



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 159 OF 2015**

**In the Matter of the Estate of LIVINGSTONE M'MUNGANIA - (DECEASED)**

**BETWEEN**

**MBOGORI BAICHU .....PETITIONER**

**AND**

**DAVID GITONGA M'MUNGANIA .....RESPONDENT**

**RULING**

1. This is a ruling on the Petition dated 29<sup>th</sup> May, 2015 by Mbogori Baichu. In the Petition, he seeks the nomination of and issue to David Gitonga M'Mungania with letters of Administration to the estate of the late Livingstone M'Mungania ("the deceased") limited only to defending a suit Meru HCCC No. 71 of 1995.

2. David Gitonga M'Mungania ("the Respondent") has opposed the Petition on the grounds, inter alia, that these proceedings are *res judicata* Meru Miscellaneous Succession Cause No. 133 of 2007. He contends that the said Miscellaneous Succession Cause No. 133 of 2007 was heard and determined in his favour.

3. The Petition was heard by way of written submissions that were filed on 10<sup>th</sup> and 14<sup>th</sup> March, respectively. On retiring to write the judgment, I noticed two issues. Firstly, the Petitioner did not exhibit the pleadings in Meru HCCC No. 71 of 1995 to prove that that suit actually exists; secondly, the Respondent did not produce the ruling or proceedings in Meru Miscellaneous Succession Cause No. 133 of 2007 to show that those proceedings were actually dismissed. He only exhibited the Chamber Summons dated 9<sup>th</sup> August, 2007 and an application for execution of decree filed on 25<sup>th</sup> August, 2015.

4. I make this ruling well aware of the provisions of Sections 107 and 108 of the Evidence Act, Cap 80 of the Laws of Kenya. As it stands, the record shows that the Petitioner may have some right under Section 54 of the Law of Succession Act, to bring the Petition but due to failure to produce the documents I have alluded to, the same cannot be properly discerned. On the other hand, the Respondent likewise seems to have had some rights enure to him on the alleged basis of the principle of *res-judicata*. However, the same are not clear in the absence of the ruling in Meru High Court Miscellaneous Succession Cause No. 133 of 2007. If this Court proceeds to write a judgment on the basis of the material on record, the same would be inconclusive due to the missing material. In my view, that would be a decision based on technicality which I believe Article 159 (2) (d) of the Constitution of Kenya frowns upon.

5. The order that will be amendable is to strike out the proceedings which will only be a temporary respite. The parties would once again be back in Court and the vicious cycle will go on and on. Rather than take that route, succession matters being special in their nature, in that they are rarely concluded, in the interest of justice, I would rather the parties are given the time to produce to this Court the aforesaid material so that a conclusive judgment may be rendered.

6. Accordingly, under Section 47 of the Law of Succession Act Cap 160 of the Laws of Kenya and Rule 73 of the Probate and Administration Rules, I direct that the Petitioner and the Respondent to supply this

Court the aforesaid material by way of Supplementary Affidavits to be filed and served within 7 days of today without fail. Judgment in this matter will now be delivered on 4<sup>th</sup> May, 2017 to take into consideration the said material. In default of the parties complying with these directions a judgment will be delivered notwithstanding the aforesaid deficiencies.

It is so ordered.

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF MARCH, 2017**

**A. MABEYA**

**JUDGE**

**30/03/2017**