



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 154 OF 1998**

**IN THE MATTER OF THE ESTATE M'MUKINDIA M'ARACHI (DECEASED)**

**CHARLES KINOTI M'MUKINDIA.....OBJECTOR**

**VERSUS**

**GEORGE KIHINJI M'MUKINDIA.....PETITIONER**

**R U L I N G**

1. The applicant through an application dated 19<sup>th</sup> May, 2011 pursuant to **Section 47 of the Law of Succession Act** and **Rule 49 and 73 of The Probate and Administration Rules** sought that this Honourable court be pleased to review orders dated 17/2/2011 as the applicant would suffer great prejudice if the same is not reviewed as he will acquire a narrow strip of land between the respondent and Gerald Muthaura M'Mukindia; that court be pleased to order subdivision of the deceased's estate into 3 equal parts to all the three dependants; that there be compensation for damages that may be affected by such subdivision and costs be provided for.

2. The application is premised on the grounds on the face of the application *inter alia*; that the respondents and Gerald Muthaura M'Mukindia proposal of subdivision will create 4 portions instead of 3 portions as ruled by the Judge; that the respondents deceived the court by passing applicant's developments as his in support of his application dated 27/5/2010; that if the respondent is allowed to proceed with his proposal for subdivision as agreed by Gerald Muthaura M'Mukindia they will subdivide the land previously occupied by their mother separately contrary to the Honourable Court's ruling and that the application has been brought without delay since discovery of the anomaly. The application is further supported by applicant's affidavit dated 16<sup>th</sup> May, 2011 in which it is deposed the surviving beneficiaries are three brothers and the asset of the deceased is L.R. Ntima/Igoki/1327 which had initially been proposed to be subdivided into 4 portions before their late mother passed on. That the grant was later amended showing their late mother was to get ¼ share of the estate and the three to share the rest. The court made a ruling dated 27/2/2011 on how the surviving beneficiaries were to share the deceased estate.

3. The applicant deposed that if the ruling of 27<sup>th</sup> February, 2011 is not reviewed he will remain with a narrow belt of land which is not economically viable between his brothers and would have a separate land from the one he already has.

4. The respondent is opposed to this application and filed a replying affidavit dated 10<sup>th</sup> June, 2010 denying the contents of the applicant's affidavit and invited the court to visit the suit land to confirm the situation on the ground. He further averred that he would be prejudiced if the applicant is allowed to get a

share of their mother's land excised from his land since he has already made permanent developments adding that the applicant has produced nothing new or justifiable that would cause the Honourable court to alter its previous decisions. He termed the application as an abuse of the court process since court made its decision on 17<sup>th</sup> February, 2011.

5. I have carefully considered the pleadings in this cause; the written submissions by both counsels, the issue for consideration is whether the applicant has established sufficient grounds to warrant a review of the court's order dated 17<sup>th</sup> February, 2011.

6. The court's order sought to be reviewed reads as follows:-

***"1. The judgment of this court dated 7<sup>th</sup> May, 2010 ordering that parcel number Ntima/Igoki/1327 be shared equally between Charles Kinoti M'Mukindia, George Kithinji M'Mukindia and Gerald Muthaura M'Mukindia be put into effect by allocating each of those beneficiaries to get a share of land where each has carried out their development and further by subdividing the portion that was held by the deceased wife equally amongst the three beneficiaries. This exercise shall be undertaken in the presence of the sub area who was one of the witnesses of the agreement between the beneficiaries on how they were to occupy the land.***

***2. There shall be no orders as to costs."***

7. The portion of land that is in dispute amongst the three beneficiaries is the portion of ¼ acre which would have gone to the parties late mother and referred to a plot no.3 in the District Physical Planners Report dated 10<sup>th</sup> October, 2013. The applicant's application is that if the order of 27<sup>th</sup> February, 2011 is not reviewed he would acquire a narrow strip which will be uneconomically viable. That if the portion is divided equally from top to the bottom, each party would get about 8 1/3 metres in width. This would mean that the applicant who has no land adjoining the portion being shared would have a long strip which would be equivalent to a road of access. That sharing this land from the top to the bottom in my view would be uneconomically viable for the applicant and if adopted would be prejudicial to the applicant if his intention was to use the land for economical purposes. Selling of the said portion would be impossible as the same cannot be used economically. I am therefore satisfied that the applicant has established sufficient reasons and grounds to warrant review. The applicant's application has been filed within a reasonable time. There has been no delay in seeking review of the court's order since it was made.

8. I have considered counsel respective submissions and the report by the District Physical Planning Officer, Imenti South, Imenti Central, Imenti North and Buuri District Report dated 15<sup>th</sup> October, 2013 and I am satisfied that the disputed portion cannot be shared from top to bottom as proposed by the respondent. The most economical and beneficial way of distribution is as per either Physical Planner's proposal 1 or 2. I have considered the two proposals and I am satisfied that if any one of the proposals adopted the portions shall be economically viable to the three beneficiaries. That none will be prejudiced. I am in exercising of my discretion going to adopt alternative proposal No.1 and order as follows:-

***a. The objector Charles Kinoti M'Mukindia to get portion sub-plot – "A" as indicated in Physical Planner's Map No.3.***

***b. George Kithinji M'Mukindia the petitioner to get sub-plot-"B" merging with plot 2 to make them one as indicated in Map 4.***

***c. Gerald Muthaura M'Mukindia to get sub-plot "C" merging with plot 4 to make them as one as indicated in map 5.***

***d. As the parties are brothers, I order that each party to bear its own costs.***

**DATED AND DELIVERED AT MERU THIS 28<sup>TH</sup> DAY OF MAY, 2015**

**J.A. MAKAU**

**JUDGE**

***DELIVERED IN OPEN COURT IN THE PRESENCE OF:***

1. M/S. Gituma for petitioner
2. Mr. Gichunge for objector
3. Clerk – Penina/Mwenda

**J.A. MAKAU**

**JUDGE**