



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO 408 OF 2007**

**IN THE MATTER OF THE ESTATE OF STEPHEN M'MIRITI M'MUNGANIA – DECEASED**

**LOISE MWARI M'MIRITI .....PETITIONER**

**VERSUS**

**ANN MWARI M'MIRITI .....1<sup>ST</sup> OBJECTOR**

**MARGARET MWARI M'MIRITI .....2<sup>ND</sup> OBJECTOR**

**RULING**

1. This is a ruling on the petitioner's Summons dated 22<sup>nd</sup> June, 2017 that seeks to stay the execution of the Judgment of this court delivered on 11<sup>th</sup> May, 2017 pending the hearing and determination of the intended appeal. The application is brought under **section 47 of the Law of Succession Act, Cap 160 Laws of Kenya ("the Act"), Rules 49 and 73 of the Probate and Administration Rules.**
2. The application also sought for an order that the status quo obtaining prior to the delivery of the judgment be maintained thereby requiring each party to maintain their occupation and use of the estate as it were prior to the impugned judgment.
3. The grounds upon which the application was predicated upon were set out in the body of the Summons and the supporting affidavit. These were that; the applicant was aggrieved by the judgment and intended to appeal against it; that a Notice of Appeal had been lodged in the Court of Appeal and proceedings applied for; that the application had been made timeously.
4. It was further contended that the applicant's house was completely disinherited from one of the prime properties and that if the judgment is implemented, some beneficiaries may dispose off their shares to 3<sup>rd</sup> parties.
5. The application was opposed through a replying affidavit of Margaret M'Miriti sworn on 11<sup>th</sup> July, 2017. She contended that the applicant has all through been an impediment in the settlement of this matter as she has been in control of the vast estate; that there was a portion of Plot No. 2787/1550 that was left out from the distribution which must have been intended for the applicant's house.
6. In his submissions, Counsel for the applicant submitted that once the Certificate of confirmation is signed, other beneficiaries may dispose off their shares whereby the applicant will stand to suffer great loss; that the application was made timeously, within 41 days of the judgment; that the applicant was ready to give security for the performance of the judgment. Counsel referred the court to the cases of **In Re Estate of Muriuki Kago [2012] eKLR, In Re Estate of Kinyua Githaiga [2009] eKLR and Alice Owano Mulusa & Anor v. Musa Mbalanya & 2 Others [2017] eKLR** in support of those submissions.
7. In his submissions, Counsel for the 2<sup>nd</sup> Objector submitted that the applicant's bone of contention was the distribution of **L.R. 2787/1550, Nanyuki** but that there was an undistributed portion thereof; that there was no draft memorandum of appeal to demonstrate that there was an arguable appeal; that the application was a scheme to drag the issue of distribution further and enable the applicant continue to enjoy the prime property to the exclusion of the others.
8. This is an application for stay pending appeal. Under **Rule 63 of the Probate and Administration Rules, Order 42 of the Civil Procedure Rules** is not one of those provisions that have been imported to and applicable to matters of succession.
9. In this regard, the court has to exercise its discretion under **section 47 of the Law of Succession Act Cap 160 Laws of Kenya ("the Act")** for the ends of justice.
10. The applicant contend that her house was not properly provided for; that one of her children **Eunice Kathambi M'Miriti** was left out from the distribution contrary to **section 40 of the Act**; that if a stay is not granted, some beneficiaries may dispose off their shares thereby

causing her to suffer great loss.

11. The 2<sup>nd</sup> Objector has opposed the application on the grounds that the dispute has taken unnecessarily long; that the applicant's dispute is only on **L.R. No. 2587/1550, Nanyuki** whereby a portion was left which may have been meant for the applicant's house. That the applicant should have applied for the review of the judgment.

12. Having considered the applicant's supporting affidavit, she has stated that her house was left out in the sharing of **L.R. No. 2787/1550, Nanyuki** which is very prime. Further, that one of her daughters, Eunice Kathambi M'Miriti was only given one portion and left out from the rest of the distribution.

13. The judgment of this court made on 11<sup>th</sup> May, 2017 would show that while the court divided **L.R. No. 2787/1550, Nanyuki** into three portions with a view to distribute it amongst the three houses of the deceased, one portion was left out as was the applicant's family. Further, when setting out the children of the 3<sup>rd</sup> house in the distribution of **Plot No. 27 Nanyuki**, the name of Eunice Kathambi M'Miriti was left out.

14. In this regard, after realizing the above errors, on 16<sup>th</sup> July, 2018, this court on its own motion recalled the judgment, reviewed the same and corrected those two errors. In this regard, the oversight which had existed in that judgment has since been corrected.

15. The dispute between the parties have been ongoing for now 10 years. This was brought to a halt by the impugned judgment. The competing interests herein are, the applicants undoubted right to appeal against a judgment she is aggrieved against and the respondents' right to enjoy the fruits of a judgment obtained after 10 grueling years of dispute.

16. The applicant has contended that if the Certificate of confirmation is signed, some beneficiaries may sell their portions. That may be so, but while the Certificate was signed on 11<sup>th</sup> May, 2017, there is no evidence on record to show that any of the beneficiaries has either attempted to sell or has brought speculators to any of the portions distributed to them. That allegation in my view remains just a speculation. Courts do not act on suspicious or speculation, but on hard facts.

17. Further, the only complaints raised by the applicant are that her house was left out in the distribution of a prime property at Nanyuki and that one of her children had been left out. Those two complaints have since been addressed and remedied vide the correction judgment made on 16<sup>th</sup> July, 2018. As it stands therefore, there is nothing to appeal against.

18. Accordingly, I do not see any substantial loss to be suffered if stay is not granted. The court feels that the applicant would like to continue perpetuating her position of advantage which persisted before the judgment when she controlled the entire income from the estate and accounted to no one.

19. Accordingly, I find the application to be without merit and the same is hereby dismissed with costs to the respondent.

**SIGNED** at Meru

**A. MABEYA**

**JUDGE**

**DATED** and **DELIVERED** at Meru this 15<sup>th</sup> day of November, 2018.

**F. GIKONYO**

**JUDGE**