



**IN THE COURT OF APPEAL
AT NYERI
(CORAM: BOSIRE, WAKI & AGANYANYA, J.J.A.)
CIVIL APPLICATION NO. NAI. 109 OF 2011**

BETWEEN

**PERIS WANJA 1ST APPLICANT
MILKA WANGUI 2ND APPLICANT
TERESIA NYAMBURA 3RD APPLICANT
VERONICA GATHONI 4TH APPLICANT
MARY MUMBI 5TH APPLICANT**

AND

HANNAH NJERI MUTHUMBI RESPONDENT

*(Application for stay of execution of the judgment of the High Court of Kenya at Nairobi (Sergon, J.)
dated 17th September, 2010
in*

H.C.SUCCESSION CAUSE NO. 133 OF 2005)

RULING OF THE COURT

Following the dismissal of their application for revocation of grant on 17th September, 2010, **Peris Wanja, Milka Wangui, Teresia Nyambura, and Mary Mumbi**, the applicants, filed a notice of appeal in the High Court on 1st October, 2010 declaring their intention of appealing to this Court against that decision. On the basis of that notice, they have taken out a notice of motion pursuant to the provisions of **rule 5(2)(b)** of the Court of Appeal Rules for, principally, an order staying the execution of the decision of the High Court, aforesaid pending the outcome of their intended appeal.

In their application for revocation of grant, the applicant alleged that **Hannah Njeri Muthumbi**, the respondent, had secretly applied for confirmation of the grant of the estate of **Nahashon Wamukurwe Muthumbi**, and distributed his estate in an unfair manner. The application was determined by way of affidavit evidence by the consent of the parties. Upon consideration of the affidavit evidence before him, Sergon J. found as a fact that the applicants were fully involved in the process of filing and prosecution of the Succession Cause, they availed their passport size photographs which were attached to the transfer forms of their respective entitlements and they duly executed those transfers by affixing their signatures on those forms. For those reasons, the learned Judge was satisfied that there was no merit in their application and consequently dismissed it. It is against that dismissal that an appeal is intended and against which an order of stay is sought before us.

The Order against which a stay is sought is clearly a negative order. This Court has often held that a negative order is not capable of a stay. Mr. Ng'ang'a, counsel on record for the applicants, pleaded with

us to grant a conservatory order instead of an order of stay. It is, however, trite practice that a court will only grant orders, of course subject to being satisfied that they should be granted, if there is a specific prayer for them, unless of course the order is only consequential. The order sought is not consequential. The wording of the prayer in the applicants' motion, as material, is as follows:-

***“That in view of the pending appeal herein from the judgment of Mr. Justice J.K. Sergon delivered on the 17th September, 2010, dismissing the applicant’s application dated 2nd October, 2007 this honourable Court be pleased to stay execution, or order that the status quo be maintained*”**

Before a Court can order the preservation of the status quo it must be shown by evidence what the Status quo is on the ground.

What is the status quo in this matter? According to the evidence before the learned Judge, all transfer forms had been signed as at the date of the judgment and, as at the date of this application what was awaited was the consent of the Land Control Board, because the suit property is agricultural land. We do not know the position on the ground at the moment, regarding the ownership of the property. In absence of such evidence a conservancy order cannot be granted.

Besides, the jurisdiction of this Court in applications under **rule 5(2)(b)** of the Court of Appeal Rules is discretionary. The applicants were obliged to show not only that their appeal or intended appeal is arguable, but also that unless they are granted the orders they seek the success of that appeal or intended appeal shall be rendered nugatory. On the material before us, we are not satisfied that the applicant’s appeal or intended appeal is arguable. They participated in the proceedings leading to the confirmation of the grant of letters of administration, and that is prima facie evidence that the grant was not made behind their backs. As the applicants were obliged to satisfy the two conditions above, even assuming they were able to satisfy the nugatory aspect, still, they would not have met the threshold for the grant of a stay or the status quo order, they are seeking.

In the result, the application dated 20th April, 2011 and filed in Court on 26th April, 2011, must fail and, accordingly, it is dismissed with costs.

Dated and delivered at Nyeri this 2nd day of December, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR