



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 270 OF 1999**

**IN THE MATTER OF THE ESTATE OF ADAM MWANGI JOSEPH GATIMU ALIAS  
MWANGI MURIUKI DECEASED**

**WILLIAM NJUGUNA MURIUKI.....PETITIONER/APPLICANT**

**VERSUS**

**ESTHER KAGURE MWANGI.....RESPONDENT**

**RULING**

1. The application is premised under the provisions of Rule 73 of the of **Law of Succession Act**; in essence the Applicant seeks an order to review and or set aside the Order of this Honourable Court made on the 13<sup>th</sup> February, 2007 by Hon.Justice Khamoni;
2. The Application is supported by grounds on the face of the application and on the Supporting Affidavit made by William Njuguna Muriuki and is dated the 30<sup>th</sup> September, 2015 in which he depones to the fact that he is the Petitioner herein and is competent to make the Supporting Affidavit.
3. An order for review is sought or in the alternative the setting aside of the order made by the Honorable Judge Khamoni on the 13<sup>th</sup> February, 2007 in which he declined to direct the Officer in Charge of Karatina Police Station to assist in providing security to the Nyeri County Surveyor to enable the partitioning of the parcel of land known as **KONYU/GAKUYU/456**, the subject matter herein.
4. At the hearing hereof the applicant was represented by Ms Mwai whereas the respondent appeared in person; both parties made oral presentations; hereunder is a summary of the rival submissions;

**APPLICANTS SUBMISSIONS**

5. The applicant is the administrator of the estate of Adam Mwangi Joseph Gatimu alias Mwangi Muriuki who was the husband of the respondent herein; the Grant was confirmed and both the applicant and the respondent are now co-owners of the subject property;
6. He deposes that each owns half of the property and that he has applied to have the property partitioned so that separate titles deeds be issued; that the respondent and her family have been hostile and have threatened the surveyor with dire consequences if he partitions the land;
7. On the 11<sup>th</sup> June and 22<sup>nd</sup> June, 2004 the Nyeri District Surveyor visited the land for the purpose of

partitioning the same but could not carry out the exercise due to the threats of the respondent and her family members;

**8.** The respondent had filed HCCC No.67 of 2004 (OS) claiming that she was entitled to his portion of the land; this claim was dismissed on the 21/02/2004; that she also filed an application to have the partitioning exercise stayed; which application was also dismissed by the court on 9/11/2004;

**9.** That his application seeking for police security was also dismissed and he has been left with no remedy for his grievance but to seek for an order of review or setting aside of the order of 13/02/2007; that requiring him to file another suit in order to seek the relief sought herein would be going against the spirit of the constitution and the law regarding expeditious and affordable dispute resolution;

**10.** He reiterated that due to the hostility on the ground he has been unable to initiate the process of obtaining a title deed for his portion of the said land and prayed that the application be granted for the ends of justice to be met;

### **RESPONDENTS SUBMISSIONS**

**11.** In response the respondent relied on her replying affidavit which was filed on the 20/02/2017; therein she deponed that there was a dispute on the portion claimed by the applicant; and that the applicant was only entitled to 40 points of an acre;

**12.** That she had never threatened or been hostile to the applicant and was always willing to discuss with the applicant on how he could get his share of the land; that she was not aware that the applicant was seeking security in the form of police protection from the Chief and the Officer in Charge of Karatina Police Station for purposes of protecting the surveyor when subdividing the land;

**13.** That the applicant was seeking police protection to illegally acquire a share in her late husband's land; and that the application was made in bad faith, intended to defeat justice and was an abuse of the court process;

### **ISSUES FOR DETERMINATION**

**14.** After taking into consideration the presentations of both parties this court finds the following only one issue for determination;

(i) Whether to review or set aside the order of 13/02/2007;

### **ANALYSIS**

**15.** The principles for review of an order or decree of the court are; that there must be discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the knowledge or could not be obtained and produced at the time the order was made; or that there must be a mistake or error apparent on the face of the record; or for any other sufficient reason.

**16.** This application for review ought to be heard by the same Judge who heard the matter and made the order; that would have been Honorable Khamoni J but he has since retired from the bench; which then means that any judge in the station has jurisdiction to review the order.

**17.** After hearing submissions of Counsel for the applicant and it is noted that there is no contention of discovery of new and important material or evidence, which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced at the time the order was made; there is also no contention of any mistake or error apparent on the face of the record;

**18.** The only reason alluded to is the frustration encountered by the Applicant and the surveyor in trying to partition the property.

19. It is this court's considered view that this does not qualify as a sufficient reason for the orders sought of review.

20. But from the circumstances of the case the material, placed before this court and in the spirit of the Constitution and the law regarding expeditious and affordable dispute resolution in order to meet the ends of justice and also to bring closure to this matter; this court is therefore inclined to consider the second leg of the application, which is the setting aside of a portion of the order made on 13/02/2007.

21. The fundamental duty of this court is to do justice between the parties and denial of the relief is found to limit and prejudice the applicant's interest in the property; for the forgoing reasons this court is satisfied that there is bona fide reason to set aside the portion of the Order denying the surveyor provision of security; this court is therefore inclined to invoke its inherent discretionary powers and sets aside the portion of the order denying the surveyor provision of security whilst visiting the property for purposes of partitioning the property; this is so as to give effect to the determination made upon confirmation of the grant.

### **FINDINGS AND DETERMINATION**

22. This court finds that the applicant has not satisfied the salient requirements for an order for review to enable this court to grant the application.

23. The application to set aside the portion of the order relating to provision of security made on the 13/02/2007 is found to be meritorious and is hereby allowed;

24. This court directs the Officer in Charge of Karatina Police Station to provide the Nyeri County Surveyor with security whilst visiting the land Parcel No. **KONYU/GAKUYU/456**.

25. The applicant to bear the costs of providing the security.

26. Each party to bear their own costs of this application.

It is so Ordered.

**Dated, Signed and Delivered at Nyeri this 22<sup>nd</sup> day of June, 2017.**

**HON.A. MSHILA**

**JUDGE**