



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 449 OF 2009**

**IN THE MATTER OF THE ESTATE OF STEPHEN M' MUTUNGI M'MUTHURI (DECEASED)**

**PETER GAKUUBI M'MUTUNGI...PETITIONER/APPLICANT**

**VERSUS**

**GEORGE M'NTUBIRI..... 1<sup>ST</sup> RESPONDENT**

**JULIUS KIRI..... 2<sup>ND</sup> RESPONDENT**

**SALOME KARUGA..... 3<sup>RD</sup>RESPONDENT**

**FLORENCE KANANA.....4<sup>TH</sup> RESPONDENT**

**LUCY KARUTHE.....5<sup>TH</sup> RESPONDENT**

**BRACE MBUTHU M'MUTUN.GI.....6<sup>TH</sup> RESPONDENT**

**R U L I N G**

1. After hearing the testimonies of all the parties to this cause and their witnesses, this court delivered a Ruling on 28<sup>th</sup> March, 2018 which distributed the estate of the late *Stephen M'Mutungi M'Muthuri* as follows:-

**L.R. Kiirua/Naari/335**

**1<sup>st</sup> House**

- a) Teresia Regeria - ½ acre
- b) Florence Kanana - ½ acre
- c) Lucy Kathure - ½ acre
- d) Salome Karuga - ½ acre
- e) Justus Mwirigi - to share the balance of 3.40 Acres
- George Nturibi - and make room and access road

**2<sup>nd</sup> House**

- a) Paul Gitonga - 1 acre as they had agreed
- b) Catherine Ntinyari - ¼ acre
- c) Peter Gakuubi - to share the balance making way

Samuel Muriuki for access road

Harun Nteere

2. Pursuant thereto, the petitioner/Applicant filed summons dated 22<sup>nd</sup> January, 2019 praying for Orders of injunction to restrain the respondents from subdividing “**Land Parcel No. Kiirua/ Naari/335 pending the hearing and determination of the suit.**”
3. The application was supported by the affidavit of **Peter Gakuubi**, the petitioner. He contended that he is dissatisfied with the outcome and has since lodged an appeal filed on 18<sup>th</sup> April 2018. That the respondent served him with a letter informing him that there will be subdivision of the estate property on 22<sup>nd</sup> January, 2019.
4. He averred that his appeal has high chances of success since the deceased left land in Isiolo measuring 16 acres and 2 acres in Timau which were not included in the estate of the deceased. That the application will not prejudice the respondents in any way.
5. The application was opposed by **Salome Karuga** vide her affidavit dated 13<sup>th</sup> February, 2019. In that affidavit, she stated that the estate was fairly distributed. That the applicant sold all his property and he now wants to hinder the respondents from getting their portions. That the deceased’s properties at Isiolo and Timau which the applicant says were left out did not belong to the deceased and that if that was the case, the applicant ought to have applied for rectification of the grant to include the same and not to appeal against the distribution.
6. I have considered the affidavits on record and the entire record. The record shows that, the applicant who testified as **PW5** never sought to prove that the alleged properties in Timau and Isiolo belonged to the deceased. He has not even produced any evidence to show that the alleged properties belonged to the deceased. He has not specified the plot numbers to prove that they even exist.
7. In any event, if the said properties actually belonged to the deceased and the applicant desires that they be included in the distribution, the best procedure would have been to apply for rectification of the certificate of grant and not to prefer an appeal.
8. The only reason advanced for the proposed appeal is that there are other properties left out of the distribution. In **re estate of Charles Kibe Karanja (Deceased) [2015] eKLR Musyoka J** held:-

*“...A certificate of confirmation of grant is by its nature a formal order extracted from the orders made by the court on the application for confirmation of grant. If a party wishes to have the assets of the estate redistributed or there is discovery of new assets that were not available or had not been discovered at the time of distribution, among others; it would be imprudent to seek rectification or alteration or amendment of the certificate of confirmation of grant..... The proper approach ought to be an application for review of the orders made at the confirmation of the grant.....Where assets are discovered after the court has confirmed the grant or a heir or survivor of the deceased who had previously been previously unheard of materializes after distribution, the court may review its orders made at the point of confirming the grant on the ground of discovery of new and important evidence that was not available at the time the grant was being confirmed.”*

9. The applicant has applied for an inhibition or a restraining order against the respondents. He has not alleged any wrong doing on the part of the respondents. All that the respondent intend to do is to effect a court order which has been procedurally obtained. I doubt whether a court of law, or even equity, properly directing its mind can injunct a party who is acting in pursuant of a lawful court order which has been procured or obtained in a due process. Further this is a 2009 matter. To continue litigating without seeking a lasting solution to the dispute is not just.
10. In the premises, I find the application to be without merit and I dismiss the same with costs.

**DATED** and **DELIVERED** at Meru this 14<sup>th</sup> day of March, 2019.

**A. MABEYA**

**JUDGE**