



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 2 of 2009

PETER MUCHIRI MUNYUKO.HEIR/PLAINTIFF

(Applying on his own behalf and on behalf of his

Brother and step brother's children)

VERSUS

HON. ATTORNEY GENERAL.....DEFENDANT

R U L I N G

1. By his Amended Chamber Summons dated 30/07/2009 expressed to be brought under Sections 98 and 3A of the Civil Procedure Act, the Applicant Peter Muchiri Munyuko, who describes himself as the 1st heir, prays for orders:-
 1. *THAT this Honourable Court do authorize the Registrar of High Court or such other person as it may deem appropriate to execute all the necessary documents to facilitate subdivision of Land Reference No. Loc. 16/Kimandi/Wanyaga/143 registered in the name of MUNYUKO MUCHIRI (DECEASED).*
 2. *THAT this honourable court do authorized the Registrar of the High Court or such other person as it may deem appropriate to execute the necessary application for Land Control Board and the Transfer of Joseph Muchiri Munyuko (Deceased) and Kimani Munyuko (deceased) in accordance with the certificate of succession issued by the Kandara District Magistrate Court on 20th December, 1966. (sic)*
 3. *THAT the cost of carrying out the sub-divisions and transfer be borne by the heirs hereof.*
 4. *THAT the cost of this Application be provided for.*
2. The application is based on grounds that some of the family members of the family of Munyuko Muchiri (now deceased) have tried to take away part of the Applicant's share of the deceased's estate and thereby caused a long delay in obtaining the title deed in respect of the Applicant's portion of land. The Applicant prays that LR No. Loc 16/KIMANDI/WANYAGA/143 be sub-divided and distributed according to the Certificate of Confirmation of Grant. The application is also supported by the Applicant's sworn affidavit dated 30/07/2009. The affidavit reiterates the contents of the grounds on the face of the application.
3. The application is opposed by the Defendant who filed Grounds of Opposition dated 4/08/2009 on the 11/08/2009. The grounds are:-

1. *THAT the said application is fatally defective and should be struck out with costs.*
 2. *THAT the Applicant as appearing in the application does not have legal capacity to file the instant application having donated his powers to another through power of Attorney.*
 3. *THAT the defendants as sued are not proper parties to the suit.*
 4. *THAT the honourable court is functus officio having confirmed the grant on 20th December, 1966 and the matter in question falls squarely outside the jurisdiction of the honourable court.*
 5. *THAT the application is incompletely (sic) before this court; it is incurably defective, scandalous, frivolous, vexatious and an abuse of the court process and that the same should be struck out with costs to the defendants.*
4. The Applicant appearing in person submitted that he is the son of the late Munyuko Muchiri and that Muchiri's brothers have also all died and hence this application. The Applicant also submitted that he was making the application in good faith.
 5. Miss Gichobi counsel for the Respondent submitted that the Applicant has no legal capacity to bring this application, having donated his powers to Edward Maina Mwangi. There is on the file a copy of a Power of Attorney executed by the Applicant herein in favour of Edward M. Maina Mwangi of Edoonma Agencies and Enterprises. The Power of Attorney is dated 29/10/2008. By the said Power of Attorney the Applicant authorized the donee to, among other things sue for the Applicant in any of the courts of law on the Applicant's behalf. There is no other document exhibited by the Applicant to show that the said power of attorney has been withdrawn.
 6. Miss Gichobi also submitted that the Applicant did not comply with section 13A of the Government Proceedings Act, Cap 40 which requires anyone wishing to sue the Government to give a 30 days' notice upon the Honourable the Attorney General before commencement of any such proceedings. Miss Gichobi relied on two authorities:- **Nairobi HCCC No.2714 of 1987 – Hudson Laisa Walimbwa –vs- Attorney General** and **Nairobi HCCC No. 937of 1998 – Damaris Wangare Gitau & 2 Others –vs- The Attorney General & 2 Others**. In both cases, the courts held that in the absence of the notice required under section 13A of Cap 40, no suit against the Government can lie. In the **Hudson Laisa Walumbwa** case that was cited with approval by Ojwang J in the **Damaris Wangari Gitau** case Ringera J (as he then was) said the following concerning section 13 of the Government Proceedings Act:

“Section 13 of the Government Proceedings Act is in clear mandatory terms that do not permit of any excuses or exceptions. Its plain meaning, to my mind, is that no proceedings against the Government, under the Government Proceedings Act, can lie or be instituted before the statutory notice has been given and expired. The dictionary meaning of the word lie in this context is, according to The Concise Oxford Dictionary, 8th edition, “be admissible or sustainable”. A suit which does not lie cannot be tried by a Court of Law. This Section (S.13) is not in the nature of a statutory period of limitation which must be pleaded and which could be waived by the defendant expressly or by conduct. It is in the nature of a substantive peremptory bar to the institution and trial of a suit filed in disregard of its requirements. The Attorney General cannot waive it. Neither can the court. And it matters not why it was not complied with. As a point of substantive law, the defendant may or may not plead it.”
 7. Miss Gichoki further submitted that the Applicant's application is not based upon any known law; that the court is functus Officio in view of the fact that the Grant of Letters of Administration have already been confirmed and the deceased's property distributed pursuant to that confirmation. Miss Gichobi also submitted that after the Confirmation of the Grant of Letters of Administration to the estate of Munyuko Muchiri, there is no longer a property known as LR Loc. 16/Kimandi/Wanuaga/143 in the name of Munyuko Muchiri. It was also Miss Gichobi's contention that the Applicants application is time barred in view of the fact that the Grant of Letters of Administration was confirmed way back on 20/12/1996. Miss Gichobi urged the court to dismiss the application with costs to the Respondent.
 8. The facts of this case are clear. Munyuko Muchiri died on 8/02/1963 due to advanced age and age-related complications. That the said Muchiri had 3 wives and sons among them the Applicant. That the deceased was the registered owner of the suit land measuring

21.22 acres. That the suit land was shared out among the three sons of the deceased, namely Joseph Muchiri Munyuko (51/2 acres) Kimani Munyuko (3.1 acres) and Peter Muchiri Munyuko, the Applicant herein, got the balance of the suit property. The distribution was admittedly done on 20/12/1966.

9. The court has considered the facts and the law as highlighted by counsel for the Respondent. The court is satisfied from the above that the matter herein is concluded; that the Applicant got a share of the estate of his later father; that the Applicant has no capacity to bring this application; that the application is incompetent and cannot lie by reason of failure on the part of the Applicant to comply with the provisions of section 13 of Cap 40 Laws of Kenya. The court is of the view that if the Applicant was aggrieved by the distribution of the deceased estate, he should have followed the right procedure to question the distribution and should have done so within time.
10. In the premises the Applicants application dated 30/07/2009 is without merit. The same is dismissed with no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 5th day of March, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Edward Maina Mwangi (Plaintiff in Person) for the Plaintiff/Applicant

Mr. Cherogony for Gichobi (present) for the Respondents

Weche - court clerk