

**IN THE COURT OF APPEAL
AT NAIROBI**

**(CORAM: GATEMBU, OCHIENG & MUCHELULE,
J.J.A.)**

CIVIL APPLICATION NO. E064 OF 2025

BETWEEN

JOSEPHINE WANJIRU GACHERU.....1ST APPLICANT

STEPHEN MUNGAI GACHERU.....2ND APPLICANT

AND

MARTIN MWANGI GACHERU.....1ST

RESPONDENT CHRISTOPHER MUNGAI

GACHERU.....2ND RESPONDENT

*(Being an application for stay of execution of the
Judgment of the High Court of Kenya at Nairobi (Riechi,
J.) dated 28th January 2025*

in

***HC. Misc. No. E189 of
2024)***

RULING OF THE COURT

1. This ruling relates to an application by the applicants Josephine Wanjiru Gacheru and Stephen Mungai Gacheru dated 4th February 2025. They seek, under Rule 5(2)(b) of the Court of Appeal Rules (among other provisions), an order of stay of execution of the judgment and orders of the High Court at Nairobi (**Riechi, J.**) delivered on 28th January 2025. In that judgment, the High Court appointed the

applicants, jointly with the respondents Martin Mwangi Gacheru and

Christopher Gachiengu Gacheru as guardians and managers of the estate of Martha Kabura Gacheru.

2. The background in brief is that the applicants petitioned the High Court under provisions of the Mental Health Act to be appointed as guardians of their mother Martha Kabura Gacheru, who has apparently been suffering from dementia and was therefore not capable of managing her affairs. It was demonstrated that Martha Kabura Gacheru stays with, and under the care of the 1st applicant. However, having heard the petition, in the judgment delivered on 28th January 2025, the High Court appointed the applicants jointly with the respondents as the guardians and managers of the estate of Martha Kabura Gacheru. Aggrieved, the applicants filed a Notice of Appeal on which the present application is hinged.
3. Based on their respective supporting affidavits, the applicants state that they are the ones who petitioned the High Court for appointment as guardians; that their late father appointed the two of them as executors of his Will; that their mother resides with and is under the care of the 1st applicant; that the High Court, without probing the suitability of the respondents, and without considering the best interests of their mother, appointed the respondents, who have never participated in the care of their mother, as joint guardians, and their inclusion poses a risk to the welfare of their mother.
4. We heard the application on 28th April 2025. Learned counsel

Ms. Wanjiru Nduati appeared for the applicants while

learned counsel **Mr. A. Gikaria** appeared for the respondents. Despite the application having been served on the respondents as early as 12th February 2025, they had neither filed a replying affidavit nor submissions. We therefore declined the request by Mr. Gikaria for time to file grounds of opposition but allowed him to make oral submissions in opposition to the application.

5. In her written and oral submissions Ms. Wanjiru Nduati, urged that the application is merited; that the intended appeal is arguable; that the grounds of appeal include complaints that the Judge erred in appointing the respondents without any formal application by them contrary to Section 26 of the Mental Health Act; that the Judge did not evaluate the suitability of the respondents before appointing them and failed to consider the best interests of the patient.
6. Ms. Nduati submitted that unless the orders sought are granted, the intended appeal will be rendered nugatory as there will be irreparable harm to the mother on account of the confusion and delays that will arise in making and implementing critical caregiving decisions as the respondents have never been involved in her care and are unfamiliar with her medical and personal needs; and that there will be irreversible disruption in the administration of her estate with risk of increased financial mismanagement.
7. Learned counsel for the respondents on the other hand submitted that the object of the application is to sideline the

respondents from taking care of their mother urging that all her children should have an opportunity to look after her; that a joint guardianship is merited and placed all the children in equal footing; that it has not been demonstrated that the respondents are unsuitable and that the application should be dismissed.

8. We bear in mind the principles applicable to applications of this nature (see for instance **Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR**). Based on the draft memorandum of appeal attached to the application, it is contended that the learned Judge erred in appointing the respondents without any application for their appointment contrary to Section 26 of the Mental Health Act; that the learned Judge failed to evaluate the suitability of the respondents before appointing them. We do not think the intended appeal is frivolous. It is arguable.
9. As to whether the appeal will be rendered nugatory, factors for consideration include whether what is sought to be stayed if allowed to happen is reversible. In this case, it has been demonstrated through the supporting affidavits which have not been controverted, that the mother is residing with and under the care of the 1st applicant and that the implementation of the judgment before the appeal is determined will be disruptive of her care and the disrupt financial management.
10. We are persuaded that that the threshold for the grant of the orders sought is met. We grant prayers 3 and 4 of the

application dated 4th February 2025. The judgment of the High Court delivered on 28th January 2025 is hereby stayed in its entirety pending the hearing and determination of the applicants' intended appeal.

- 11. Costs of the application shall abide the outcome of the intended appeal.

- 12. Following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to delivery of this judgment, and the remaining members of the Court being unanimous, this decision is delivered in accordance with Rule 34(4) of the Court of Appeal Rules.

Dated and delivered at Nairobi this 21st day of November 2025.

S. GATEMBU KAIRU, FCI Arb, C.Arb.

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR