



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**SUCCESSION CAUSE NO. 2095 OF 1994**

**IN THE MATTER OF THE ESTATE OF MBAYA MBARIRI (DECEASED)**

**ANN WAMBURA MBAYA.....APPLICANT**

**VERSUS**

**SIMON GITARI.....1<sup>ST</sup> RESPONDENT**

**GICHOBI NJAGI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application subject of this ruling is dated 17<sup>th</sup> May 2019 and brought pursuant to **Order 45 Rule (1)** of the **Civil Procedure Rules** and **Rule 63 of the Probate and Administration Rules**.
2. The application seeks various orders some of which are now spent. Relevant for now are; that leave be granted for counsel prosecuting this matter on behalf of the applicant to come on record, stay of execution of this court's order of 14<sup>th</sup> May 2019, and review and/or setting aside of court orders made on 15<sup>th</sup> of October, 2008 and 14<sup>th</sup> May, 2019 respectively.
3. The application was predicated on grounds that the Respondents are not beneficiaries of the estate herein, during the hearing of the suit the court was not seized of relevant information as Lawrence N. Kiongo who had the decision favour him was not a beneficiary of this estate, further the order of 15<sup>th</sup> October, 2008 revoked the grant issued to the applicant such that she cannot effect any transfer. And further the original protestor now deceased Njagi Mburugu who was the 2<sup>nd</sup> protestor's father and son to Mbaya Mbariri the deceased herein was not entitled to inherit the land subject matter.
4. The application was opposed by filing of grounds of opposition to the effect that the court no longer has jurisdiction as it is functus officio since the applicant preferred an appeal against the ruling of Hon. K. H. Rawal being appeal No. 71 of 2009 which appeal was dismissed on the 6<sup>th</sup> of December, 2017 as such the application offends **Section 80** of the **Civil Procedure Act** and **Order 45 Rule (1) of Civil Procedure Rules**.
5. There was no opposition to counsel prosecuting the application coming on record and in that regard leave is duly granted.
6. In order to understand this matter the court considered its history which is briefly as follows; The original nemesis in this matter were parents of the applicant and second Respondent namely; Jane Mbaya Mbariri and Njagi Mburugu. They were both children of the deceased herein Mbaya Mbariri who is said to have had two houses. After the death of Mbaya Mbariri a succession dispute arose over Property L.R. NO. Kabare/Njuki/34 the subject herein between the original parties named above; being Kerogoya Resident Magistrates Succession Cause No. 37 of 1998. The current applicant was substituted in place of her mother and the matter was referred for arbitration by a panel of elders by consent of the parties. The verdict of the elders was that 8 acres of the land in dispute would go to Jane Mbaya Mbariri and 6 acres to Njagi Mburugu. The parties appear to be content at the time and a consent adopted at the Magistrates court in Kerogoya where the dispute had initially been referred. The current applicant appeared to have had a change of heart and applied to vary the order which application was denied. She thereafter filed this cause and Njagi Mburugu filed an objection. Rawal J's determination is on the objection. And this is what she said; -

**“it does not need a deep consideration of the facts to find that the administratrix herein has misled the court with stark defiance of the order made by the competent court and concealment of the fact that from this court. The objector's summon for revocation of the grant dated 21<sup>st</sup> March 1995 and certificate of confirmation of grant dated 6<sup>th</sup> December 1996 is allowed and I direct that the grant of representation made in favour of the Administratrix and the certificate of confirmation dated 6<sup>th</sup> December, 1996 are revoked.”**

7. I will echo the sentiments of Rawal J and add that the current applicant is not only defiant but completely dishonest and every move taken by her in this cause is in total disregard of the law, and out to circumvent and defeat the cause of justice. I also stop to wonder whether counsel currently on record read the record for the reasons above and to be expounded further in this ruling as indeed this is a court of Record.

8. Under **Order 45** of the Civil Procedure rules a party aggrieved by the decision of the court has two options. The party may prefer an appeal or return to the same court for review based on grounds set out in that order which include discovery of new evidence that was not obtained despite due diligence having been exercised or where there is an error apparent on the face of the record. A party cannot choose one method and on failing seek to exercise the other option. This appears to be a deliberate move by the law so as to stop vexatious applications and to bring an end to litigation.

9. The court is informed that an appeal was preferred by the applicant against Njagi Mburugu (deceased) which appeal was dismissed on the 6<sup>th</sup> of December 2011. This was equally affirmed by counsel for the applicant.

Therefore, the application before court fails the test for review.

10. The original Objector Njagi Mburugu in this matter was the 2<sup>nd</sup> respondent's father as has been admitted by the applicant. The record also show that Rawal J's ruling of 15<sup>th</sup> October, 2008 erroneously included the name Lawrence N. Kiongo, the lawyer then on record for the objector instead of Njagi Mburugu which error was rectified by the court on the 24<sup>th</sup> of March, 2009. The so-called error apparent on the face of the record is therefore non-existent. Rawal J simply reiterated the orders of the Resident Magistrate in Succession Cause 37 of 1998

11. Secondly, the respondents are not strangers as alleged, they are holders of a grant that was issued to them on the 24<sup>th</sup> of May, 2013 in the matter of the estate of Njagi Mburugu allowing them to pursue this matter vide Civil Suit No. 16 of 2013 High Court Karatina.

12. Clearly, even if the application before court met the necessary threshold for consideration of review order, the orders of Rawal J were sound and cannot in anyway be faulted, I would certainly have had no basis whatsoever to review the same.

13. And in the way the Orders of Rawal J were couched the orders of this Court of the 14<sup>th</sup> May 2019 are most relevant and necessary in order to bring this matter to a closure.

14. For the above reasons the application is dismissed with costs to the respondent.

**Dated and Delivered in Nairobi on this 27<sup>TH</sup> day of February, 2020.**

**ALI-ARONI**

**JUDGE**