



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**CIVIL APPLICATION 54 OF 2009**

**BETWEEN**

**GAUKU MOHAMED .....APPLICANT**

**AND**

**GITONGA MOHAMED .....RESPONDENT**

*(Being an application for stay of execution depending an intended appeal from the ruling of High court of Kenya at Meru (Lenaola, J.) dated 17<sup>th</sup> October, 2007 in Meru  
in*

H.C.Succ. C. No. 294 of 1996)

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**RULING OF THE COURT**

This application, expressed to have been filed in this Court under rules 5(2)(b), 42(1) and 43(1) of the court of Appeal Rules seeks:

“1. ...

**2. THAT this Honourable court be pleased to order that there be an unconditional stay of execution of the ruling of his Lordship Honourable Justice Lenaola delivered on 17<sup>th</sup> October, 2007 together with all consequential orders made thereafter, pending the hearing and determination of the Civil Appeal No. 64 of 2008.**

**3. THAT the costs of this application abide the outcome of the appeal.”**

The application was supported by the averments in the affidavit sworn by the applicant on 10<sup>th</sup> February, 2009 and filed in Court together with the same on 19<sup>th</sup> February, 2009. It arises from a succession dispute between the applicant and the respondent over plot **No. 6 Meru Municipality measuring 40 x 60 ft.** The plot was owned by **Mohamed Gitonga (deceased)** who died on 14<sup>th</sup> February 1979. The applicant, the deceased's daughter, petitioned for letters of administration for his estate claiming that she was his sole surviving daughter. As it emerged, the respondent teamed up with **Adija, Muthee, Gichangi, Wanja** and **Saida** to object to the applicant's application on the ground specifically that the respondent, being the only son of the deceased, he was the rightful heir entitled to apply for letters of administration in respect of the deceased estate together with his mother, **Karambu Mohamed**, deceased widow, who was still alive. The applicant in a further affidavit denied that the respondent was the deceased's son and said her mother had left the deceased in 1962 and got married to another man who was the father of the respondent. The superior court (**Lenaola, J.**) after perusing submissions filed by the parties wrote and delivered a ruling on 17<sup>th</sup> October, 2007 in which the learned Judge ordered that both the applicant and the respondent inherit and share in equal share **plot No. 6 Makutano Meru Municipality.**

The applicant appealed against this decision in *Nyeri Civil Appeal No. 64 of 2008*. In the meantime she filed this application for stay of execution as herein before stated. The application was placed before this Court for hearing on 6<sup>th</sup> November, 2009. While the applicant appeared to submit on the application before us, neither the respondent nor his legal representative appeared, though served with the hearing notice, hence the application was prosecuted ex-parte. The applicant told the Court in her submissions that the appeal she had filed had chances of success and that if this application is not granted then she will suffer.

In the applicant's supporting affidavit she revealed that she had made a similar application in the superior court which was granted on condition that she deposited Kshs.50,000/= in a joint interest earning account in the names of counsel for respondent and her own names but that she was unable to raise that money.

The twin principles which should be established before an application of this nature is granted by this Court are well known, namely, the applicant should establish an arguable appeal and that if the application is refused and she wins the appeal, its success will be rendered nugatory. Though the applicant states in the supporting affidavit and in her submissions before us that she has lodged the appeal she did not attach a copy of the memorandum of appeal to this application but we do not doubt she has done so as she has given its number as *Nyeri Civil Appeal No. 64 of 2008*. In paragraph 4 of the supporting affidavit the applicant states:

***“4 THAT though I contended (sic) the objector’s legitimacy as a dependant of the deceased curiously no evidence has been adduced before court to determined (sic) his relationship to the deceased.***

It is our view that, being a lay-woman, there is no better way the applicant could have established an arguable point than as brought out in the above averment. She is contesting the legitimacy of the respondent as the deceased's son.

As to the second limb she said before us that if the application was not granted she would suffer. She also brought this out in paragraph 12 of the supporting affidavit. It states:

***“12 The appeal before this honourable court has very high chances of success and if stay is not granted I am likely to suffer irreparable loss which cannot be compensated by way of damages.”***

We are also aware that this application was not opposed because although the respondent was served with it and/or the hearing notice, he neither filed any response to or appeared in Court to oppose it. As earlier indicated the superior court (*Ouko, J.*) had granted a stay on condition that the applicant deposited Kshs.50,000/= but the basis of this monetary condition is not shown. No wonder the applicant was unable to meet it. Thus the learned Judge was not opposed to granting stay. In the circumstances of the case and in exercise of the discretion given to us by *section 5(2)(b)* of the Rules of this Court, we grant to the applicant stay of execution as prayed in prayer 2 of the application dated and filed in Court on 19<sup>th</sup> February, 2009. Costs shall abide the outcome of the appeal.

***Dated and delivered at Nyeri this 14<sup>th</sup> of May, 2010***

**E. O. O’KUBASU**

.....  
**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

**J. G. NYAMU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**