



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 98 OF 2013**

**IN THE MATTER OF THE ESTATE OF TABITHA WANJIRU MWITHIMBU alias WANJIRU M'MWITHIMBU (DECEASED)**

**IBRAHIM MUGWE GAKAU.....PETITIONER**

**VERSUS**

**DORIS NKIROTE KIMATHI.....1<sup>ST</sup> PROTESTOR/APPLICANT**

**WILFRED GITHINJI WAMAL.....2<sup>ND</sup> PROTESTOR**

**JOSEPH KIAMA GACHUNGI.....3<sup>RD</sup> PROTESTOR**

**R U L I N G**

1. This Ruling relates to the Motion on Notice dated 19/02/2020 by **Doris Nkirote Kimathi** (“**the applicant**”) under **Rule 41(3) of CAP 160 Laws of Kenya**. In the Motion, the applicant sought that the grant be amended or rectified in order that three (3) acres be included as distributed to her as per the decree and order from LDT Case No. 38/1999.
2. The grounds upon which the application was predicated upon were set out in its body and the supporting affidavit of **Doris Nkirote Kimathi** sworn on 19/02/2020. It was contended that the applicant had obtained a decree in LDT No. 38/1999 but the deceased died before execution of the same.
3. In this regard, she contended that having pursued her claim in the right forum, she had revived the decree and an order was made to that effect on 22/01/2020. For that reason, the applicant prayed that the grant be confirmed in terms of the decree whereby she should get three (3) acres in the estate.
4. The application was opposed vide the replying affidavit of **Wilfred Githinji Wamai** sworn on 4/6/2020. He deponed that, revival of LDT No. 38 of 1999 was unprocedural, against the rules on natural justice and was marred by non-disclosure of material facts. That there was total disregard of the order of inhibition still in place granted in Nanyuki SRMC Civil Suit No. 50 of 1994 which restrained **Mwithimbu M’Mutiga** (now deceased) from interfering with the parcel No. KIRIMARA/KITHITHINA BLOCK 1/71 (“**the estate**”).

5. At the hearing of the application Ms. Mwangi appeared for the applicant but the respondent did not appear.
6. In its Ruling made on 4/10/2018, the Court made various orders one of which was that the claim by the applicant and the Interested Party for three (3) and two (2) acres, respectively be pursued in the appropriate forum to establish their claims against the estate. The parties were given twenty-four (24) months before the grant for that part of the estate could be confirmed. This order was issued because the two could only seek enforcement of their rights in a civil (ELC) court and not before the family court.
7. According to the judgment dated 20/1/2000 made in LDT No. 38 of 1999, three (3) acres were supposed to be excised out of the Estate and be given to the applicant. As at the time of confirmation, the applicant had not executed the said judgment.
8. The applicant made an application to the lower court and an order was made on 22/01/2020 whereby the suit was revived to enable the applicant execute the decree therein. That is the decree the applicant wishes the Court to adopt and distribute to her 3 acres in the estate.
9. The 2<sup>nd</sup> protestor has firmly opposed the application on the grounds that the order reviving the suit was unprocedural, was against the rules of justice and was made on non-disclosure of facts.
10. He further contended that the decree in **LDT No. 38 of 1999** was made in violation of an order made in the **Nanyuki SRMCC No. of 1994 (“the Nanyuki suit)** wherein **Mwithimbu M’Muthiga** had been restrained from interfering from the estate herein.
11. The Court has carefully considered the contestations of the parties. There was no evidence of the existence of the Nanyuki suit. The alleged order restraining **Mwithimbu M’Muthiga** from interfering from the estate herein was never produced. It is the cardinal principal of law that he who alleges must prove. See *section 107 of the Evidence Act*.
12. In this regard, it was upon for the respondent to prove the existence of the alleged order. He never produced the same. He only asked the Court to take judicial notice of the same. The existence of an order in a previous judicial proceeding is a matter of fact that must be proved. The respondent did not prove the existence of the same.
13. In this regard, the Court is unable to find that the decree in **LDT No. 38 of 1999** was made in violation of any court order as alleged by the respondent. In any event, this is a fact which the respondent should have raised before the lower Court when the decree in the **LDT No. 38 of 1999** was being adopted. He never did so. He cannot raise it here. It is too late in the day.
14. The second issue is that the revival of **LDT No. 38 of 1999** was effected un-procedurally. If that was the case, the respondent should have appealed against the order granting the revival. There is no evidence to show that the respondent had challenged the said order. Indeed, there was no allegation that the said order had been appealed against. In this regard, the said order remains lawful and in force.
15. Accordingly, I find that the applicant has proved that she is entitled vide **LDT No. 38 of 1999** to have 3 acres distributed to her.
16. Accordingly, the three (3) acres of the Estate which had been set aside in accordance with **Rule 41 (3) of the Probate and Administration Rules** be and are hereby distributed to **Doris Nkirote Kimathi**.
17. This being a family matter, I make no order as to costs.

**DATED** and **DELIVERED** at Meru this 25<sup>th</sup> day of June, 2020.

**A. MABEYA**

**JUDGE**