



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

**Succession Cause 91 of 1994**

**IN THE MATTER OF THE ESTATE OF**

**STEPHEN RURI RUHIU alias RURI MUNYIRI - DECEASED**

**AND**

**LYDIA MUKUHI RURI .....PETITIONER**

**VERSUS**

**MUNYIRI RURI .....OBJECTOR**

**R U L I N G**

Before me is an application expressed to be brought pursuant to rule 73 of the Probate and Administration Rules. It is a chamber summons application in which the applicant in the main seeks that “...the respondent’s protest sworn on 21<sup>st</sup> June, 2005 be struck out...”

The application is brought on the grounds that:

- (a) **The issue of distribution in the succession cause was determined by Mathira District Officer by consent of the parties herein.**
- (b) **The schedule on the applicant’s application dated 25<sup>th</sup> August, 2004 for confirmation of grant is based on issues agreed upon by the parties.**
- (c) **The respondent has never appealed against the award of the Mathira District Officer the basis of the applicant’s application for confirmation.**
- (d) **The respondent’s protest is only raising issues which have been agreed upon and is therefore frivolous.**
- (e) **The said protest is an abuse of the court process and should be struck out.**

The application was further supported by the affidavit of **Munyiri Ruri**, the applicant in which in the main he gives the historical background of the matter and expounds in detail the grounds in support of the application. Suffice to say that the applicant and the protestor are joint administrators of the estate of **Stephen Ruri Ruhiu (deceased)**. It was the protestor who in fact petitioned this court for the grant of letters of administration on 18<sup>th</sup> October, 1995. Thereafter the applicant objected and on 16<sup>th</sup> May, 1997

Temporary Letters of Administration were issued by this court to both the applicant and the protestor. When it came to the confirmation of the grant the two parties agreed by consent to refer the issue of distribution of the deceased estate to the District Officer, Mathira Division for determination: The District Officer duly heard the matter and made an award which was then filed in this court on 4<sup>th</sup> November, 1999. Thereafter the protestor applied to have the award set aside on various grounds. However the said application was on 8<sup>th</sup> May, 2000 dismissed by **Justice Juma** for non-attendance. Thereafter the applicant applied to have the District Officer's award adopted as the judgment of this court. On 10<sup>th</sup> May, 2001 **Justice Juma** again entered judgment terms of the award. Following entry of judgment counsels on both sides; that is to say **Kebuka Wachira** for the applicant and **S.M. Wahome** for the protestor entered a consent to have the surveyor by the name **M/S Munyoro Site Surveying Limited** visit the suit land and pick the boundaries as per occupation by the parties and in accordance with the judgment of this court dated 10<sup>th</sup> May, 2001. A duly signed consent to that effect was filed in this court on 22<sup>nd</sup> September, 2003. The surveyor having executed his mandate, the applicant on 26<sup>th</sup> August, 2004 filed summons for confirmation of grant based on the judgment and the scheme that the surveyor had come up with. It was then that the applicant was surprised with a protest on 21<sup>st</sup> June, 2005.

In his submissions in support of the application, **Mr. Wachira** stated that the protest seeks to reopen matters already canvassed and determined. In so doing, the protestor is blaming people who are not even parties to the proceedings. Counsel submitted that in the protest, the protestor has not demonstrated how the estate should be distributed and has not challenged what has been done so far.

In response, the protestor who appeared in person chose to rely on her replying affidavit. She also submitted that she wanted another surveyor to re-do the work, preferably a government surveyor from Nyeri. Finally, the protestor submitted that the land should be sub-divided into two equal shares so that each of the two houses gets an equal share.

In her replying affidavit, the protestor seems to blame all that has befallen her on the counsel for the applicant; yet she had her own lawyer throughout the proceedings in this court. She also faults the District Officer's award for failing to specify the mode of distribution of the estate of the deceased. She further depones that she could not have appealed against the award and or judgment as they were defective. As regards the consent to have the suit land surveyed, the protestor depones that she was not aware of the consent involving the two lawyers on record for the protagonists.

Having carefully considered the application, the supporting affidavit and the annexures thereto as well as the replying affidavit and the submissions of counsel for the applicant and the protestor in person, I wish to make the following observations.

The parties to this suit agreed that the issue of distribution of the deceased's estate would be handled by the District Officer, Mathira with the assistance of the elders. I have looked at the proceedings and the award and I must say, the DO handled the task commendably well. He had the testimony from both sides and thereafter authored the award. In the award he gave reasons why it may not be possible to have the suit land shared equally between the two houses as demanded by the protester. The deceased had given a portion of the same land to his nephews who have developed the same. Much as the protestor was dissatisfied with the award and made efforts to set it aside, she was nonetheless unsuccessful as the application was dismissed. It does appear that the protestor was then satisfied with the outcome as in a letter dated 19<sup>th</sup> December, 2000 to the chief Justice complaining about unavailability of this court file she specifically said and I quote,

**“... That I had filed an application to set aside the award of the D.O. vide an application dated 3<sup>rd</sup> September 1999 which came up for hearing on 8<sup>th</sup> may, 2000 when the ruling of the application was delivered by the honourable Judge it was dismissed with no order as to the cost and I was satisfied with the orders....”**

If the protestor was satisfied with the orders, it meant that the distribution of the estate would be as per D.O's award. How then can she turn around and plead ignorance and assail the lawyer for the applicant

for all manner of ills. This conduct is in my view despicable. Feigning ignorance on the part of the protestor on the goings on in this case is clearly an afterthought designed to achieve ulterior motives.

Once the award was adopted as a judgment of the court, the protestor's lawyer and the applicant's lawyers agreed and consented to have the award enforced on the basis of a surveyor's report. It is the protestor's case that her counsel had no instructions to enter such a consent. That may well be so. However as at this time, her lawyer was still on record acting for her. He had her full instructions to act in her best interest. From what I have read on the record, I do not discern any misconduct on the part of the protestor's counsel that would have compromised her interests. How could a mere act of picking and marking boundaries have compromised her interest if such an act was in accordance with D.O's award? I have looked at the surveyor's report and it does not at all depart from the D.O's award. Further if indeed the protestor's counsel acted without instructions in entering the consent, that is not reason enough to set aside the award. The protestors remedy lies elsewhere against the counsel. A consent order can only be set aside, in my view if it was obtained by fraud or mistake which is apparent on the face of the record. That is not the case here. The protestor has gone further to accuse her own counsel of forgery. If indeed her counsel committed a forgery, how come that the protestor has not taken up the matter with the police for appropriate coercive and remedial measures?

The protester claims that the award from the D.O Mathira was totally defective and could not have been relied upon by this court because it did not specify the mode of distribution of the estate of the deceased. Nothing can be further from the truth. Having carefully considered the award, I am satisfied that the same was capable of enforcement. Even assuming for purposes of argument that the protestor was right in his allegation, I do not think that his remedy lies in re-opening up the matter all over again. There was nothing to stop her from seeking from court the interpretation of the award and if there was need for correction, that would have been entertained at that stage. I would also wish to point out that this same argument had been advanced in the application for setting aside the award by the protester, which as I have already indicated was dismissed. There is no point in regurgitating the same issue over and over again.

If the protester was unhappy with the award and or judgment of the court resulting there from, she ought to have appealed. The protester however takes at her own peril, the view that she could not have appealed against an award or judgment that was defective as it had not specifically given her a portion with measurements. I do not follow the argument. What other strong ground of appeal would have been than that the award and judgment was defective. By parity of reasoning, why should the matter be reopened if the award and or judgment are deficient!

All said and done, this cause having come this far, I think it will be in the interest of justice that this matter be wrapped up. Public policy requires that at some point there must be an end to litigation. That time I think has come as regards this matter. As correctly submitted by the learned counsel for the applicant, the affidavit of protest does not disclose any issue to be determined by this court. There is no need to send another surveyor to the suit land as the previous surveyor did a sterling job. If the only reason the protester seeks for a another surveyor to be despatched to the suit land is to have it divided into two equal shares so that each house can get its share, it may well be an impossible task. As already stated elsewhere in this ruling, the deceased had set aside a portion of the suit land for his nephews who have since developed them. In the new scheme contemplated by the protester, the nephews would be disinherited which act would run counter to the deceased's intentions and aspirations.

For all the foregoing reasons, I find the application dated 30<sup>th</sup> July, 2005 merited. As the protest raises nothing new and all the issues raised therein having been agreed upon by the parties involved all along I find that the protestor filed is an abuse of the court process and liable to be struck out. Accordingly the affidavit of protest by the protester dated 21<sup>st</sup> June, 2005 and filed in court on the same day be and is hereby struck out with no order as to costs.

***Dated and delivered at Nyeri this 26<sup>th</sup> June 2007.***

**M.S.A MAKHANDIA**

**JUDGE**