

**IN THE COURT OF**  
**APPEAL AT NAIROBI**  
**(CORAM: JAMILA MOHAMMED, TUIYOTT & KORIR,**  
**JJ.A.) CIVIL APPLICATION NO. E084 OF 2025**

**BETWEEN**

**LUCY WAMBUI NJOROGE .....1<sup>ST</sup>**  
**APPLICANT MONICAH WANJIRU SHIMUESHOLI .....**  
**....2<sup>ND</sup> APPLICANT AND**  
**FRANCIS GATERI KINUTHIA .....1<sup>ST</sup>**  
**RESPONDENT**  
**JOSEPH WAINAINA KINUTHIA .....2<sup>ND</sup>**  
**RESPONDENT**

***(Being an application for stay of execution against the  
ruling of the High Court at Nairobi (E. K. Ogola, J.) dated  
30<sup>th</sup> January 2025***

***in***

**HC Succession Cause No. 2371 of 2013)**

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**RULING OF THE COURT**

**Background**

1) **Lucy Wambui Njoroge** and **Monicah Wanjiru Shimuesholi** (the applicants) have moved this Court by a notice of motion dated 11<sup>th</sup> February, 2025 brought pursuant to the provisions of **Rule 5(2)(b)** of the **Court of Appeal Rules** seeking orders of stay of execution and injunctive reliefs pending the hearing and determination of the

intended appeal. The

motion seeks principally to stay the ruling and orders of the High Court (E.K. Ogola, J.) delivered on 30<sup>th</sup> January, 2025 in Nairobi HC Succession Cause No. 2371 of 2013, and to restrain **Francis Gateri Kinuthia** and **Joseph Wainaina Kinuthia** (the respondents), their agents or servants from interfering with the applicants' quiet possession of land parcel No. **Dagoretti/Riruta/232** (the suit property) being property forming part of the **Estate of Wamiiri Bernard Ngugi** (the Deceased).

2) The applicants state that the impugned ruling dismissed their application dated 4<sup>th</sup> August 2023, which had sought to preserve the Estate of the Deceased and prevent intermeddling by the respondents. They contend that interim orders previously granted on 19<sup>th</sup> September 2023 lapsed upon delivery of the ruling. They assert that the intended appeal is arguable and that unless stay is granted, the same will be rendered nugatory. They aver that they are granddaughters and heirs of the Deceased, born and residing on the suit property where the Deceased was buried. It is their contention that the respondents have in the past unlawfully attempted to subdivide and dispose of the suit property to their detriment and that the estate is at risk of dissipation.

3) The respondents oppose the application through a preliminary

objection and a replying affidavit sworn on 19<sup>th</sup> March 2025. They contend that the applicants lack *locus standi* as they have no grant of letters of

administration and therefore cannot maintain either the intended appeal or the instant application. They argue that under Section 82 of the Law of Succession Act, only a holder of a valid grant may act on behalf of the estate. The respondents further submit that the impugned ruling was a negative order incapable of being stayed, as it merely dismissed an application and did not compel any party to act or refrain from acting. They rely on this Court's decision in **I&M Bank Limited v Ufanisi**

**Freighters Limited & 3 Others [2023] KECA 976 (KLR)**, among others,

to support that proposition.

**4)** The principles governing the grant of orders under Rule 5(2)(b) of this Court's Rules are settled. An applicant must demonstrate: (i) that the intended appeal is arguable, meaning it is not frivolous; and (ii) that unless the orders sought are granted, the appeal will be rendered nugatory if successful. These twin principles were restated in **Trust Bank**

**Limited & Another v Investech Bank Limited & 3 Others [2000]**

**eKLR** and **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others**

**[2013] eKLR.**

## **Determination**

5) We have carefully considered the motion, the affidavits on record, the rival submissions, and the applicable law. The order impugned is that of

E.K. Ogola J. dated 30<sup>th</sup> January 2025, which reiterated earlier findings that the issue of ownership of the suit property had been conclusively determined by the District Magistrate's Court in 1972 and by the High Court in its judgment of 31<sup>st</sup> October 2019. The learned Judge dismissed the applicants' motion dated 4<sup>th</sup> August 2023 as *res judicata*. The orders issued were thus negative in nature, not requiring any act to be performed or restrained. In such circumstances, and as held in ***Jennifer***

***Akinyi Osodo v Boniface Okumu Osodo & 3 Others [2021] eKLR***, a

negative order is incapable of execution and cannot be stayed.

- 6) As regards the prayer for injunctive relief, the applicants have not presented credible evidence of ongoing acts of intermeddling, construction, or dispossession by the respondents. There are no photographs or other material evidence demonstrating imminent danger of alienation. The record further shows that although the grant issued to the applicants was revoked in 2019, they remain in occupation of the property and have not been evicted. In these circumstances, the applicants have not established that the intended appeal would be rendered nugatory if stay is not granted.
- 7) Having failed to satisfy the requisite twin principles under Rule 5(2) (b),

the applicants' notice of motion dated 11<sup>th</sup> February 2025 is without

merit. Accordingly, the same is hereby dismissed with costs to the respondents.

8) Orders accordingly.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of November, 2025.**

**JAMILA MOHAMMED**

.....  
**JUDGE OF APPEAL**

**F. TUIYOTT**

.....  
**JUDGE OF APPEAL**

**W. KORIR**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**