



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

Civil Appli 174 of 2008 (UR 111/08)

MARGARET WACHEKE MUTUOTAAPPLICANT

AND

JANE WANJIRU NGOTHO

PRISCILA MUTHONI THIONGO

MARY NJERI KIHINGO

HANNAH WACHUKA WATORO

CECILIAH MBOO MUREITHI.....RESPONDENTS

*(Application for stay of execution of the judgment, decree and any other subsequent orders
of the High Court of Kenya at Nyeri (Kasango, J.) dated 16th November, 2007*

in

H.C.SUCC. NO. 2 OF 1993)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules seeking two orders namely, firstly, stay of execution of the judgment of the superior court dated 16th November, 2007, the resultant decree and any subsequent order pending determination of **Civil Appeal No. 2 of 2008**; and secondly, an order of injunction to restrain the respondents, their servants or agents from entering on land parcel **No. Loc. 14/Kairo/381** or otherwise interfering with the applicant's possession pending the determination of the said appeal.

The applicant and the 2nd, 3rd, 4th and 5th respondents are daughters of *Mutuota Muchui*, now deceased. The deceased was the registered proprietor of land parcel **No. Loc.14/Kairu/381** comprising approximately 3.2 acres. He was survived by six daughters the applicant and the five respondents. Sometime in 1993 *Priscilla Muthoni Thiongo* (2nd respondent) filed succession cause in the High Court at Nyeri being Probate and Administration **No. 2 of 1993** for grant of the letters of administration in respect of the estate of her deceased father Mutuota Muchui. The Grant was given and was subsequently confirmed on 12th October, 1999. By the confirmed grant the suit land was divided amongst the six daughters of the deceased including the applicant. The applicant subsequently applied for the revocation of the grant on the grounds *inter alia* that the grant was obtained without her knowledge and that her deceased father had made an oral will bequeathing the entire land to her. The application was heard by Juma, J. but he left before he wrote the judgment. The judgment was subsequently written by Mary Kasango, J. It appears that *Jane Wanjiru Ngotho* (1st respondent) died before Mary Kasango, J. delivered the judgment. The objection was subsequently dismissed on 16th November, 2007 and the superior court ordered that the suit land be divided equally amongst the five surviving daughters of the deceased - that is the applicant and the 2nd, 3rd, 4th and 5th respondents. The applicant being aggrieved by the decision of the superior court filed **Civil Appeal No. 2 of 2008** which is still pending for hearing. In the meantime the applicant filed an application in the superior court for stay of execution of the judgment of 16th November, 2007. The superior court dismissed the application on 18th June, 2008 saying in part:

“I have considered the submission of each side. It is clear that on the grant being confirmed the suit property was registered in the names of all the daughters of the deceased. This fact is conceded also by the objector. The objector accepts that each beneficiary was given their (sic) portion. With that in mind it would be unjust to grant wholesomely the orders that are prayed for by the applicant. I believe the best decision would be that each beneficiary be entitled to make use of their (sic) parcel of land but that a prohibition do issue on that land until the appeal is determined.”

For this application to succeed the applicant is required to show that the pending appeal is arguable and that unless the orders for stay of execution and injunction are granted the appeal if ultimately successful would be rendered nugatory. The applicant deposes, among other things, that the appeal which is already lodged is arguable and has merit. She has annexed a copy of the memorandum of appeal. We have perused and considered the judgment of the superior court (Mary Kasango, J.), the subject matter of the appeal and the grounds of appeal in the memorandum of appeal and we are, with respect, satisfied that the appeal raises both legal and factual issues which are clearly arguable. We have refrained from a detailed examination of the merits of the appeal for such course may be preemptory or embarrass the Court at the hearing of the appeal.

The applicant states both in the application and in the supporting affidavit that she has been living on the suit land with her family since 1970 after she and her husband separated; that the respondents have never occupied the land; that the respondents are happily married and stay in their other respective pieces of land; that she has extensively developed the land; that there is a likelihood that the land would be alienated if it is not preserved pending appeal and that there is likelihood that the applicant will suffer irreparable heavy loss and damages if execution proceeds.

The superior court has already dismissed a similar application for stay of execution of the decree for reasons reproduced herein earlier. The superior court however issued a prohibitory order to preserve the suit land pending appeal. Thus the fear of the applicant that there is a likelihood that the land may be alienated pending appeal is without any foundation. The other matters raised by the applicant tend to show that it would be just in the circumstances of the case to allow the applicant to exclusively use the land pending appeal but those matters do not show that the appeal, if successful, would be rendered nugatory. It would be unjust as the superior court has already made orders to restrain the 2nd, 3rd, 4th and 5th respondents from using their respective portions of land when they are already registered as proprietors and when their respective portions have been demarcated.

The applicant has not shown that the appeal would be rendered nugatory unless the orders sought are granted.

Accordingly we dismiss the application. The costs of the application shall be costs in the appeal.

Dated and delivered at Nyeri this 30th day of October, 2009

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR