



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 403 OF 2006**

**IN THE MATTER OF THE ESTATE OF M'RUUTI M'MUGAMBI ALIAS RUUTI MUGAMBI -  
(DECEASED)**

**AND**

**1. M'ETONGA M'RUUTI**

**2. NAOMI MURIRE THURANIRA ... APPLICANTS**

**VERSUS**

**STEPHEN MWITHIA M'RUUTI..... RESPONDENT**

**RULING**

1. By a Ruling of this Court (Gikonyo J.) delivered on 9<sup>th</sup> November, 2015, the Court delivered itself thus:-

***“(2) On record are two surveyor’s reports. One is by Thagishu & Associates. It is undated but it attached a Sketch Map sub-dividing NYAKI/THUURA/1235 as follows;***

***(i) Portion A – 1.73 acres***

***(ii) Portion B – 0.86 acres***

***The Report stated that the land measures approximately 1.048 Ha. (equivalent of 2.59 acres).***

***The other report is by Gatome & Associates. It is dated 21/10/2014. It annexed a Sketch Map sub-dividing NYAKI/THUURA/1235 as follows;***

***(a) Portion A - 0.83 acres which is 1/3 of the whole land and is undeveloped; and***

***(b) Portion B - 1.66 acres which is 2/3 of the total area and is developed with permanent building.***

***(3) From the documents filed in court, an extract from the record in the Land Registry for NYAKI/THUURA/1235 shows that the land measures approximately 1.0 Ha. The Report by Gatome & Associates worked on 1.0 Ha. It seems more reliable. It also provides access to both portions of land at two (2) points. The sub-division also seems to be supported by all the***

**beneficiaries except the Petitioner. In the circumstances, and being guided by the professional surveys reports herein, I order that;**

**(a) The sub-division of NYAKI/THUURA/1235 shall be done in accordance with the survey report by Gatome & Associates dated 21/10/2015 and the annexed Sketch Map thereto.**

**(b) Accordingly, the estate property shall be distributed in accordance with (a) above.”**

2. After that ruling which settled the distribution of this Cause, M’Etonga M’Ruuti (hereinafter “the Applicant”) filed an application on 18<sup>th</sup> November, 2015 for the review of that ruling. Pursuant thereto, on 24<sup>th</sup> May, 2016, the Court made an order to the effect that:-

**“I note Gatome & Associates are not co-operating in this matter. I appoint the County Surveyor to do the survey of the estate property and file a report within 30 days.**

**Parties to ensure the survey is done immediately. The survey should be guided by the judgment herein ...”**

3. On 7<sup>th</sup> September, 2016, the District Surveyor, MeruCentral District visited the property, undertook the survey and filed his report on 13<sup>th</sup> September, 2016. Consequently, on 14<sup>th</sup> September, 2016, the Court made the following order:-

**“COURT**

**This matter has taken different turns just when it looked to be over. This Court ordered the District Surveyor to give his report on the appropriate sub-division of the suit land after the previous two Surveyors appointed by the respective parties herein could not agree. Accordingly, the Survey by the District Surveyor Mr. Mwiti . K. N. dated 7/9/2016 is now adopted by this Court as the basis of sub-division of the suit land. Accordingly, the suit land shall be sub-divided as per the said survey and sketch map annexed to the said report. Those are now the orders of the Court.”**

5. On 12<sup>th</sup> October, 2016, the Applicant filed an application for orders to authorize the Deputy Registrar to sign all transfer documents on behalf of the Respondent, Stephen Mwitha M’Ruuti, who is the administrator. He also sought a further order to commit the Respondent to jail for a period of 30 days for contempt of Court having failed to comply with the order of the court of 14<sup>th</sup> September, 2016. The ground upon which the application was premised was that the Court had adopted the report of the District Surveyor dated 7<sup>th</sup> September, 2016; that despite as aforesaid, the Respondent had failed to comply with that Court Order.

6. The Respondent opposed the application vide a Replying Affidavit sworn by him on 27<sup>th</sup> February, 2017. He swore that although he was in agreement with the mode of distribution, he was not happy that the Court had not considered the estate terrain; that the 1/3 share that he had been given in the estate was an invaluable piece of poor terrain and that in the premises, he had filed a Notice of Appeal to challenge the Court’s decision in the Court of Appeal.

7. This ruling then is on that application. I have already set out above the chequered history of this matter. How surveyors have had to go to the ground twice to demarcate the estate on the ground in terms of what the parties were agreeable to be the distribution of the estate.

8. It is clear from the foregoing that there is a valid order on record dated 14<sup>th</sup> September, 2016 which is a culmination of several attempts on the part of the Court and the parties to conclude this matter. A Certificate of Confirmation of grant was extracted from that order. The same has neither been varied nor set aside. Further, there is no order of stay of execution of that Order or Certificate. Nevertheless, there

is on record, a Notice of Appeal filed in Court on 27<sup>th</sup> September, 2016. The Petitioner also applied for proceedings on 30<sup>th</sup> September, 2016. The proceedings were typed and are still lying in the court file. The Petitioner has neither collected them to lodge an appeal nor has he made any follow up in his alleged attempt to challenge the Order of this Court of 14<sup>th</sup> September, 2016.

9. In view of the foregoing, the question that arises is, can the mere filing of the Notice of Appeal per se be a bar to the execution of a lawful and regular Court Order as per the confirmed grant? I do not think so. A party must move the Court to stay its orders for the process of execution to be stayed. I am aware that Rule 63 of the Probate and Administration Rules does not cite Order XLII of the Civil Procedure Rules as one of the Orders that apply to succession matters, but nevertheless a party to a succession matter can move the Court for appropriate orders either under Section 47 of the Law of Succession Act or Rule 73 of the Probate and Administration Rules. To my mind, the mere intention to challenge an order in the Court of Appeal by way of filing and serving a Notice of Appeal cannot per se act as a bar to the execution of an Order of the Court.

10. In view of the foregoing, I am satisfied that there is a lawful Court Order in force. The same has neither been stayed, varied nor set aside. That Order cannot be executed without the co-operation of the Petitioner who is not willing to co-operate thereby embarrassing the court process. It is in such circumstances that Section 98 of the Civil Procedure Rules was enacted. That Section provides:-

**“98. Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other documents shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”**

11. In the circumstances, I am satisfied that there is no good reason why prayer no. 2 of the Motion dated 12<sup>th</sup> October, 2016 should not be allowed. As regards prayer no. 3 I see no good reason to grant that prayer while prayer no. 2 will be sufficient. That prayer is therefore declined.

12. Accordingly, I allow the motion in terms of prayer no. 2 of the Motion dated 12<sup>th</sup> October, 2016. Since this is a family matter, there shall be no order to costs.

**DATED AND DELIVERED AT MERU THIS 30<sup>TH</sup> DAY OF MARCH, 2017.**

**A. MABEYA**

**JUDGE**

**30/3/2017**