



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2 OF 2019**

**IN THE MATTER OF THE ESTATE OF M'IBUTU M'IMAITA (DECEASED)**

**JAPHETH GUANTAI F. IBUTU.....1<sup>ST</sup> APPLICANT/ADMINISTRATOR**

**ISMAIL KABURU M'IBUTU.....2<sup>ND</sup> APPLICANT/ADMINISTRATOR**

**VERSUS**

**STEPHEN KIMONYE.....PETITIONER/3<sup>RD</sup> ADMINISTRATOR**

**R U L I N G**

1. This ruling relates to the Summons dated 10/9/2019 which was brought pursuant to **section 1A & 1B of the Civil Procedure Act and Rule 49 of the Probate and Administration Rules**. The applicants seek the removal of all inhibitions, caution and restrictions placed on **LR No. Abothuguchi/Githongo/476**.
2. The grounds upon which the application was made were set out in the body of the Summons and the supporting affidavit of **Japheth Guantai F. Ibutu** and **Ismail Kaburu M'Ibutu** sworn on 10/9/2019. They contended that the Land Registrar had made a restriction made against the title on 2/5/2019 to await the hearing and determination of an appeal. That the petitioner claimed to have filed an appeal and went to the Land Registrar to lodge an inhibition instead of applying for a stay of execution. They complained that the Land Registrar did not summon them to hear them before entering the restriction.
3. Although the application was served upon the respondent on 23<sup>rd</sup> September, 2019, he did not respond to it. On 12/9/2019, Mrima J ordered that the application be heard on 3/10/19. On the said 3/10/2019, the parties appeared before the Deputy Registrar when the respondent informed the Court that his advocate was out of the country until the 30/10/19. The matter was then listed for 4/11/2019.
4. On the said 4/11/2019, when the matter came up for hearing, the respondent informed the Court that his advocate had been sick since August, 2019. For reasons on record, the Court declined to grant an adjournment and ordered the application to be argued.
5. Mr. Mburugu, Learned Counsel for the applicants relied on the supporting affidavit of his clients. On his part, the respondent stated that since he had not filed any document in response, the Court should refer to the record.
6. At the time of writing this ruling however, the respondent had caused to be filed submissions by the firm of Kithinji Thurair & Company. It was submitted for the respondent that having been dissatisfied by the judgment that was delivered on 29/6/2018, the respondent had filed an appeal, viz No. 103 of 2019 in which he had applied for stay of execution. The submissions dealt with the demerits of the judgment and went further to annex and produce evidence. It was urged that the orders sought should not issue.
7. I have considered the submissions and the entire record. The issue for determination is **whether there should be a removal of all inhibitions, caution and restrictions placed on LR No. Abothuguchi/Githongo/476**.
8. This cause began in 1995 when it was filed in Nairobi as **Succession Cause No. 2924 of 1995**. The matter was fully tried in Nairobi and concluded vide the Judgment of Musyoka J of 29/6/2018 it was then transferred to this court for confirmation. Whereby it was allocated a new number **Meru Succession Cause No. 2 of 2019** The grant was confirmed on 3/4/2019. It is pursuant thereto that the applicants sought to have the estate distributed in terms of the aforesaid Judgment.
9. The applicants' quest to effect the distribution of the estate has been thwarted because of the restriction placed on the title by the Land Registrar. They have become impotent in carrying out their obligations the reason why they are seeking the said removal of the said registration.
10. According to the respondent, he was dissatisfied with the judgment in this matter and had preferred Civil Appeal No. 103 of 2019

together with a stay of execution. That for that reason, he had placed the restriction on the subject estate property. He contended that the Court of Appeal at Nairobi had on 5/7/2019 issued to advocates notices for a case management for purposes of status conference with a view of fixing a suitable hearing date by consent.

11. Under *Section 47 of the Law of Succession Act* provides that:

***“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:***

***...”***

12. This is a matter already concluded with finality before this Court. It has taken the parties about 25 years to have the matter concluded. The only process that remains is appellate. Under that process, the law provides for avenues of staying the orders and decrees of this Court. It is not within the jurisdiction of the Land Registrar to block the legal process of transmission of the estate property on the ground that there is an appeal pending against the orders of this Court.

13. To this Court’s mind, by the respondent resorting to that route, he was bent in frustrating the legal process for no apparent reason. He should have sought to stay the execution of the said judgment either before this Court or before the Court of Appeal. Clearly, the Land Registrar acted without jurisdiction.

14. Further, the applicants have alleged, and it has not been denied, that they were not summoned by the Land Registrar to hear them before entering the restriction. The course taken by the Land Registrar was not founded in law.

15. One of the judicial principles under *Article 159 of the Constitution* is that justice ought not to be delayed. This is a matter that has been pending for over two decades now. There is no bar to the respondent of pursuing an appeal or even staying the execution of the Judgment of this Court, he so wishes. In the meantime, the legal process of realizing the fruits of the Judgment should not be impeded.

16. Accordingly, the application is found to be meritorious and is allowed in the following terms:-

- a) all inhibitions, caution and restrictions placed on LR. No. Abothuguchi/Githongo/476 be removed forthwith.**
- b) the two applicants JAPHETH GUANTAI F. IBUTU and ISMAIL KABURU M’IBUTU do execute all the necessary documents to distribute the estate.**
- c) the Land Registrar Meru do dispense with the production of the title deed for LR No. Abothuguchi/Githongo/476 to effect transfer resultant subdivisions to the respective beneficiaries as per the Certificate of Grant.**
- d) each party to bear own costs.**

**DATED and DELIVERED at Meru this 11<sup>th</sup> day of December, 2019.**

**A. MABEYA**

**JUDGE**