



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION 39 OF 2003

**IN THE MATTER OF THE ESTATE OF LATE GLADYS
GACHERI.....DECEASED**

DAVID NDUMBA MUGUONGO.....PETITIONER

V E R S U S

DAVID MURITHI.....OBJECTOR

THE LAW OF SUCCESSION

Stay of Orders Inherent power of the Succession Courts s.47 of the Law of Succession Act, (Cap 160 Laws of Kenya) and Rule 73 of the Probate and Administration Rules. Order XLI of Civil Procedure Rules inapplicable.

R U L I N G

By a Ruling dated, signed and delivered on 17th October 2007, and entitled **Ruling on Distribution** the Hon. Mr. Justice Lenaola, distributed the estate of the late Gladys Gacheri (deceased) among the Petitioner and the Objector equally, but instead of distributing the Objector's portion directly to him, the court distributed objector's portion to his sons (one Erick Mbaabu, and Samuel Mwiti) in accordance with the wishes of the deceased.

Unhappy with the said mode of distribution of the deceased's estate the Objector has filed **Civil Appeal No. 277 of 2007**. Having done so, Objector has now come to this court by way of a Chamber Summons under a certificate of urgency dated and filed on 29th February 2008 and seeks the orders following:

- (1) A stay of execution of its orders of distribution made on 17th October 2007 in respect of title No. NYAKI/KITHOKA/762 pending the hearing and determination of the Objector's/Applicant's Appeal by the Court of Appeal.
- (2) An inhibition be placed on Title No. NYAKI/KITHOKA/762 pending the hearing of the said Appeal.

The Application is supported by the Affidavit of the Objector/Applicant, David Muriithi and the grounds set out on the face of the application. The Petitioner/Respondent (M. David Ndumba Muguongo) has opposed the Application by his Replying Affidavit sworn on 11th March 2008 and filed on 12th March 2008. The issue is really one, whether or not the court should grant the two prayers, and if so on what basis or grounds.

During argument on the application Rtd. Justice Rimita, learned Counsel for the Objector/Applicant relied upon the Court's inherent jurisdiction as set out in Section 47 of the Law of succession Act, (Cap 160 Laws of Kenya) and Rule 73 of the Probate and Administration Rules made under the said Act. He also relied upon the decision of Hon the Justice Lenaola, in **Guido Kanyangi Nabea vs Chairman Board of Directors Miathene Sub-District Hospital (Meru H.C.C.C. No. 36 of 2006)** where the learned Judge allowed a stay of proceedings pending the determination of an appeal on a preliminary point of law.

On his part Mr. Manasses Kariuki Karoki, learned counsel for the Petitioner/Respondent relied upon the principles set out in Order XLI rule 4(1) & (2) of the Civil Procedure Rules for seeking and granting a stay of execution of the court's Ruling of 17th October 2007, and relied upon the case of HALAI & ANOTHER VS THORNTON & TURPIN (1963) LTD. [1990] K.L.R. 365 where the Court of Appeal (Gicheru J.A.(as he then was) and Chesoni & Cockar JJA) held inter alia that – “the High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions namely:-

1. the applicant shall establish a sufficient cause,
2. the court must be satisfied that substantial loss would ensue from refusal to grant a stay and
3. the applicant must furnish security and application must of course be made without unreasonable delay.

As noted above, the application for stay of execution of the Courts order in this matter is premised upon the provisions of Section 47 of the Law of Succession Act, and Rule 73 of the Probate and Administration rules which respectively say-

s.47 The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

PROVIDED that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.'

And Rule 73 aforesaid says:

73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

For comprehensiveness of this Ruling reference is also made to Rule 63 of the Probate and Administration Rules which expressly applies orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX of the Civil Procedure Rules made under the Civil Procedure Act, (Cap 21 Laws of Kenya), and the High Court (Practice and procedure Rules, made under the Judicature Act, Cap 8, Laws of Kenya). In other words, Order XLI Rule 4 (1) & (2) of the Civil Procedure Rules, the basis of the Court Appeal decision in HALAI & ANOTHER THORNTON & TURPIN (1963) Ltd, and that decision, have no application to matters covered under the Law of Succession Act. It is thus incompetent to rely on the said Order, or authorities based on the said order.

For the same reason the authority of **GUIDO KANYANGI NABEA VS CHAIRMAN BOARD OF DIRECTORS, MIATHENE BOARD OF DIRECTORS, MIATHENE SUB DISTRICT HOSPITAL.** (supra) has equally no application in this matter. The matter in that case concerned an

ordinary civil appeal, and not a succession cause. Having thus ruled out the application of Order XLI rule 4(1) & (2) of the Civil Procedure Rules, the court must fall back on its inherent and unfettered discretion **“to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders (s.47 supra) as may be necessary “*for the ends of justice*”.....(rule 73 supra)**

By the Ruling of 17th October 2007, this court distributed the suit land (Title No. NYAKI/KITHOKA/762) equally among the Petitioner and the Objector. For the reasons given by the learned judge, the half portion which the Objector hoped would go to himself was distributed directly to his sons. This was all done in fulfillment of the oral wishes of the deceased, the owner of the suit land. This is what the learned judge said in paragraph 8 of his **Ruling on distribution** the subject of the Appeal-.

8. I should say one more thing Muriithi has suffered no prejudice as his sons who traditionally would still have inherited his land have been secured by the deceased and this court must uphold those wishes as it is lawful mandate. Muriithi may not much like it but sadly, on the law and facts, his claim must not be sustained. In the end I shall order distribution of Title number NYAKI/KITHOKA/672 as follows:-

- (i) David Ndumba Muguongo – ½**
- (ii) Erick Mbaabu - ¼**
- (iii) Samuel Miriti - ¼**

I do not see why the sub-division of the land would complicate the issue if the Objector/Applicant should succeed in his appeal, the land would be still be there. The sub-division could be reversed or consolidated, of course at a cost. It cannot however in justice be said that the Objector stands to suffer any harm, loss or prejudice if the orders sought are not granted. On the contrary I think the Petitioner who has the no share of the land stands to suffer greatly if he were excluded from the land for another at least three or more years pending the determination of the appeal.

I therefore see no merit in this application and the Chamber summons dated and filed on 29th February 2008 is dismissed with costs to the Petitioner/Respondent.

There shall be orders accordingly.

Dated signed and delivered this 25th day of July 2008

M. J. Anyara Emukule

Judge.