



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 544 OF 1994**

**1. HEZEKIAH MWANGI MACHARIA**

**2. TED JOSHUA MACHARIA.....PLAINTIFFS**

**VERSUS**

**1. LAURA WAITHIRA NGANGA**

**2. ZIPPORAH WAMAITHANGANGA**

**3. ALICE MUMBI NGANGA (sued as administrators of the estate of Joseph Nganga Kihonge)  
.....DEFENDANTS**

**R U L I N G**

1. The Plaintiffs filed this suit against Joseph Nganga (hereinafter “deceased”) who however, died during the subsistence of the suit. By an application dated 21<sup>st</sup> August, 2001, the Plaintiffs sought to revive the suit which order was granted by Rimita J on 21<sup>st</sup> February, 2002 and the administrators of the estate of the deceased were substituted as the in Defendants. The suit proceeded and judgment was entered in favour of the Plaintiffs. A notice to show cause was subsequently issued against the Defendants to show cause why warrants of arrest should not issue against them in execution of the decree therein. It was the Defendants’ contention that they had distributed the deceased’s estate by the time judgment was entered. The Deputy Registrar was not satisfied by the Defendants’ explanation for failure to satisfy the decree and stated that the Defendants had failed to place such evidence before the Judge and that addressing that issue while the Plaintiffs already have a judgment would be tantamount to reviewing the judgment. The Deputy Registrar further held that nothing had been placed before him to prove that the deceased’s estate has been fully distributed and for the said reasons the Defendants were committed to civil jail.
2. By the notice of motion dated 13<sup>th</sup> February, 2015, the 2<sup>nd</sup> Defendant is seeking stay of the orders of the Deputy Registrar made on 21<sup>st</sup> January, 2015 issuing warrants for the arrest of the Judgment Debtor pending the hearing and determination of an appeal against that order. This motion is brought under Section 3A and 38 of the Civil Procedure Act and Under Order 22 Rule 22, Order 42 Rule 6 (1) (2) (3) (4) (5) and (6) and Order 49 Rule 7(2) and (3) of the Civil Procedure Rules. The motion is premised on the grounds set out in the body of the application and the supporting affidavit of the 2<sup>nd</sup> Defendant sworn on 13<sup>th</sup> February, 2015. She essentially contends that by the time the suit was revived, she and the other administrators had disposed of the deceased properties and were unable to satisfy the decree and that the failure to satisfy the decree is not deliberate for the aforesaid reason. Secondly, she stated that committal to civil jail would be detrimental to her health considering that she is aged eighty years (80) which loss would be compounded by the fact that she has no knowledge of the facts leading to the judgment.
3. In response thereto the Plaintiff filed grounds of opposition to the effect that; the application is misconceived and lacks merit; the administrators have participated fully in the proceedings leading to the decree in that capacity; the administrators are estopped from attempting to escape liability to pay and settle the decretal sum; the administrators have lodged a notice of appeal against the judgment delivered leading to execution proceedings in their capacity as administrators; the applicants are attempting to obtain a stay of execution of the decree issued indirectly and that the administrators are enjoined by the Law of Succession Act to meet the

Plaintiffs' claim.

4. The Defendants in submission reiterated that the deceased's property had been distributed by the time judgment was entered. The 2<sup>nd</sup> Defendant contended that she had given a clear record indicating that the debts known to the administrators were settled. That she has demonstrated that she stands to suffer loss of her freedom which would render the appeal nugatory. She cited **Nyeri ELC No. 217 of 2012 Charles Ngatia Nguyo Vs Ekira Gathoni Kariithi & Another** where the court held that the court has the power under Order 42 Rule 6 (2) to grant a stay in case of an appeal should it be satisfied that substantial loss may result and an application for stay has been brought without unreasonable delay. It was submitted further that in situations where the demand for security deprives a party of the right to appeal, the court should dispense with the requirement for security. That there would be a serious legal issue on the application of Section 39 of the Civil Procedure Act.
5. The law provides that it is for a party to prove its case. While the 2<sup>nd</sup> Defendant herein calls upon this court to believe that the administrators had exhausted the deceased's estate, no such evidence has been tendered before this court. Further, the 2<sup>nd</sup> Defendant has not demonstrated that she has filed an appeal. She instead referred to an appeal filed by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. This court cannot also ascertain the 2<sup>nd</sup> Defendant's age without a document to that effect. However, it is noteworthy that even though the Plaintiffs have a right to execute, the onus lied on them to establish that they exhausted all other modes of execution which modes have failed and that the only option left was to commit the 2<sup>nd</sup> Defendant to civil jail. I am fortified by the decision of **Vijay Morjaria Vs Harris Horn Junior & Another Civil Case No. 285 of 2004 (UR)** where it was held that the decree holder who desires to have the freedom of a judgment debtor restricted must show that he has exhausted all other measures to secure payment and that the only option left is incarceration. For that reason and for the reason of the alleged age of the applicant whereby if she is committed to civil jail and she succeeds on appeal, she would have already served the sentence by the time the appeal is concluded thereby suffering substantial loss. In the circumstances, the application herein is merited and is allowed. A fair order is for order each party to meet his/her costs costs of the application. The Appeal however must be filed and prosecuted within 12 months of today failing of which the committal ordered by the Deputy Registrar may proceed.

Dated, Signed and Delivered at Nairobi this 5<sup>th</sup> day of June, 2015.

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**A MABEYA**

**JUDGE**