

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE 47 OF 1971

IN THE ESTATE OF MWARI KABUTU DECEASED

M'MBOGORI M'MBUTU.....RESPONDENT/PETITIONER

VERSUS

REBECCA GAKU M'MWARI.....APPLICANT

R U L I N G

The applicant by a Notice of Motion dated 3.10.2003 sought among others that this honourable court be pleased to:-

- (a) *Place an order of inhibition in respect of Land Parcel No. Ntima/Igoki/1378 until the determination of this application.*
- (b) *Review the order dated 26.10.1971 transferring the above Land parcel to the respondent*
- (c) *Order the rectification of the Land Register by directing that the registration of the said land in the name of respondent be cancelled so that ownership of same will revert to the deceased Mwari Kabutu*

When the application came up for hearing on 14.7.2005, Mr. Nyaboga who represents the respondent raised what the court understood to be preliminary objections in points of law. They included the following:-

- (1) *That the applicant's application is fatally defective because it is brought under Civil Procedure Act and Rules i.e S.80 and SS.128 & 143 of the Registered Land Act Cap 300 and Order XLIV rules 1(a) and 4(1) of Civil Procedure Rules, instead of being brought under the provisions of the Succession Act, Cap 160 of the Laws of Kenya*
- (2) *That the Further Affidavit sworn by the applicant on 23.3.2005 wrongly depicts the Land Registrar Meru who is not a party as the plaintiff and Mwari Kabutu as a defendant.*

He argued that both the Land Registrar and Mwari Kaburu, are strangers to this suit. For the above reasons, he sought that the Further affidavit should be struck out and the application should as well be struck out.

Mrs. Ntarangwi for the applicant admitted that the application was indeed brought under Civil Procedure Act and Rules and under Cap.300. She said that the procedure followed was right since the Succession Act came into effect much later and that it was the earlier procedure which was being followed under Cap 300, which demanded that the Land Registrar was to be made party and the deceased to be made a defendant. This is what the applicant did in this matter, she argued.

I have carefully considered the preliminary points raised. Mr. Nyaboga promised the court that he would submit some legal authority to support his position but did nothing about it. Otherwise he merely raised the two points in a very raw manner but totally failed to argue them reasonably and substantively. It is not enough for a party to raise such important points of law, whip them on the face of the court and sit back waiting for favourable results. Mr. Nyaboga had to persuade the court that his points had substance upon which the court could rely on. Having failed to do so, this court has no alternative but to

dismiss these points of law raised by the respondent and order that the main application be fixed for full canvassing. This means that Mr. Nyaboga wasted court's and respondent's time. The respondent will pay will the courts and applicant's costs. Applicants costs are assessed by court at Kshs.3,000/=. Orders accordingly.

DATED AND DELIVERED AT MERU THIS 22ND DAY OF SEPTEMBER,2005

D. A. ONYANCHA,

JUDGE