



**Gichanga v Gichanga & another (Civil Application
E232 of 2021) [2022] KECA 811 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KECA 811 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E232 OF 2021
K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA
JULY 29, 2022**

BETWEEN

RISPER WAMAITHA GICHANGA APPLICANT

AND

ALEXANDER KIMANI GICHANGA 1ST RESPONDENT

YVONE ASAMBE 2ND RESPONDENT

*(Application for stay of execution, pending the hearing and determination
of an appeal against the ruling and order of the High Court of Kenya
(Muchelule, J.) dated 15th June 2020 in HC Succ. Cause No. 1088 of 2005)*

RULING

1. This application relates to the estate of Joseph Gichanga Kimani (deceased) who died on 26th March 2005. The dispute has been in court for the last 17 years, with no sign of conclusion. The short background to the application before us is as follows. The deceased had two wives and thus two houses. The first is the house of Leah Njoki Kimani (deceased) (Njoki) which had five children. The second is the house of the applicant, Risper Wamaitha Gichanga with four children. The bulk of the estate constitutes parcels of land in Kajiado County. The deceased died testate and when the applicant applied for grant of probate of letters of administration with will annexed, Njoki filed an objection on the grounds that the deceased died intestate, the will relied upon by the applicant was a forgery and invalid, and non-disclosure of all the properties of the deceased.
2. The dispute was heard by the High Court (Muigai, J.) who by a judgment dated 9th June 2017 found that the will in question was indeed made by the deceased, but that he had failed to provide for some of his dependants. Accordingly, the court upheld the objection and issued grant of letters of administration intestate jointly to the applicant and the 1st respondent, Alexander Kimani Gichanga, to each represent the two houses of the deceased. On 10th July 2017 the applicant applied for review of



the judgment on the grounds that having found that the deceased died testate, the court ought to have implemented the will. The application was dismissed vide a ruling dated 13th March 2019.

3. It fell upon Muchelule, J. to distribute the estate of the deceased following two separate and inconsistent applications for confirmation of grant by each of the administrators. By a ruling dated 15th June 2020, and in accordance with the judgment of 9th June 2017, the learned judge distributed the net estate to all the dependants rather than in accordance with the will. The ruling resulted in a certificate of confirmation of grant authorising distribution of the estate.
4. The applicant was aggrieved and filed a notice of appeal evincing intention to appeal the ruling. She also successfully obtained from the High Court an order of stay of distribution of the estate for a period of 90 days, to enable her pursue the issue in this Court.
5. By her Motion on Notice dated 16th June 2021, the applicant now seeks an order of stay of execution of the ruling and order of the High Court at Nairobi dated 15th June 2020. She submits that her intended appeal raises several arguable points including the extent to which the court is bound to respect the wishes of a deceased in a will and whether the court can ignore a will it has found to be otherwise valid, and distribute the estate as if the deceased died intestate. She adds that her intended appeal will be rendered nugatory because after the issuance of the certificate of confirmation of grant, the land in question will be distributed to beneficiaries and with the risk that they shall be disposed of or alienated to third parties before the appeal is finally heard and determined.
6. The 1st respondent opposes the application on the ground that the application was filed one month out of the 90 days granted by the High Court and that the intended appeal has been filed without leave, and therefore is not arguable. He relied on the decision of this Court in *Johnstone Ombima Okwaro & Another v. Dorcas Okwaro & 2 Others* [2019] eKLR in support of that proposition. The 1st respondent further maintains that the applicant, by reason of her delay, will not suffer any irreparable loss and that the intended appeal will not be rendered nugatory.
7. The 2nd respondent also opposed the application, submitting that the intended appeal is not arguable because it is founded on a misapprehension of the judgment of Muigai J. who did not find the will of the deceased valid as claimed by the applicant. On the nugatory aspect, it was submitted that the applicant would not suffer irreparable loss and damage because it was possible to value the portions of the estate in question and compensate her if she succeeds on appeal. Due to the long period that the dispute has been in court, the 1st respondent urged us to dismiss the application as the applicant has been in charge and enjoying the estate.
8. As all the parties rightly submit, to entitle the applicant to an order of stay of execution pending the hearing and determination of her intended appeal, she must satisfy the Court, first, that the intended appeal is arguable and second, that the appeal will be rendered nugatory if it succeeds absent an order of stay of execution (See *Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others* [2013] eKLR). Turning to whether the applicant's intended appeal is arguable, it is not in dispute that this appeal arises from the *Law of Succession Act*. We have carefully examined the record of appeal and it is abundantly clear that the applicant neither sought nor obtained leave to appeal against the decision of the High Court.
9. Decisions of this Court abound, holding that there is no automatic right of appeal to this Court from a decision of the High Court in succession matters. The appellant must first obtain leave, either from the High Court or from this Court. In addition to the decision in *Johnstone Ombima Okwaro & Another v. Dorcas Okwaro & 2 Others* (supra), which the 1st respondent cited, there is also *Francis Macharia Karanja & Others v. Virginia Murboni Karanja* CA No. 203 of 2014, *Rhoda Wairimu Karanja & Another v. Mary Wangui Karanja & Another* [2014] eKLR, *John Mwita Murimi & 2 Others v.*



Mwikabe Chacha Mwita & Another [2019] eKLR, John Ndungu Wainaina & 2 Others v. Mary Njeri Kikuyu [2015] eKLR, Hafswa Omar Abdalla Taib & 2 Others v. Swaleh Abdalla Taib, CA No. 22 of 2014, Isaac Alizza v. Samuel Kisiavuki [2021] eKLR and Yunes Kerb Oruta v. Davin Kwamboka Oruta v. George Kerb Oruta & Another, CA No. 60 of 2016.

10. In the absence of leave to appeal, we do not think the intended appeal is arguable. On the basis of that finding, it is not necessary to consider the second limb under rule 5(2)(b). Having failed to satisfy both considerations, this application has no merit and is hereby dismissed with costs. It is so ordered

DATED AT NAIROBI THIS 29TH DAY OF JULY, 2022

J. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

