

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**PROBATE AND ADMINISTRATION CAUSE NO. 13 OF 2020**  
**IN THE MATTER OF THE ESTATE OF KOITUMET MASOJO**  
**(DECEASED)**

**BETWEEN**

**ELIZABETH NAIYANUI KOITUMET .....1<sup>ST</sup>**

**APPLICANT**

**ROSE NANTEI NASHUNCHU .....**

**.....2<sup>ND</sup> APPLICANT**

**LILIAN NAISIMOI KOITUMET.....3<sup>RD</sup>**

**APPLICANT**

**Versus**

**JOSEPH SIRONKA KOITUMET.....1<sup>ST</sup>**

**RESPONDENT**

**NAISENKE ENE SIRIMOI.....2<sup>ND</sup>**

**RESPONDENT**

**RULING**

1. **Koitumet Masojo** (the deceased herein) died intestate on 15.04.2017 and was survived by two widows, namely, **Mukonyo Koitumet** (first house, now deceased) and **Lilian Naisimoi Koitumet** (surviving widow, second house) and their respective children. The deceased died possessed of several assets including land parcels **Kajiado/Ochoro-Onyore/13419,4896** and

**Kajiado/Olchoro-Onyore 9775**, the latter measuring 30 acres. An amended grant was issued by **Mutuku J**, on 24<sup>th</sup> May 2022 to **Joseph Sironka ole Koitumet** as the 1<sup>st</sup> administrator (a son from the 1<sup>st</sup> house, hereafter the 1<sup>st</sup> Respondent) and the surviving widow, **Lilian Naisimoi Koitumet** as the 2<sup>nd</sup> administrator.

2. However, the subsequent summons to confirm grant was met with a protest filed by two daughters of the 2<sup>nd</sup> house, namely, **Elizabeth Naiyanui Koitumet** and **Rose Nantei Nashunchu** (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Applicant/Applicants) which protest was supported by their mother, the 2<sup>nd</sup> administrator. The protest was opposed via an affidavit sworn by the 1<sup>st</sup> Respondent and his sister in the 1<sup>st</sup> house, **Naisenke Ene Sirimoi** (hereafter the 2<sup>nd</sup> Respondent). The dispute centred on the land parcel **Kajiado/Olchoro-Onyore 9775** (hereafter the disputed estate asset) which the protestors claimed to have been a gift made *inter vivos* to them by the deceased, and therefore not part of his free property available for distribution to the other beneficiaries, matters strongly contested by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

on behalf of the 1<sup>st</sup> house . The court issued directions for the hearing of the protest.

3. Meanwhile, the court had on 1.03.2023 partially confirmed the grant regarding the uncontested assets of the estate. The protest was thereafter heard by way of *viva voce* evidence. By a judgment delivered on 24<sup>th</sup> June, 2024 the court **(Mutuku J)** dismissed the protest and made orders *inter alia* revoking the Applicants' title to the disputed estate asset, reverting the title to the disputed estate asset to the estate of the deceased, and distributing it in equal shares among the fifteen beneficiaries in the two houses.
4. Evidently aggrieved by the outcome, the Applicants filed a notice of appeal to the Court of Appeal dated 2.07.2024, and also lodged the motion dated 18.7.2024 before this court, invoking *inter alia* Article 159 of the Constitution, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (CPA), Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules (CPR). Some of the prayers in the motion are spent. The live prayers of the motion, which is the subject of this ruling, are (d) and (f), respectively seeking that, pending the hearing and determination of the intended appeal, the

court be pleased to stay execution of the judgement delivered on 24.06.2024 and particularly orders (i) to (iii) thereof as they relate to the disputed estate asset; and that pending the hearing and determination of the intended appeal, this court be pleased to issue an order preserving the status quo in respect of the disputed estate asset.

5. The application was premised on the grounds on its face as amplified in the supporting affidavit sworn by the 2<sup>nd</sup> Applicant in her own behalf and on behalf of her co-Applicant. To the effect that the impugned judgment effectively deprived her and the 1<sup>st</sup> Applicant, of their duly acquired title to the disputed estate asset which they contend was gifted to them by the deceased, hence unavailable for distribution; that being thereby aggrieved, the Applicants had instructed their advocates who filed the notice of appeal dated 2<sup>nd</sup> July 2024 in the Court of Appeal; and that the appeal raises arguable grounds with high chances of success.

6. The deponent further expressed apprehension that if the judgment is executed, it will result in the cancellation of the Applicants' title, premature subdivision and distribution, the

Applicants' eviction and other irreversible actions by the beneficiaries, including the sale or alienation of the disputed estate asset measuring 30 acres to third parties. That the disputed estate asset is of immense sentimental and financial value, and execution of the judgment would result in substantial loss to the Applicants as the Respondents lack the financial capacity to make compensation should the appeal succeed. Thus, rendering the appeal nugatory. The court was therefore urged to grant the application in order to preserve the disputed estate asset.

7. The application was opposed by the replying affidavit sworn by the 1<sup>st</sup> Respondent on his own behalf and on behalf of the 2<sup>nd</sup> Respondent Raising argumentation concerning the asserted inappropriate invocation of Order 42 Rule 6 of the CPR, the deponent characterizes the application as defective, misguided, and an abuse of the process of the court.
8. Stating that the judgment did not exclusively benefit the Respondents but all fifteen surviving dependants of the deceased, including the Applicants, each of whom received equal shares, he dismissed the claim that the Respondents

lack the means to compensate the Applicants in case of a successful appeal, as unproved and unfounded. He further disputed the Applicants' asserted occupation of the disputed estate asset, stating that the asset was vacant and the Applicants' eviction concerns are farfetched.

9. The 1<sup>st</sup> Respondent further defended the impugned judgment, stating that this court could not interrogate the grounds of appeal and concluded by asserting that the Applicants had failed to demonstrate sufficient cause for the orders sought. Thus, urging the court to dismiss the application.

### **Submissions**

10. The application was canvassed by way of written submissions. As before, the Applicants' submissions addressed the grounds of appeal inter alia challenging the court's jurisdiction to revoke title, in demonstrating that their appeal was indeed arguable. And reiterating the depositions in their supporting affidavit asserted that, if stay were not granted, they would suffer substantial loss as the appeal would have been rendered nugatory through execution of the impugned judgment. Here citing **James**

**Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, and Nurani & another (Suing as the legal administrators of the Estate of Sadrudin Shamsudin Ismail Nurani) v Gulam & 2 others (Environment & Land Case 596 of 2014) [2025] KEELC 682 (KLR).** In conclusion, the Applicants urge the court to stay execution to preserve the subject property and prevent the appeal from being rendered nugatory.

11. On their part, the Respondents first addressed the question whether in the absence of leave to the Applicants to appeal to the Court of Appeal, there exists a valid appeal in the Court of Appeal. To dispose of this objection summarily at this stage, this is not a question for this court to deal with at this stage, more so as the Respondents claim to have already lodged an appropriate challenge to the appeal now pending before the Court of Appeal. This court cannot take it upon itself to anticipate the outcome of the pending challenge by dealing with the objection here. For the purpose of the instant application before this court, an apparently valid notice of appeal was lodged before the

Court of Appeal and is deemed to subsist until the Court of Appeal determines otherwise.

12. Moving on, the Respondents additionally took issue with the late jurisdictional challenge raised by the Applicants as a ground of appeal, the Respondents contending that the grounds in the draft memorandum of appeal do not represent an arguable appeal.

13. As to whether the Applicants have satisfied the threshold for the grant of stay of execution pending appeal, the Respondents asserted on one hand that by dint of Rule 63 of the Probate and Administration Rules Order 42 of the CPR is not applicable to succession causes. But adding that in any event, the Applicants have not met the requirements of Order 42 Rule 6(2) of the CPR to justify an order to stay execution. Also citing **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** as to what comprises substantial loss, which is what in proper applications is sought to be prevented.

14. In that regard, the Respondents contended that the Applicants have not presented evidence of imminent transfer or alienation of the disputed estate asset, hence

demonstrating how substantial loss would arise. In the Respondents' view, the application lacks merit and ought to be dismissed with costs.

### **Analysis and Determination**

15. The court has considered the material canvassed in respect of the application. The application is expressed to be brought under Article 159 of the Constitution, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (CPA), Order 42 Rule 6 of the CPR. None of the invoked provisions, including the provisions of Order 42 Rule 6 of the CPR that provides for applications to stay execution pending appeal in the Court of Appeal, have been applied by Rule 63 of the Probate and Administration Rules to succession causes. Rule 49 of the Probate and Administration Rules however provides that:

**“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit”.**

16. Similarly Section 47 of the Law of Succession Act empowers the High Court to entertain any application and to make such orders as may be expedient, while Rule 73 of the Probate and Administration Rules saves the inherent power of the court ***“to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”***.

17. The jurisdiction of the Court of Appeal to entertain appeals from the High Court in succession matters, is based on the provisions inter alia of Sections 3, 3A and 3B of the Appellate Jurisdiction Act and the Court of Appeal Rules 2022, and with regard to interlocutory applications, Rules 5(2)(b) of the Court of Appeal Rules, 2022 which states that:

**2) Subject to subrule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—**

**(a) in any criminal proceedings where a notice of appeal .....; or**

**(b)in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.**

18. In the case of **George Gathuru Karanja v George Gathuru Thuo & 2 Others [2019] e KLR**, the Court of Appeal while dealing with an application to stay execution of the orders of the High Court in a succession cause, stated that the jurisdiction to grant stay of execution was discretionary and is intended for the preservation of the subject matter of appeal where an appeal has been filed, or is intended, and that the jurisdiction arises where the Applicant has lodged a notice of appeal as stated in **Safaricom Ltd v Ocean View Beach Ltd and 2 Others Civil Application No.327 of 2009 (UR)**.

19. In setting out the applicable principles, the Court of Appeal further stated in **George Gathuru Karanja's** case above that:

**“As a matter of both law and practice, the applicant is obligated to satisfy the twin**

**principles enshrined in this provision in order to earn a relief under the said rule. These are, first, that the appeal or the intended appeal is arguable and second, that if the stay sought is not granted, the appeal/intended appeal as the case may be, will be rendered nugatory. See the Githunguri case (supra). By arguable is not meant an appeal or intended appeal which must succeed but one which raises a bona fide issue worthy of consideration by the Court. See Kenya Tea Growers Association and Another versus Kenya Planters Agricultural Workers' Union, Civil Application No. Nai 72 of 2001 (UR)".**

20. The Court proceeded to clarify that:

**"An arguable appeal need not raise a multiplicity or any number of such points. A single arguable point is sufficient to earn an applicant such a relief. See Damji Premji Mandavia versus Sara Lee Household & Body Care**

**(K) Limited Civil Application No. Nai.345 of 2005 (UR); Kenya Railways versus Ederman Properties Ltd, Civil Appeal No. Nai 176 of 2012 and Ahmed Musa Isamel versus Kumba ole Ntamorua & 4 others, Civil Appeal No. Nai 256 of 2013.**

**As for the second limb, an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of Stanley Kangethe Kinyanjui versus Tony Ketter & 5 others, C.A. No. 31 of 2012 where in this Court stated inter alia thus:**

***“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”***

**Both limbs must be established before a party can earn a relief under Rule 5 (2)b) of the Court of appeal Rules, 2010. See Republic v Kenya Anti-Corruption Commission and 2 Others v 2009 KLR 31...”**

21. This court takes guidance from the foregoing principles in considering the application before it. The Applicants have asserted that they have already filed a notice of appeal, a copy of which is annexed to the supporting affidavit alongside the draft memorandum of appeal (annexures marked “**RNN2**” & “**RNN 3**”, respectively). The court has also considered the history of this matter as elaborately captured in the judgment of **Mutuku J.**

22. The Applicants by their affidavit and draft memorandum of appeal raised several points for argument before the Court of Appeal. A key plank therein relates to the question whether the disputed estate asset formed part of the free property of the estate of the deceased hence available for distribution and whether the High Court had jurisdiction to revoke the Applicants’ title to the said disputed estate asset. No doubt these, together with other issues raised by

the draft memorandum of appeal are bona fide issues worthy of the consideration of the Court of Appeal.

23. On the second consideration, the Applicants express apprehension that execution of the judgment will result in the orders in the judgment taking effect, thus the eventual sub-division and transfer of shares in the disputed estate asset to beneficiaries who, may well dispose of them, leaving the Applicants without recourse if the appeal were to succeed. Principally, because the beneficiaries have no capacity to compensate the Applicants in such event. Thus, rendering the appeal nugatory.

24. While it is true, as asserted by the Respondents, that no proof in justification of the Applicants' expressed fears has been shown, the record contains copies of the decree extracted as of 25.06.2024, barely a day after the judgment of this court. To my mind, the Applicants' apprehension does not appear idle; indeed, in view of the longstanding litigation herein, it appears feasible that some beneficiaries would desire to expeditiously execute the judgment and monetize their shares in the disputed estate asset thereby rendering it virtually untraceable. And while the

Respondents dispute the Applicants' apprehension, they have not tendered any material in that regard, or in support of their asserted capacity to compensate the Applicants in the event of the appeal succeeding.

25. Considering the nature of the disputed estate asset and applying the test in **Stanley Kang'ethe Kinyanjui v Tony Ketter and 5 Others (supra)**, that whether an appeal will be rendered nugatory primarily depends on whether what is sought to be stayed if allowed to happen is reversible, or if not reversible whether damages will reasonably compensate the party aggrieved, the court is of the view that in all likelihood, if stay is denied in this instance, the disputed estate asset may be dissipated through subdivisions, transfers to the 15 beneficiaries of the estate and even alienation to third parties.

26. Reversal of such an eventuality appears illusory given the lengthy processes and costs, not to mention litigation that would attend attempts at such reversal. Moreover, even if the Applicant could in theory be reasonably compensated through damages, there is no demonstration of the capacity of the Respondents in that regard. Thus, on the facts of the

case, the likelihood of the appeal being rendered nugatory does not appear remote.

27. In the court's considered view therefore, the justice of the matter lies in preserving the disputed estate asset pending the determination of the appeal before the Court of Appeal. The court will therefore allow the application dated 18.07.2024, with the necessary caveat that this does not grant to the Applicants the liberty to deal adversely with the disputed estate asset. The live prayers of the application, namely prayer (d) and (f) appear similar in purport and effect, and in the courts opinion, prayer (f) seems superfluous.

28. In the result, the court **will grant the application dated 18.07.2024 in terms of prayer (d) only** and given the nature of the dispute, will order that the parties bear their own costs.

**DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 17<sup>TH</sup> DAY OF FEBRUARY 2026.**



**C. MEOLI**  
**JUDGE**

**In the presence of:**

**For the Applicants: Mr. Odhiambo hb for Mr. Nyboma**

**For the Respondents: Mr. Senteu**

**C/A: Lepatei**

ORIGINAL