even sold them to 3<sup>rd</sup> parties. For this reason, the applicant must fast-track the appeal should the orders sought be granted.

20. It is my considered opinion that the prayers for stay of the ruling and leave to appeal are merited and are hereby allowed.

21. The applicant is directed to fast-track this appeal in the interests of all the parties involved.

22. Each party to meet its own costs of this application.

23. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF MAY, 2017.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**1. The Applicant**

**2. The Respondent**

**3. Mr. Guantai for Mr. Kagio for respondent**