



**REPUBLIC OF KENYA**

**High Court at Embu**

**Civil Appeal 145 of 2011**

**GRACE WANGARI KIURA.....APPELLANT**

**VERSUS**

**PAUL MURIUKI KIURA.....RESPONDENT**

**R U L I N G**

This is the application dated 16<sup>th</sup> February 2012 by way of Notice of Motion brought under Section 1, 1A, 1B, 3 of the Civil Procedure Act and Order 42 Rule 6 of the Civil procedure Rules. It seeks the following orders:-

1. ***Stay of execution of the lower court's judgment delivered on 29/9/2011 in Succession Cause No. 42/2009 in the matter of the estate of Peter Kiura Gakoru alias Kiura Gakoru.***
2. ***The Court to order that status quo be maintained i.e. the applicant to continue to occupy and cultivate 1/8 acre of land parcel No. INOI/THAITA/460 pending the hearing and determination of the appeal filed herein.***

The main ground is that the lower Court ordered that the land No. INOI/THAITA/460 be wholly registered in the name of the Respondent yet the Appellant/Applicant knows of no other home besides where she resides. And that the Respondent has started demolishing her house. The parcel of land comprises of 4 acres.

She has also filed a supporting affidavit. In it she says she grew up knowing that the deceased were her biological parents and only learnt of the contrary during the hearing of the succession cause. She has filed an appeal challenging the lower court judgment.

She is applying for stay of execution because she lives on this land and the Respondent has started demolishing her house with the sole purpose of having her evicted. She has annexed certificates showing her names.

The application was opposed by the Respondent who relied on his replying affidavit. He states that the applicant is now admitting what she denied in the lower court. And annexure PNK1 showed that the Applicant had a biological father who had provided for her. Mr. Munene cited delay in making the application and it should be dismissed. He also raised an issue about certain annexures not having been marked.

The appellant/Applicant availed to the Court a copy of the proceedings from the lower Court. The Trial Court had before her an estate whose only property comprised of land parcel No. INOI/THAITA/460 measuring 4 acres. The Court hearing the appeal will have to determine what the value of that estate was and hence make a finding on whether that fell within the jurisdiction of a Resident Magistrate under the provisions of Section 48(1) of the Law of Succession Act.

From the Judgment of the lower Court the learned trial Magistrate found that the Appellant/Applicant was a Dependant and not a daughter as earlier claimed. She then dismissed her claim for a share and awarded the whole estate to the Respondent herein. There is evidence that the Appellant/Applicant lives and cultivates part of this land. She was not claiming the whole land.

The learned trial Magistrate also found that the applicant and Respondent were brought up together and for her the Applicant ought to come to Court as a dependent and not as a daughter. And that basically is the reason that made the Court not provide for her saying she had lied to the Court from the onset.

It is on the basis of these facts that the applicant has moved to the High Court to have a 2<sup>nd</sup> opinion on those set of facts. The scenario prevailing is that the Respondent is the one entitled to that whole parcel of land known as INOI/THIMAITA/8 as a result of the judgment of the lower Court.

Order 42 Rule 6(2) of the Civil Procedure Rules provides for the conditions under which stay of execution pending appeal may be granted.

1. ***The Court must be satisfied that substantial loss may result if order is not granted.***
2. ***The application must have been made without unreasonable delay.***
3. ***Security for due performance of the decree.***

The 3<sup>rd</sup> condition is only applicable to monetary decrees. The decree herein is not such a decree. The Appeal herein was filed on 20/12/2011, leave having been granted on 9/12/2011. The present application was filed on 16/2/2012. This must have been prompted by the demolishing complained of. The Respondent has however denied that he has demolished any house.

My finding is that there is no inordinate delay in filing the application. She has however shown that if stay of execution is not granted she will suffer loss. This is in the sense that this land in which she is claiming a share will be registered in the names of the Respondent and she will be evicted.

It is only fair and just to have the decree of the lower Court stayed pending the hearing and determination of the appeal.

I therefore allow the application and grant prayer 2 and 3 of the said application.

I also order this appeal transferred to Kerugoya High Court for hearing and determination.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 6<sup>TH</sup> DAY OF NOVEMBER 2012.**

**H.I. ONG'UDI  
JUDGE**

**In the presence of:-**

**Ms. Wangechi Munene for Appellant**

**Mr. Munene for Respondent**

**Appellant/Applicant**

**Njue CC**