



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 97 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE M' NDATHO M' NABEA ALIAS NDATHO NABEA ALIAS JOSEPH M' NDATHO M' NABEA (DECEASED)**

**CECELIA MUKOMUGA.....PETITIONER**

**-Versus-**

**GEOFFREY MUTHAMIA KIAMBI.....1<sup>ST</sup> RESPONDENT**

**PETER MUTUA RUTERE.....2<sup>ND</sup> RESPONDENT**

**JUSTUS MURERWA M'AJOGI.....3<sup>RD</sup> RESPONDENT**

**PHILIS GAKIL.....4<sup>TH</sup> RESPONDENT**

**RULING**

[1] Before me is a Notice of Motion Application dated 20<sup>th</sup> September 2018 and brought pursuant to the provisions of Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules 2010, in which the Applicant seeks setting aside of the orders made on 22<sup>nd</sup> June 2017 and reinstatement of the application dated 5<sup>th</sup> June 2017 for hearing on merit.

[2] The application is supported by the grounds on the face of it and an affidavit sworn by Mercy Kaume, the Advocate who has the conduct of this matter on behalf of the Applicant. These are that she had been instructed to file the application dated 5<sup>th</sup> June 2017, in which they thought they could be given a date for inter parties hearing but the said application was placed before Justice Oginjo who dismissed it for being premature. The judge alleged that they had not complied with the orders of 18<sup>th</sup> May 2017, yet in the said application they had sought orders to stay implementation of the said orders.

[3] The record reveals the following:-

**1. That, on 18<sup>th</sup> May 2017, the court *inter alia* had directed the district surveyor to within 21 days visit the estate property and establish among other things, whether the Respondents' share on the ground was inconsistent with the confirmed Grant;**

**2. that, by an application dated 5<sup>th</sup> June 2017, the applicant sought inter alia to revoke the Grant made on 3<sup>rd</sup> July 2013 and stay of implementation of the order made on 18<sup>th</sup> May 2017.**

[4] Accordingly, as was rightly observed by Ongijo J, the Applicant at the time of the ruling on 22<sup>nd</sup> June 2016 had not complied with the orders issued on 18<sup>th</sup> May 2017. The Learned Judge was therefore right in dismissing the Applicant's application for being pre mature. Indeed as at 20<sup>th</sup> November 2017, the Applicant had not complied with the orders issued on 18<sup>th</sup> May 2017 whereupon the court directed that she appears before court on 23<sup>rd</sup> January 2018, to give account of compliance with the directions of the court given 18<sup>th</sup> May 2017. On 23<sup>rd</sup> January 2018, the Applicant still had not complied with the directions of the court which impelled the court to direct that a surveyor to visit the land under police protection and file a report within 30 days. The court further clarified that the surveyor was only to confirm the persons occupying the land and the manner of occupation. On 26<sup>th</sup> September 2018, the report had been filed. Ms Kaume for the Applicant stated that she did not have the report. According to the report, the district surveyor visited the suit property where all the interested parties and the area chief were present. The surveyor further confirmed that the Respondents had shown them their respective positions on the ground and each was picked although the same was disowned by the petitioner. The contents of the surveyors report have not been controverted by any other or credible professional report or opinion. Such matters are settled through expert evidence and the surveyor has confirmed the

positions of parties on the ground as per the grant. The matter is closed.

[5] Accordingly, there is no any or sufficient reason to set aside the orders made on 22<sup>nd</sup> June 2017 or to reinstate of the application dated 5<sup>th</sup> June 2017 for hearing on merit. Consequently, I find the Notice of Motion dated 20<sup>th</sup> September 2018 to be without merit and is dismissed.

**Dated, signed and delivered in open court at Meru this 6<sup>th</sup> day of February, 2019.**

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**F.GIKONYO**

**JUDGE**

**In presence of**

Kariuki for interested party

Ngugi for Kaume for respondent

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**F.GIKONYO**

**JUDGE**