

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

FAMILY APPEAL NO. E015 OF 2025

IN THE MATTER OF THE ESTATE OF MARTHA NJERI GITAU

(DECEASED)

PETER NJOGU

GITAU.....APPELLANT/APPLICANT

VERSUS

JOSEPH GITAU NJUGUNA.....1ST

RESPONDENT

DAVID GATUHI GITAU.....2ND

RESPONDENT

KENNETH NG'ANG'A KIBE.....3RD

RESPONDENT

R U L I N G

Brief facts

1. The three applications for determination are dated 20th August 2025, 29th October 2025 and 7th November 2025. The first application dated 20th August 2025 seeks for orders of stay of execution in respect of the ruling in Thika CM Succession Cause No. 416 of 2017 delivered on 6th August 2025 pending the hearing and determination of

the appeal. The second application dated 29th October 2025 seeks for orders stopping the respondents from intermeddling on LR. No. LOC.16/KIARUTARA/1020 belonging to the estate of the deceased herein pending the hearing and

determination of the appeal. The application dated 7th November 2025 seeks for orders that the court do visits and view the suit property before determining this appeal.

2. In opposition to the application dated 20th August 2025, the 1st & 2nd respondents filed a Replying Affidavit dated 1st October 2025 and the 3rd respondent filed a Replying Affidavit dated 24th September 2025. In opposition to the application dated 29th October 2025, the 1st & 2nd respondents filed a Replying Affidavit dated 7th November 2025 while the 3rd respondent filed a Replying affidavit dated 5th November 2025. In opposition to the application dated 7th November 2025, the applicant filed a Replying Affidavit dated 2nd February 2026.

Appellant's/Applicant's Case on the application dated 20th August 2025

3. The applicant states that the trial court in Thika CM Succession Cause No. 416 of 2017 delivered its ruling on 6th August 2025 which set to disinherit some of the beneficiaries of the estate of the deceased herein. The applicant further states that no orders of stay were granted by the magistrate. The respondents are

determined to extract the final orders and proceed with the distribution of the estate to his prejudice. The applicant states that if the said execution is left to suffice, some beneficiaries are bound to suffer irreparable loss of the inheritance.

4. The applicant avers that he has a prima facie case with high chances of success and there has been no delay in lodging the appeal. The applicant states that the respondents will not be prejudiced if the orders sought are granted as they will have their day in court.

The 1st & 2nd Respondents' Case

5. The 1st & 2nd respondents state that they are brothers together with the applicant and they are all beneficiaries of the estate of the deceased herein. The 1st & 2nd respondents state that the ruling was delivered on 6th August 2025 whereby the court catered and outlined every beneficiary contrary to the averment that the ruling disinherited some beneficiaries.
6. The 1st & 2nd respondents argue that the applicant has failed to indicate any prejudice occasioned in the ruling of the trial court.

The 3rd Respondent's Case

7. The 3rd respondent states that the allegations that the ruling is set to disinherit some of the beneficiaries of the estate is not true since the trial court addressed itself on

the issue of equal distribution of the estate vis a vis the agreement by all the beneficiaries to wit the trial court found that there was uncontested evidence that a family meeting was held and all beneficiaries agreed that the suit land be distributed among the five sons while daughters retained a 50 by 100 plot. Further, the court found that a fresh and equal division would depart from what was agreed upon by the family which was later developed by the beneficiaries concerned. The proposed re-distribution would also offend the principle of estoppel and the

doctrine of party autonomy. Thus, the 3rd respondent argues that it is not true that any of the beneficiaries of the deceased were disinherited and that the mode of distribution as per the lower court's ruling was fair and nondiscriminatory since it was based on the agreement by all the beneficiaries.

8. The 3rd respondent states that the beneficiaries of the estate of the deceased stand to suffer and will be highly prejudiced since the matter has been pending finalization for a period of over 8 years to the detriment of all beneficiaries. Furthermore, delaying the administration by staying the implementation of the ruling will only undermine the principle of timely completion of succession causes and it is only just that the matter is put to rest and the estate of the deceased distributed.

9. The 3rd respondent states that no steps have been taken that qualify as execution especially considering that the

applicant is the administrator of the estate. The claim that the respondents are determined to proceed with distribution is unfounded and misleading as the applicant is the one who is authorized to initiate the process of executing the confirmed grant as the administrator. The 3rd respondent argues that the applicant has not demonstrated substantial loss he stands to suffer should stay not be granted since what he alleges is nothing but mere apprehension. Further, the application has not been filed timeously as it was filed 14 days after the delivery of the ruling and the applicant has not offered any explanation for the delay.

10. The 3rd respondent states that the appeal is not arguable and has no chances of success as the issues raised were addressed by the lower court.

Appellant's/Applicant's Case on the application dated 29th October 2025

11. The applicant states that the respondents are intermeddling with the estate of the deceased. The applicant further states that land parcel LOC.16/KIARUTARA/1020 belonging to the estate of the deceased contains a tea bush being harvested by the respondents for economic gains. Further the respondents have continued cutting down trees belonging to the estate with impunity contrary to the wishes of the beneficiaries and they have planted vegetables and other

agricultural crops on the estate for their own gain at the expense of the beneficiaries.

The 1st & 2nd Respondent's Case

12. The respondents state that they distributed the properties to all the beneficiaries and since it's a tea growing area, every beneficiary has been using his portion by picking tea on their respective portions. The respondents argue that all the beneficiaries save for the applicant are utilizing their portions. Furthermore, the beneficiaries have been picking tea on the property since their mother passed on including the applicant.

13. The respondents state that the pictures taken by the applicant are not the true representation of the land itself.

The 3rd Respondent's Case

14. The 3rd respondent states that the applicant has chosen to be selective on what to disclose in a bid to obtain orders which would be extremely oppressive to the respondents. The 3rd respondent further states that the matter has been heard by a competent court of law and a judgment delivered after a lengthy three years trial.

15. The 3rd respondent argues that the orders sought would upstage the status quo as the various beneficiaries have occupied their respective portions and it is only fair that status quo be maintained until the appeal is heard and determined. The 3rd respondent states that if the

orders sought are granted without going through the due process, the same would be extremely prejudicial to them.

The 1st & 2nd Respondents'/Applicants' Case on the application dated 7th November 2025

16. The applicants state that the photos attached by the applicant indicating the activities on the ground do not reflect the actual activities on the ground. The applicant is not honest to the court and if the orders sought are granted it will limit their clients economical use as they pick tea. The applicants urge the court to visit the suit land to understand the circumstances of what is transpiring on the land.

17. The 2nd respondent filed a Further Affidavit dated 9th February 2026 and states that the site visit will deal with the pending issues

as regards the appeal as the court will have a clear understanding of what is on the ground and how they have lived.

The Appellant's/Respondent's Case.

18. The respondent states that he is opposed to the court visiting the suit property as the site can be sufficiently understood through the attached photographs making the site visit irrelevant. The respondent further states that the suit property is too remote and the time and expenses

required for the visit outweigh the primary purpose of the pending applications which is maintaining the estate of the deceased pending the hearing of the appeal. The applicant argues that the proposed site visit and specific location of the estate of the deceased is not critical in determining facts relevant to seeking interim orders pending the main appeal.

19. The respondent states that the site at which the 1st and 2nd respondents cut down trees and planted crops prompting an application to stop the intermeddling has undergone significant seasonal changes and hence the proposed site visit could be misleading to the court rather than helpful.

20. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

21. The applicant relies on **Order 42 Rule 6 of the Civil Procedure Rules** and submits that the application has been filed timeously as the impugned ruling was delivered on 6th August 2025 and he filed

the instant application and memorandum of appeal on 20th August 2025. Relying on the case of **Kenya Shell Limited vs Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1986] 1 KECA 94 KLR**, the applicant submits that if stay is not granted the estate will be subdivided and distributed according to a mode he is actively

challenging. Further, once transferred to third parties such as the 3rd respondent or sub divided amongst the sons, the substratum of the appeal will be destroyed.

22. The applicant submits that he is the administrator of the estate and is not seeking to dispose of any property but rather to preserve it.

23. The applicant relies on section 45(1) of the Law of Succession Act and submits that any person who intermeddles is guilty of an offence and is liable to make good the property. The applicant further refers to the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358** and submits that he has established a prima facie case as the respondents are not the administrators of the estate and yet they are unilaterally exploiting the estate's resources for private gain. The applicant argues that the estate comprising of agricultural land will suffer irreversible loss as the respondents have cut down trees causing permanent depletion of the estate's assets.

24. The applicant argues that the balance of convenience tilts in favour of preserving the estate. He further argues that while the respondents claim a right to use the land based on the lower court's ruling, the said ruling is currently under challenge and to allow

them to continue exploiting the land would be to presume the outcome of the appeal.

25. The applicant submits that the purpose of the application dated 7th November 2025 is to delay the hearing and determination of his applications. The respondents have not denied the specific acts of cutting trees or planting crops. The applicant submits that a site visit is a drastic step usually reserved for determining intractable boundary disputes or complex questions of physical features and not to verify whether trees have been cut down. The applicant further submits that a site visit consumes valuable judicial time and imposes logistical burdens yet the photographic evidence provides a sufficient evidential basis for the court to make a finding.

The 1st & 2nd Respondents' Submissions

26. The respondents rely on **Order 42 Rule 6 of the Civil Procedure Rules** and the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto Misc Application No. 42 of 2011 [2012] eKLR** and **Silverstein vs Chesoni [2002] 1 KLR 867** and submit that the applicant has failed to demonstrate how he stands to suffer substantial loss. The respondents submit that the ruling of the trial court was firmly grounded on uncontested family consensus, minutes of meetings and actual occupation of the estate parcels by the beneficiaries. The applicant has not shown how he will be prejudiced by the enforcement of a distribution voluntarily agreed upon and acted upon by all parties. Further, no beneficiary was disinherited and the respondents and other beneficiaries have

already taken possession and developed their respective portions in reliance on the agreement. the respondents argue that they shall suffers prejudice and irreparable harm if execution is stayed as they have waited for over eight years for the matter to be finalized and any further delay would deny them the enjoyment of property they have already began developing. Relying on the case of **Kenya Shell Ltd vs Benjamin Karuga Kibiru & Another [1986] KLR 410**, the respondents argue that since the applicant has failed to demonstrate that he will suffer irreparable harm, the application should therefore be dismissed.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal

27. **Section 47 of the Law of Succession Act** gives the court jurisdiction to entertain any application such as the present one which seeks to preserve the status quo pending the appeal. Order 42 Rule 6(2) of the Civil Procedure Rules lays down the conditions which a party must establish in order for this court to order stay of execution. These conditions are:-

a) Substantial loss may result to him/her unless the order is made;

b) That the application has been made without unreasonable delay; and

c) The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

28. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

2. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

3. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may

become available to the applicant at the end of the proceedings.

4. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b)

of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

29. On the issue of substantial loss, the case of **Re Estate of Wanga Ole Oiyie [2022] eKLR** Gikonyo J. relied on the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR** where the court held:-

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

30. The applicant states that he and other beneficiaries stand to suffer substantial loss as the distribution of the estate by the lower court will disinherit them. The respondents argue that the applicant has not been excluded as the estate was distributed according to their family agreement which was voluntarily entered into.

31. On perusal of the ruling of the lower court, the learned magistrate distributed the estate in line with the family meetings held on 7th December 2014 and 16th May 2016. The meetings were said to have been attended by all the parties to the matter including the applicant who all agreed to distribute the suit property amongst

the five sons and the daughters to retain the 50 x 100 feet plot where the house stands. Although the applicant argues that he and some of the beneficiaries stand to be disinherited, it is evident that he was allocated a piece of the suit land, being one of the five sons and further he has not annexed any affidavit by any beneficiary claiming that they have been disinherited. The 1st and 2nd respondents said that all the beneficiaries were catered for and are satisfied with the distribution. This position does not pre-empt the appeal, assuming it is true. The applicant has not provided any evidence to show otherwise. Therefore it is my considered view that the applicant has not demonstrated that he stands to suffer substantial loss as he has been provided for in the estate and therefore he shall not be disinherited.

32. The instant application was filed on 20th August 2025 and the ruling was delivered on 6th August 2025, thus the application has been brought timeously.

33. On the issue of security, it is trite law that security is discretionary and it is upon the court to determine the same. This is not a money decree and the court may not find it appropriate to call for deposit of security. The applicant carried forward a similar argument. However, the court retains its discretion to give the necessary directions herein.

34. The grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicant's unfettered right to file an appeal to fully ventilate his

grievances. This was well stated in the case of **M/s Porteitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997** where the court held:-

That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.

35. Bearing the said balance in mind, the succession cause in the lower court was filed in the year 2017 and the estate distributed in the year 2025. Thus it has taken

8 years for the cause to be finalized. Rather than issuing the orders of stay in a scenario where some of the beneficiaries have occupied their respective portions of the estate, the court would rather have status quo maintained pending the hearing and determination of the appeal. It is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal. Furthermore, I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise arguable points of law.

36. Accordingly, it is my considered view that the application dated 20th August 2025 lacks merit and ought to be dismissed.

37. The applicant has further argued that the respondents are intermeddling with the estate and the court ought to grant an injunction against them to refrain them from economically benefiting from the estate.

31. **Section 45 of the Law of Succession Act** provides:-

1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

2) Any person who contravenes the provisions of this section shall-

a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b) Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

32. In **Veronica Njoki Wakagoto (Deceased) [2013] eKLR**, the court held:-

The effect of Section 45 of the Act is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation and any person who handles the estate property without authority is guilty of intermeddling. The

law takes a very serious view of intermeddling and makes it a criminal offence.

33. From the foregoing, it is clear that the issue of intermeddling does not suffice as the trial court appointed

the applicant and the 1st & 2nd respondents as co-administrators of the estate and that the estate has already been distributed pursuant to the magistrate's ruling dated 6th August 2025. In my view, the prayer of an injunction sought herein is not appropriate as the estate has already been distributed among the beneficiaries. The case has been finalized and an injunction would be misplaced. If the orders sought herein are issued, it is likely that they would result in unsettling the beneficiaries who have already occupied their respective parcels. It would not be in the interests of justice to disturb the status quo unless there is a good reason to do so.

34. Having found that the applicant has not established grounds for stay or for an injunction, the application for visitation to the site will not serve any useful purpose and would amount to additional evidence in this appeal. The applicant ought to have sought orders to visit the land before the court below.

35. Accordingly, it is my considered view that the applications dated 29th October 2025 and 7th November 2025 both lack merit and are hereby dismissed.

36. The costs of the applications shall abide in the appeal.

37. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 30TH DAY OF APRIL 2026.***

F. MUCHEMI
JUDGE