



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 21 OF 1988**

**IN THE MATTER OF THE ESTATE OF THE LATE *LIKABO INYAMA LUSALA* – DECEASED**

**BETWEEN**

**MACHANJA LIGABO -----PETITIONER/RESPONDENT**

**AND**

**INYAMA LIGABO ----- OBJECTOR/APPLICANT**

**AND**

**1. GEORGE MANG’ULA LIGABO  
2. KHOMBEKHOMBE LIGABO  
3. CHARLES LUCHITIO LIGABO -----**

**APPLICANTS**

**4. ISAAC IKHONI LIGABO  
5. MOSES NAMUSENDE LIGABO  
6. ISAAC MUHAMBE LIGABO**

**RULING**

1. From the record in this matter, on 9.2.1999, *Tanui, J.* recorded the following order by Consent of parties;

**“ORDER: By Consent –**

**1) It is agreed by [the] brothers that Dr. Machanja Ligabo will pay Shs.115,000/= and Inyama Ligabo will also contribute the same amount to be shared equally by the 7 brothers as their share of parcel No. ISUKHA/SHITOCHI/1104.**

**2) The distribution of the estate of the deceased to be in accordance with signed agreement filed on 9/2/99.”**

2. On 10.2.1999, the learned Judge stated as follows;

**“The only issue now pending is the mode of the sub-division of the parcel of land title No. Isukha/Shitochi/1104 between the Petitioner and the Objector.”**

3. On 8.2.2000, the learned Judge in addressing the above issue ordered as follows;

***“I have carefully considered the evidence of this objection as a whole. I note that the mother of these brothers prefers to live during this time [in] her life with Inyama Ligabo, her last born son. I have therefore decided to accept the Objection of Inyama Ligabo. This plot of land is to be divided vertically so that Dr. Machanja Ligabo will have a half portion of it extending from his house to the stream and excluding the grave and the house of their mother while Inyama Ligabo is to have half the portion to the right of the plot as one faces the main road. I make no order as to costs.”***

4. After that order, parties never quite settled and the dispute continued with a number of interlocutory applications being filed and before me now, and with the above background in mind, on 10.11.2009, Ikhoni Ligabo filed an Application seeking orders that the orders made on 8.2.2000 be reviewed with a view to granting the other beneficiaries their rightful share in L.R. No. Isukha/Shitochi/1014 for reasons that the Respondents, Dr. Machanja Ligabo and Inyama Ligabo have failed, refused and/or neglected to fulfill the conditions attached to their sharing title No. 1014 aforesaid. The only condition, it is stated was the payment of Kshs.115,000/= as elsewhere above indicated.

5. In his Supporting Affidavit sworn on 30.10.2009, Ikhoni Ligabo has deponed that whereas the Respondents continue to use the land, Muhambee Ligabo and Shio Ligabo have since died without receiving their inheritance and the Respondents have become arrogant and abusive whenever the sum of Kshs.115,000/= is demanded from them.

6. In a Replying Affidavit sworn on 13.3.2010, Inyama Ligabo deponed that he fulfilled his part of the agreement and he attached a document titled ***“renunciation of interest in respect of L.R. No. Isukha/Shitochi/1104”*** and it, Ambeyi Ligabo, Namusende Ligabo, Muhambe Ligabo and Milimu Ligabo in the presence of Peter Bulinda, Peter Amutari and Loderic Muchenditsi, acknowledged that Inyama Ligabo had paid Kshs.115,000/= in order for them to renounce their interest in the suit land.

7. Further, that Shio Ligabo was never a beneficiary to the estate and so was never expected to receive any money as a result of the consent order. He has also stated that the Applicant and others have already obtained orders to compel the Petitioner to pay the beneficiaries the Kshs.115,000/= as earlier ordered and there is therefore nothing to review and the Application ought to be dismissed.

8. I have carefully considered the Application before me and aside from the fact that the same has been brought with undue delay, (I cannot understand why it has taken nine years to enforce a simple order for payment of money), Order XLIV Rule 1 (1) of the repealed Civil Procedure Rules, and which were applicable when the Application was filed, provides as follows;

***“O. XLIV 1(1) Any person considering himself aggrieved –***

***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is hereby allowed,***

***and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”***

9. Clearly, no new evidence has been tendered and no case has been made that there is an error on the face of the record. Is there a sufficient reason to necessitate a review of the order? See **China Road and Bridge Corporation (Kenya) vs D. M. K. Construction Ltd. C.A. 325/2000.**

10. In my view, the orders are sought without any reasonable basis because on the part of Inyama Ligabo, he has proved on a balance of probabilities that he paid the Kshs.115,000/= as ordered and he was thereafter released from any obligation. Any argument regarding non-payment of Shio Ligabo is not validated by the record and no evidence has been placed before me to show that he was entitled to the estate at all. In any event, the document dated 22.12.2000 was an acknowledgment that Inyama paid the money and the matter, at least as regards him, should have rested there.

11. Regarding the obligation to pay Kshs.115,000/= on the part of Dr. Machanje Ligabo, I have seen an order given on 2.12.2009 by *Chitembwe, J.* It reads as follows;

***“This matter coming up before me HON. SAID J. CHITEMBWE, J. on this 8<sup>th</sup> July, 2009 for the hearing of the Applicants Application dated 2<sup>nd</sup> December, 2008 under Certificate of Urgency AND UPON reading the said Application and the affidavit in support thereof plus annexures;***

***IT IS HEREBY ORDERED AS FOLLOWS;***

1. ***That the Petitioner MACHANJA LIGABO be and is hereby ordered to effect transfer of L.R. NO. ISUKHA/ILEHO/491 to the Applicants.***

2. ***That the petitioner be and is hereby ordered to give a Statement of Accounts arising from rent collected on Kakamega County Council Plot No. 10 Khayega-market.***

3. ***That the Petitioner be and is hereby ordered to account for the proceeds got from sale of sugarcane crusher.***

4. ***That the Petitioner be and is hereby ordered to account for the one acre jaggery plot proceeds in respect of L.R. NO. ISUKHA/ILEHO/491.***

5. ***That the Petitioner be and is hereby ordered to comply by the ruling of court to pay beneficiaries Kshs.115,000/= in respect of their share of parcel No. ISUKHA/SHITACHI/1104 account for the proceeds got from sale of sugarcane crusher.”***

12. Why has that order not been executed if there was non-compliance? The simple issue is non-payment of a liquidated sum of money and I see no bar to the Applicant executing in the usual manner for recovery of that sum.

13. The Succession Cause herein has been pending before this court since 1988 and the only outstanding issue would seem to be the Kshs.115,000/=. To my mind, a review of orders made eleven years ago, by consent of parties for reason of non-payment of that sum would be an abuse of the court process and I decline to act in connivance with the Applicant.

14. The Application dated 30.10.2009 is completely misguided and is dismissed with no order as to costs.

15. Orders accordingly.

***Delivered, Dated and Signed at Kakamega this 17<sup>th</sup> day of March, 2011.***

**ISAAC LENAOLA  
J U D G E**