



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT MERU

SUCCESSION CAUSE NO. 220 OF 98

**IN THE MATTER OF THE ESTATE OF THE LATE MWIREBUA KABUCHANIA alias
MWIRABUA KABUCHANIA - DECEASED**

MARETE MWIREBU

(substituted by Patiness Gaturo Marete).....1ST PETITIONER

VS

ELIAS NJABANI.....OBJECTOR

DANIEL MURITHI GEOFFREY.....INTERESTED PARTY

RULING

Notice of Preliminary Objection dated 7th March 2014 was filed by M/S Joan W.G. Ndorongo & Co. Advocates for the Objector Elias Njabani on grounds that the matter res judicata as per the judgment of **Hon. Justice Anyara Emukule** rendered on 7th April 2008 and ruling of **Hon Justice Mary Kassango** dated 18th May 2011.

The Preliminary Objection was also raised on the grounds that the interested party lacks Locus Standi on the matter since he is titled to any parcel of land originated from the petitioner herein (deceased) and the same was declared null in the ruling of Justice Kasango on 18th May 2011;

The third ground for the Preliminary Objection was that the interested party should lay his claims in the estate of the petitioner (now deceased) Marete Mwirebua;

It was also urged that the parties ought to have appealed against the judgment of Justice Emukule and the ruling of Justice Kasango;

In this matter parcel of land number Mwimbi/Chogoria/525 was ordered to be distributed to Charity Kanyua Mwirebua, Gilbert Kinyua, Elias Njabani Mwirebua and Kamundi Mwirebua. Marete Mwirebua had been settled inter vivos on parcel of land number Mwimbi/Chogoria/561 and Daniel Kaburu Mwirebua had been settled inter vivos on parcel of land number Mwimbi/Murugi/541. The petitioner Marete Mwirebua (deceased) later applied for review of the judgement on distribution delivered on 4th April 2008 but **Hon Justice Kasango** dismissed the application for reasons it didn't meet the standard required under order 44 Rule 1 of Civil Procedure Rules. The Hon Judge said the application attempted to appeal against judgment of the court. She relied on the authority of **Njoroge & others vs Savings and Loan Kenya Ltd [1990] eKLR 78** where it was held:-

“In the circumstances an application for review should not be taken as a form of appeal. To warrant a review of an error alleged on the face of record, such an error ought to be so clean as to be without dispute. Where the very existence of an error o record is contestable by parties, I think such a matter is a ground which should be canvassed on appeal.”

In consideration of the Judgement and Ruling on record I do find Replying Affidavit of Patiness Gaturo Marete sworn on 28th June 2012 in opposition to application for confirmation dated 9th August 2012 goes against the finding in the Judgement of Emukule Judge that her husband Marete Mwirebua now deceased was already provided for during the life time of the deceased and therefore could not claim Land parcel no. Mwimbi/Chogoria/525 which was ordered to devolve to the widow Charity Kanyua and her sons Gilbert Kinyua, Elias Njabani and Kamundi Mwirebua. Further affidavit in protest of confirmation by Patiness Gaturo Marete sworn on 29th July 2013 is a replica of the application for review of the judgement of **Justice Emukule** which was filed by her deceased husband and which was also dismissed.

If Marete Mwirebua (Deceased) sold land to Daniel Murithi Geoffrey then the said purchaser has recourse to the estate of the said Marete Mwirebua and not from L.R. No. Mwimbi/Chogororia/525 and Patiness should comply with the ruling of **Justice Kasango** by appealing against the judgement of **Justice Emukule** and desist from filing multiple vexations applications which are only delaying the completion of the cause herein.

It therefore follows that the preliminary objection to the affidavit in protest are valid and same is upheld. The affidavits in protest sworn and filed by Patiness Gaturo Marete are hereby struck out.

Charity Kanyua, Elias Njabani Mwirebua, Kamundi Mwirebua and Gilbert Kinyua to attend court for confirmation of the estate in respect of distribution of parcel of land No. Mwimbi/Murugi/525. Costs of objection to be paid from the estate of the deceased.

Ruling Signed, Delivered and Dated this 16th Day of June 2017.

HON. A. ONG’INJO

JUDGE

In the presence of:

C/A :Penina

Objector:- Nyenyire Advocate H/B for Mutunga advocate

Petitioner:- Mr Carl Peters Mbaabu –

Mr Kitheka Advocate for Interested party –

Order

Mention 2.8.2017 for confirmation of grant in favour of Charity Kanyua, Elias Njabani, Kamundi Mwirebua and Gilbert Kinyua

HON. A. ONG’INJO

JUDGE