



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of David Gitau Kariuki (Deceased) (Succession Cause
783 of 2007) [2025] KEHC 14036 (KLR) (6 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 783 OF 2007
JM NANG'EA, J
OCTOBER 6, 2025**

BETWEEN

**DAVID WAGATUA GITAU 1ST APPLICANT
MARY WANGUI GITAU 2ND APPLICANT
EVANSON KAMAU GITAU 3RD APPLICANT**

AND

**GRACE WANJIRU CHELANGAT 1ST RESPONDENT
SUSAN WANJIKU GITAU 2ND RESPONDENT**

RULING

1. For this court's determination is the Applicants' Chamber Summons dated 5th May 2025 for the following relief:-
 1. Spent
 2. Spent
 3. That the Honourable Court be pleased to grant the Applicants leave to appeal to the Court of Appeal against the Ruling, Decree and Order issued on 28th April, 2025.
 4. That the Honourable Court be pleased to issue stay of execution and implementation of its Ruling, Judgement and Order issued on the 28th April 2025 pending hearing and determination of the intended appeal. [sic]
 5. That the costs of this Application be provided for.
2. The Application is supported by the Applicants' joint affidavit purportedly sworn on 5th May 2025. The Applicants aver that they are joint Administrators and Beneficiaries of the Estate of the Deceased



herein. They express their dissatisfaction with the ruling of this court given on 28th April 2025 by which two of them [David Wagatua Gitau and Mary Wangui Gitau] were ordered to undergo DNA testing at the instance of the Respondents herein. They lament that the process is humiliating intrusion into their privacy rights to which they are entitled under *the Constitution*.

3. The Applicants further aver that the Law Succession Act is silent on appeals to the Court of Appeal from the High Court, and leave to appeal this court's orders is therefore necessary to serve as notice to the Respondents. They assert that they have a right to appeal to argue what they describe as "grave and weighty issues" as may be discerned from a draft Memorandum of Appeal exhibited. According to the Applicants, they would suffer prejudice and embarrassment if stay of execution of the impugned order is not granted.
4. The Applicants continue to dispose inter alia that their Application has been made timeously and in good faith.
5. The Respondents oppose the Application through affidavit evidence of the 1st Respondent [Grace Wanjiru Chelangat]. They contend inter alia that the Application is merely intended to delay execution of the court's ruling of 28th April, 2025.
6. The Respondents further argue that the Application does not meet the legal threshold for grant of stay of execution pending appeal, for the reason that substantial loss to be occasioned to the Applicants if the Application is allowed is not demonstrated. It is contended that the court's decision does not occasion prejudice to the Applicants or the Estate of the deceased since it only seeks to establish the rightful beneficiaries of the Estate.
7. The Respondents therefore urge the court to dismiss the Application as an abuse of the court process that further delays conclusion of the Succession Cause.
8. The Applicants swore and filed a further affidavit in answer to the Respondents' evidence. The court is told that the Respondent's affidavit does not address the issue raised in the Applicants' affidavit. The Respondents' affidavit is also faulted for purporting to have been sworn with the authority of the 2nd Respondent yet the latter's such written authority is not annexed to the Affidavit. According to the Applicants, the Respondents are strangers to them and it would thus be difficult to identify them for the purpose of the DNA analysis ordered by the court.
9. The Applicants advert to other matters that go to the merit of the intended appeal which this court cannot delve into in this Application.
10. Written submissions were filed as directed by the court. The Applicants reiterate their affidavit evidence in support of the Application in their Submissions.
11. Making reference to this court's decision in Narok High Court Succession Cause No. 31 of 2017 Re Estate of Wanga Ole Oiyie [Succession Cause No. 31 of 2017], the Applicants underscore that leave to appeal in succession matters is necessary since the *Law of Succession Act* does not have provisions relating to appeals from this court to the Court of Appeal.
12. The Applicants also think that stay of execution of the court's order in question is critical since they complain of intrusion into their privacy if they are compelled to provide samples for the intended DNA profiling.
13. The Respondents also reiterate their averments in their affidavit by submissions made through their advocates. The submissions do not address the application for leave to appeal but only focus on the application for stay of execution of the contested order. Learned Counsel for the Respondents argue



that the Applicants have not satisfied the conditions for stay of execution pending appeal set out under order 42 rule 6 of the Civil Procedure Rules 2010. Counsel allude inter alia to Case Law in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR in which it was observed that the Applicant has the burden of demonstrating that execution would irreparably affect or negate the essential core of the appeal. In the opinion of the Respondents, the Applicants have not shown how the DNA test would prejudice them. It is stated that the exercise would either validate or discredit the Respondents' claim that they are the children of the deceased.

14. Further reliance is placed on Case Law in *Amir Suleiman v Amboseli Resort Limited* eKLR. The court opined in the case that in the exercise of the court's discretion whether or not to grant stay of execution pending appeal, it should opt for the lower risk of injustice. The Respondents suggest that allowing the DNA testing to proceed is a lower risk that also helps conclude this long pending matter. They complain that the Applicants have been obstructing quick conclusion of this matter as they enjoy the benefits of the Estate.
15. Arising from the parties' submissions and affidavit evidence in relation to the application before the court, the following issues are set out for determination:-
 - a. Whether the Applicants have made out a case for grant of leave to appeal the impugned order.
 - b. Whether stay of execution of the subject order pending the intended appeal is warranted in the circumstances of this matter.
 - c. The orders, including as to the costs of this Application that commend themselves to the court.
16. The Respondents concede that the Application has been brought without delay. It was filed less than 10 days after the court's ruling of 28th April 2024 sought to be appealed. I agree that the Application was brought with due dispatch.
17. As pointed out by the Applicants, there are no provisions in the *Law of Succession Act* governing appeals from this court to the Court of Appeal. Notwithstanding, Rules 49 and 73 of the Probate and Administration Rules enacted under the *Law of Succession Act* save the inherent powers of the court to aid in furtherance of justice in cases before it. The legal position is reiterated in *Rhoda Wairimu Karanja & Another* [2014] eKLR.
18. In the circumstances, an appeal to the Court of Appeal from an order or decree of this court issued in Succession matters lies with leave of the court.
19. The Applicants are aggrieved by the court's order directing two of them to submit themselves to DNA sampling for the purpose of determination of their paternity vis a vis the Respondents. They hold the view that they cannot be compelled to undergo the process they say intrudes their privacy rights.
20. I think that the Applicants are entitled to be heard on appeal and hereby grant them leave to appeal the court's order.
21. Turning to the second limb of the Application to wit; stay of execution of the disputed order pending determination of the intended appeal, Order 42 Rule 6 of the Civil Procedure Rules 2010 stipulates the following conditions that have to be satisfied before such stay is granted;
 - a. The Application should be brought without unreasonable or unexplained delay.
 - b. The Applicant must demonstrate substantial loss that could result if the Application is not granted.
 - c. The security for costs that may ultimately be binding on the Applicant must be given.



22. The court has already found that the Application has been brought timeously and therefore the first condition has been satisfied.
23. Regarding the prayer for stay pending appeal, the Court of Appeal determined a similar application in *BGG & Another v EWK & Another* [Civil Application E584 of 2023 [2024] KECA 484 [KLR] [9 May 2024] [Ruling] in which stay of execution pending appeal against an order requiring the Applicant to undergo DNA profiling for determination of a Succession dispute. Like in the instant case, it was argued that such an exercise was intrusive to privacy rights. While acknowledging the intrusive nature of DNA analysis, the Superior Court held that the test overrides the right to privacy guaranteed by Article 31 of *the Constitution* in the circumstances of the case. The Court observed that DNA was only meant to tie up the link between the deceased whose Estate is to be transmitted and the Respondent in order to determine the latter's dependency. It was therefore decided in that case that the Appeal was not arguable and the application for stay of execution of the impugned order was declined. In light of that holding, the Superior Court thought that it was unnecessary to go into the issue as to whether the appeal would be tendered nugatory if stay was not granted.
24. The Court in Nairobi High Court Succession Cause No. 2967 of 2012 Re Estate of Wilfred Gathiomi [deceased] was of the same opinion in comparable circumstances. The Court was of the view that no substantial loss could result to the Applicant;

“ except inconvenience that is less important to finding a lasting solution to the issue...”

It was noted that resolution of a paternity issue in contention overrides the Applicant's inconvenience resulting from intrusion into his privacy and there was no other proposed way of resolving the matter.

25. In *Tropical Commodities Ltd. International* [in liquidation] [2004] 2 EA 331, this court explained “Substantial loss” as;

“ any loss great or small, that is of real worth or value as distinguished from a loss without value or loss that is merely nominal.”

It is the cornerstone of the court's discretion to grant or decline stay pending appeal [see Case Law in *Rhoda Mkuma v John Abuoga* [1988] eKLR.

26. The Applicants herein have not shown substantial loss they would suffer if they provided necessary DNA as directed samples pending hearing and determination of their appeal. This is less injurious relative to the imperatives of finding the truth as to sibling paternity for the purpose of succession.
27. In the circumstances of this case, there is no need for security for costs and none is ordered to be deposited. There is no money decree for which security for costs may be required.
28. The Application accordingly partly succeeds as follows;-
1. Leave to appeal the impugned order is granted.
 2. Stay of execution of the order pending appeal is declined.
 3. To avoid further delay, two of the Applicants [David Wagatua Gitau and Mary Wangui Gitau] alongside the Respondents are directed to present themselves for DNA sampling as directed on 28/4/2025, within 7 days from the date hereof.
 4. The DNA Analysis Report be filed within 30 [thirty] days of the sampling.
 5. The court makes no orders as to the costs of this Application.



J. M. NANG'EA - JUDGE

RULING DELIVERED VIRTUALLY THIS 6TH DAY OF OCTOBER, 2025 IN THE PRESENCE OF:

Applicants, All Present

Respondents, Absent

Court Assistant Jeniffer

J. M. NANG'EA - JUDGE

