



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC PETITION NO. 5 OF 2014**

**BERANO M'MWITHIGA M'ARAUKI.....PETITIONER**

**VERSUS**

**DISTRICT LAND ADJUDICATION & SETTLEMENT**

**OFFICER TIGANIA EASH & WEST.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**PETER IMATHIU .....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application dated **12<sup>th</sup> March 2012** seeks review of the orders made on **14<sup>th</sup> July 2020**. The same is supported by grounds on its face and a supporting affidavit sworn on **12<sup>th</sup> March 2021** by **Barano M'Mwithiga M'Arauki**. The main ground is that the applicant has filed a citation in **Tigania PMC Misc succession Cause No. 63 of 2019** for the 3<sup>rd</sup> respondent's son to refuse or accept appointment as an administrator.
2. The application is opposed through a replying affidavit sworn on **19.7.2021** by the 3<sup>rd</sup> respondent's counsel, **Mr. C.P. Mbaabu advocate** in which he has attached a death certificate showing his client passed on **1.4.2018**. He avers the suit abated by operation of law and that the alleged citation has never been served upon the cited **Bernard Kibari**. He urges the court to find the application lacking merits or basis in law.
3. On the side of 1<sup>st</sup> and 2<sup>nd</sup> respondents, indication was made before the court on **29.9.2021** by **Mr. Kieti advocate**, that they were not opposing the application.
4. The petition herein was filed on **31.3.2014** seeking to impugn the 1<sup>st</sup> respondent's decision made on **22.10.2013** over **Parcel No. 1472 Ankamia Adjudication Section**.
5. The 3<sup>rd</sup> respondent opposed the petition largely on the basis that the correct procedure would have been to file a Minister's appeal under Section 29 of Cap 284 instead of a petition.
6. A preliminary objection to that effect was heard and dismissed on **30.12.2008** at which time apparently the 3<sup>rd</sup> respondent was already dead. On **13.5.2019** the court was notified of the death and the applicant was given more time on various date between **24.9.2019, 28.11.2019, 19.2.2020** and **25.6.2020** leading to a ruling on **14.7.2020** in which the court pronounced itself on abatement of the suit against the 3<sup>rd</sup> respondent. No appeal was ever made over the abatement order.
7. On **28.10.2020**, parties agreed by consent to file written submissions with regard to the main petition with a mention date for **9.2.2021** to confirm compliance. To date no party including the petitioner has ever complied with those directions.
8. With the above background I now turn to the application. In an application for review of an order, the applicant must meet the prerequisites namely discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not have been procured by him at the time the order was made or for any other sufficient reason.
9. The reasons given in this application are that a citation was allegedly filed on **5.12.2020**. The said citation is also captured in the court's ruling of **14.7.2020**. Consequently this court finds no new evidence or material to warrant review of its previous orders.

10. Secondly, the application is made under **Order 12 rule 1**. Assuming this was a typing error and the applicant meant **Order 31 rule 1** which refers to suits against administrators of estates there is no order brought to the attention of the court regarding **Tigania PMCC No. 63** of 2019 appointing a legal representative of the 3<sup>rd</sup> respondent.

11. On the aspect of reviving or reinstating a suit which has abated, **Order 24** is the one governing such a scenario and which the applicant has not invoked that Section. In any event, the issue is now **res judicata** given the ruling of 14.7.2020.

12. The applicant has not suggested the name of the person to be made a party as per **Order 24 rule 1**. The application must also be made within a year upon the demise of the party. This application ought to have been made by **30.4.2019**. However under **Order 24 rule 3** there is a proviso that the court may extend the period for a good reason.

13. In this application there is no such request for extension of the period, and even assuming this court was to invoke the overriding objective under **Section 1A, 1B and 3A** of the **Civil Procedure Act** as read together with **Article 159** of the **Constitution**, the applicant has not given any sufficient reason why the citation has not been prosecuted one way or the other for close to over 3 years.

14. Further this court ordered the disposal of the main petition by way of written submissions. There has been no compliance at all with those directives.

15. This is obviously an old matter. The record indicates it was filed on **31.3.2014**. Interim orders were issued on **2.4.2014**. The petition was filed under the provisions of **Article 22** of the Constitution. **Rule 3 of the Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** provides the overriding objective is to facilitate access to justice as per **Article 48** and shall be interpreted as per **Article 259 (1)** so as to advance the bill of rights, values and principles in **Article 10**. While exercising its jurisdiction under the rules the court shall facilitate the expeditious, just, proportionate and affordable resolution of all cases, by just determination, efficient use of the available judicial and administrative resources, timely disposal of proceedings at a cost affordable manner and use of appropriate technology.

16. **Rule 3 (8)** thereof states:

***“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.”***

17. In this petition, the record shows there has been blatant disregard of court directions leading to delay of the matter. The court has been very lenient to the petitioner including granting interim orders for over seven years. The petitioner has had more than enough time to enjoin the intended legal representative and or file written submissions since in a petition the law allows petitions to be determined through affidavit evidence. The deceased 3<sup>rd</sup> respondent had sworn before his demise, a replying affidavit.

18. In **Counties Efficiency in Democracy –vs- Kenya Airports Authority Ltd. & Another interested Party one Way Cleaning Services Ltd. & 2 Others [2018] eKLR Mumbi Ngugi J.** as she then was now Judge of Appeal held thus:

***“The court record indicates a party who has no interest in pursuing its claim, such as it is and has taken advantage of the indulgence of the court to engage both the court and the respondents in a circus that should not be permitted to continue.”***

19. My finding is the petitioner has taken advantage of the situation to endlessly delay the matter yet he has been enjoying interim orders for over seven years now. To accede to the prayers sought in the motion is to allow abuse of the court process to continue.

20. I disallow the application dated **12<sup>th</sup> March 2021**, vacate the interim orders issued on **2<sup>nd</sup> April, 2014** and dismiss the petition dated **29<sup>th</sup> March 2014** for non-prosecution with costs to the respondents.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2021**

**IN PRESENCE OF:**

**MUTISYA FOR 3RD RESPONDENT**

**KIETI FOR 1ST AND 2ND RESPONDENTS**

**MAITAI RIMITA ADVOCATES – ABSENT**

**COURT ASSISTANT - KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**