



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

Succession Cause 161 of 2002

M'NYANGE M'IMANYARA PETITIONER/RESPONDENT

VERSUS

M'RARAMA M'TURUCHIU.....OBJECTOR/APPLICANT

Civil Procedure & Practice

- v Review – power of – of High Court – grounds which High Court will grant review.**
- v Stay of orders – grounds for stay.**
- v Law of Succession Act Cap 160 Laws of Kenya) – power of court to make orders in matters of Succession – s. 47 and Probate and Administration Rules rules 63 and 73**

RULING

By an application dated 8th January 2009 the Objector in the Succession Cause and the applicant herein seeks the following prayers:-

- (a) an order of stay of the orders in the courts Judgment dated 13th March, 2008,**
- (b) review its order dated 13th March 2008 on the grounds that-**
 - (i) there is sufficient cause to warrant the review of the judgment in view of the courts findings;**
 - (ii) it is fair and just that the land be shared equally between the two parties in view of the evidence on record and the court's findings;**
 - (iii) the deceased's widow does not reside on the disputed land and there will be a further dispute as to what each party occupies;**

The application was also supported by the affidavit of the Applicant sworn on 8th March 2009 and reiterated the above grounds that there is sufficient cause to review the judgment and order that Title **No. ABOTHUGUCHI/KATHERI/690** be shared equally between the parties, and that such review will

forever put the dispute between the parties to rest and each party will feel satisfied with the court's distribution if it is done equally.

The Petitioner who is the Respondent in this application opposed the application and in a Replying Affidavit sworn and filed on 11th February 2009, the Respondent in essence denies that there were any grounds for review (paragraphs 3 & 4) of the Replying Affidavit, that there has been inordinate delay to bring the application and that it is an afterthought after the Respondent refused the objector to go with a private surveyor to sub-divide the land instead of the District Surveyor as ordered by the court (paragraph 5), that land should be shared in the proportion in which it is currently occupied (paragraph 6) and finally that the Petitioner's daughter Alice Kingaru, lives and cultivates three-quarters of the land. She (the Petitioner herself) does not live on the land because of threats and fear for her life posed by the objector and his kin (paragraph

Finally the Petitioner/Respondent depones on advice from her Advocate on record that in law, there have arise no circumstances which may render the court to disturb its earlier judgment which in all aspects appears just and reasonable.

Those respective grounds, and averments were reiterated by Mr. Rimita learned counsel for the Objector/Applicant and Mr. Mburugu learned Counsel for the Petitioner/Respondent when the application was urged before me on 29th June 2009. The application was premised upon the triple provisions of Section 47 of the Law of Succession Act (Cap 160, Laws of Kenya) rules 63 and 73 of the Probate and Administration Rules and Order XLIV of the Civil Procedure Rules.

Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules are jurisdictional provisions which confer upon the court, **firstly** jurisdiction or competence to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient, (Section 47 of the Act), and **secondly** reiterate the court's inherent competence and jurisdiction likewise to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Rule 63 of the Probate and Administration Rules on the other hand is a procedural and practice rule which incorporates the application of specified orders of the Civil Procedure Rules including Order XLIV thereof (relating to review of orders or decrees of the court). One of the Civil Procedure Rules not applied to matters of succession is Order XLI (Appeals) which provides for stay of proceedings orders or decrees under rule (4) thereof. In the absence of the application of that Order and rule, the court would fall back to the jurisdictional provisions of section 47 of the Act, and 73 of the Probate and Administration Rules.

Considering the first prayer, a stay of the orders in the judgment Mr. Rimita learned counsel for the Object/Applicant did not cite any authority in support of that leg of the application. In my own view the consideration for making an order of stay in a succession cause would not be different from that of any other civil matter or action. These considerations would **inter alia** be;

- (1) substantial loss may result to the applicant unless the order is made,
- (2) the application has been made without unreasonable delay.
- (3) such security as the court may order for the due performance of the decree or order which may ultimately be mending on him has been given by an applicant;

No such grounds were canvassed by Mr. Rimita on behalf of the Objector. That leg of the Application has no basis at all and must therefore fail and it is so ordered.

Would the second leg of the application, review fair any better? The grounds for review are set out in Order XLIV Rule 1(I) of the Civil Procedure Rules and applied to matters of succession by rule 63 of the

Probate and Administration Rules. These conditions are:-

- (1) discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge or could not be produced by the applicant at the time when the decree was passed or order made or
- (2) a mistake or error apparent on the face of the record, or.
- (3) any other sufficient reason;

There is no new important matter or evidence discovered by the applicant, there is also no mistake or error apparent on the face of the record. The applicant seeks a review on the ground of “**other sufficient reason.**” Mr. Rimita referred to the case of **KIMITA VS WAKIBIRU** [1985] K.L.R. 317 where the Court of Appeal held **inter alia** that the third head under Order XLIV rule 1(1) of the Court Procedure Rules enabling a party to apply for review “**for any other sufficient reason**” is **not necessarily confined to the kind of reasons stated in the two preceding heads in that sub-rule which do not form a genus or class of things analogous to that general head**”.

Whereas I with respect, agree with that holding, an applicant for review on the ground of “**any other sufficient reason**” must establish that sufficient reason. In **KIMITA VS WAKIBIRU** (supra), the discovery of the actual acreage on survey was the sufficient other reason.

In this case, what the applicant refers to as sufficient other reason, is what the applicant has always desired, the land be shared equally between the two parties, and that in any event the Petitioner Respondent does not reside on the disputed land. These are matters which the Objector/Applicant has always known and in any event the Petitioner has a daughter living on the land and the fact that she (the Petitioner’s/Respondent) lives elsewhere is not sufficient reason for sharing the land equally.

The Objector/Applicant avers in paragraph 6 of his supporting Affidavit that the court made findings which were supported by law “**but unfortunately missed the issue of “equitable distribution.”** Now what is equitable? Equity is not synonymous with equality or sharing land or property on a fifty: fifty basis. It means fairness, impartiality. For instance in divorce matters equitable distribution of the marital property merely entails a fair but not necessarily equal allocation of the property.

In the matter at hand after analyzing the evidence before me, and the law and precedent availed to me I found that the most **equitable** way to distribute the suit land **ABOTHUGUCHI/GITHONGO/815** was for each, (the Petitioner/Respondent herein) and the Objector (Applicant herein) to retain the portions they occupy and have developed. No sufficient reason has been shown for me to review and change or alter that order.

For those reasons, the Objector’s/Applicant’s Notice of Motion dated and filed on 8th January 2009 is dismissed with costs to the Petitioner/Respondent.

There shall be orders accordingly.

Dated, Delivered and Signed at Meru this 31st day of July 2009

ANYARA EMUKULE

JUDGE