



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Succession Case 230 of 1998**

***IN THE MATTER OF THE ESTATE OF MACHARIA GATHIRU – DCD***

**AND**

**CHARLES MUTHOGA MACHARIA ..... APPLICANT**

**VERSUS**

**FRANCIS HEZEKIAH GICHUKI ..... RESPONDENT**

**RULING**

Charles Muthoga Macharia (hereinafter referred to as the applicant) has come to this court by way of a notice of motion said to be brought under Rule 73 of the Law of Succession Rules 53A of the Civil Procedure Act and Order L of the Civil Procedure Rules seeking Orders that:

*The Respondent be ordered to remove the structures lying on the access road leading to the applicant's land parcel Kirimukuyu/Mbogoini/961, alternatively and without prejudice: The Honourable Court do order demolition of all structures lying on the access road to land parcel Kirimukuyu/Mbogoini/961 and the Respondent to meet the cost of demolition.*

The application is grounded on a ruling delivered by this court on 6<sup>th</sup> December 1999 dismissing the Respondent's objection (or was it a protest?) to the distribution of the estate of his late father Macharia Gathiru deceased, and ordering the applicant and the Respondent to share Kirimukuyu/Mbogo-ini/184. It is the applicant's contention that the order has been executed and the aforementioned land sub-divided into two portions Kirimukuyu/Mbogoini/961 and 960 which have been registered in the names of the applicant and the Respondent respectively but that the Respondent has constructed some structures on the access road to the applicant's parcel No. 961 thereby making it difficult for the applicant to access his land.

The Respondent Francis Hezekiah Gachuki objects to the application maintaining that the grant of letters of administration intestate and the subsequent confirmations are null and void *abinitio* and ought to be set aside. Mr. Ngoge who appeared for the Respondent submitted that the application is mischievous as the applicant ought to file a suit if he is complaining of trespass and that the court should dismiss the application and order the right procedure of administration to be followed.

Having considered this application I find that it is improperly before this court as the same has been brought by way of a notice of motion a procedure only known under the civil Procedure Rules and not applicable under the Law of Succession Act. Further the application is said to be brought under Rule 73 of the Law of Succession Rules 53A of the Civil Procedure Act and Order L of the Civil Procedure Rules. There is however no rule known as Rule 73 of the Law of Succession Rules, nor is there section 53A of the Civil Procedure Act. As for Order L of the Civil Procedure Rules, the same is not one of the orders applicable to succession matters as provided under Rule 63 of the Probate and Administration Rules. The application before the court is therefore incompetent and I would dismiss the same.

Having said that, I must add that it is evident that the Respondent is deliberately ignoring the ruling of the court delivered on 6<sup>th</sup> December 1999 as he contends that the same is null and void. The Respondent has not denied the allegation that he has constructed structures on the surveyed designated access road to the applicant's parcel No. 961. The construction appears to be a deliberate attempt to frustrate the ruling of

6<sup>th</sup> December 1999 which the Respondent maintains is a nullity. The Respondent cannot however be allowed to ignore an order of the court. As long as the same remains in force the Respondent must respect the same. Under these circumstances the court moves *suo motto* under Rule 73 to the Probate and Administration Rules so as to meet the ends of justice by ordering the Respondent to remove the structures on the surveyed designated access to the road to the applicant's parcel No. 961 within 21 days from the date hereof failing which the applicant will be at liberty to remove the same.

***Dated signed and delivered this 28<sup>th</sup> day of March 2006.***

**H. M. OKWENGU**

**JUDGE**