



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**SUCCESSION CAUSE NO.212 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE INANGA EMONGI (DECEASED)**

**LOISE MUTHONI GITONGA.....APPLICANT**

**VERSES**

**JAMES KABII MIRITL.....RESPONDENT**

**RULING**

1. The summons by the applicant dated 14<sup>th</sup> September 2020 pray that this court do review its judgement dated 28<sup>th</sup> May 2019 by distributing the estates properties as well as rectifying the grant. The application is supported by the affidavit of the applicant sworn on the same day.
2. The grounds raised by the applicant on behalf of herself and her house is that the judgement cannot be implemented as it is and this has necessitated her to undertake a valuation of all the estates properties. Based on her valuation this court should proceed to adopt the same and distribute the estate appropriately.
3. As regards her house which is the 2<sup>nd</sup> house it was her opinion that they are not interested with the properties in Meru. She urged the court to adopt her proposal which to her was reasonable in the circumstances.
4. The respondents replying affidavit sworn on 5<sup>th</sup> October 2020 opposes the application on the grounds that the applicant has already preferred an appeal against the judgement of this court and has in fact obtained stay of the same pending the determination of the intended appeal. For that reason, therefore this court has no capacity to entertain the application till the appeal is heard and finalised.
5. The respondent has however given his proposal on how the estate ought to be shared and he departs from the view of the applicant that the Meru properties should be taken solely by the 1<sup>st</sup> house and the Lodwar by the 2<sup>nd</sup> house. He was however amenable to having this court determine the distribution.
6. The court has heard the parties and when the matter came up for determination the parties were in agreement that the court proceeds to share them out. The legal challenge raised by the respondent namely that the court cannot review its order while an appeal is pending is true.
7. The provisions of **Order 45(1) of the Civil Procedure Rules** are clear as well as many other authorities. The same states as follow.

***(1) Any person considering himself aggrieved—***

***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”***

8. In effect whereas this court could have easily determined the application the applicant has already filed a **Notice of Appeal dated 6<sup>th</sup> June**

2020 and by the ruling of this court dated 10<sup>th</sup> March 2020 this court granted orders of stay pending appeal.

9. To the extent that the above orders are existing especially the pending appeal, this courts hands are tied. The law does not permit the court to make any review of its decisions while the matter is pending at the Court of Appeal. The only option is for the parties to reach a consensus or the applicant to withdraw the Notice of Appeal and thereafter proceed to request the court to review its decision.

10. For the above reason the application is struck out with no order on costs.

**Delivered, Signed and Dated at Kitale this 11<sup>th</sup> December 2020**

**H. K. CHEMITEI**

**JUDGE**