



REPUBLIC OF KENYA



**In re Estate of Keresent Wanjala Mukitang'a (Deceased) (Succession Cause 36 of 2012) [2024] KEHC 16160 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16160 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 36 OF 2012**

**DK KEMEL, J**

**DECEMBER 20, 2024**

**IN THE MATTER OF THE ESTTE OF KERESENT WANJALA MUKITANG'A (DECEASED)**

**BETWEEN**

**ERIC WAMALWA WANJALA ..... PETITIONER**

**AND**

**PATRICK WASWA NGANGA ..... OBJECTOR**

**RULING**

1. The Petitioner/Applicant herein filed an application dated 23/2/024 seeking the following orders.
  1. Spent.
  2. That this Honourable court be pleased to cancel land parcel number Kimilili/Kamukuywa/1359 and 1360 and revert to Kimilili/Kamukuywa/368 in the name of the deceased for purposes of succession.
  3. Spent.
  4. That the court do set aside the County Survey report dated 8/12/2023.
  5. Costs be in the cause.
2. The application was supported by grounds set out thereunder as well as the supporting affidavit sworn on even date. The 1<sup>st</sup> Petitioner's gravamen is inter alia; that the objector herein unlawfully entered land parcel Kimilili/Kamukuywa/368 and sub divided the same into parcels Kimilili/Kamukuywa/1359 and 1360 without the consent of the beneficiaries; that the actions of the Objector herein are causing damage and loss to the estate of the deceased; that the objector is seriously intermeddling with the estate; that it is fair and in the interest of justice that his court orders that the land reverts back in the



name of the deceased and in its original number namely Kimilili/Kamukuywa/368 so that the same can be distributed to the beneficiaries.

3. The Objector/Respondent opposed the application inter alia; that the initial land was one block No. Kimilili/Kamukuywa/368 shared between three brothers Keresent Wanjala Mukitanga, Joseph Nyongesa Mukitanga and Mourice Wanyama Mukitanga and that the same was registered in the name of Keresent Wanjala Mukitanga in trust for the rest; that he bought his portion from Joseph Nyongesa Mukitanga in 1968 and has been in occupation for 56 years without any problem; that sub division of parcel 368 has been undertaken giving rise to parcel numbers 1359 and 1360 and that he is in occupation of parcel 1360 while 1359 belongs to the Petitioner's family; that the new titles are ready for issuance once the original title deed on parcel 368 is surrendered; that all the parties had appeared before the mediator and it was agreed that survey be conducted to establish the exact portions and boundaries on the ground; that the petitioner appears to be on a mission to remove him from the land that he had occupied for a long time.
4. The application was canvassed by way of written submissions. Both parties duly complied.
5. I have given due consideration to the application, rival affidavits and submissions. It is not in dispute that the parties herein had agreed by consent to have this matter deliberated through the Court Annexed Mediation. It is not in dispute that the mediator duly filed his report dated 29/11/2023. It is not in dispute that the parties herein agreed by consent that a resurvey be carried out on the Objector's portion comprised within Land Reference No. Kimilili/Kamukuywa/368 and establish the acreage of 3.5 acres due to the Objector herein. It is not in dispute that the resurvey was duly conducted and is dated 8/12/2023 and that the parties were to react to the same and thereafter the petitioners were to file the requisite summons for confirmation of grant.

It is also not in dispute that the original title on LR Kimilili/Kamukuywa/368 was closed on sub division on 6/2/2015 wherein two titles were created namely Kimilili/Kamukuywa/1359 and 1360 respectively but that the title were not issued as the original title was not surrendered and which led to the entry of a restriction thereon. That being the position, I find the issue for determination is whether the 1<sup>st</sup> Petitioner's application has merit.

6. I will start with the 1<sup>st</sup> Petitioner's request for an order that the County Surveyor's report dated 8/12/2023 be set aside. It is instructive that the survey dated 8/12/2023 was arrived at by the parties painstakingly raising fees for the said exercise after a previous one was rejected and which had forced the parties to appear before a mediator for a solution. It was after the mediation proceedings that the parties agreed to call for a resurvey of the portions of land occupied by the parties and others on LR No. Kimilili/Kamukuywa/368. The said survey report appears to be comprehensive and it has captured the portions occupied by those on the ground. I have looked at the map accompanying the report and note that each portion has been adequately catered for. It is instructive that the resurvey is the outcome of the mediation and that none of the parties have lodged any complaints regarding the mediation resolutions dated 22/11/2022. It seems to me that the 1<sup>st</sup> Petitioner is out to scuttle the process and thereby delay the finalization of this matter which is now at the tail end. It is noted that the 1<sup>st</sup> Petitioner has not presented any cogent reasons as to why the said survey report dated 8/12/2023 should be interfered with yet the same has captured everything on the ground. It is quite out of order for the 1<sup>st</sup> Petitioner to claim that all those people on the ground are strangers yet the deceased herein had registered the land in his name in trust for himself and his two brothers and hence the whole land did not belong to him as can be seen by the fact that the rest of the family members are on the ground with those who bought from them. Hence, even if the 1<sup>st</sup> Petitioner intends to sub-divide the land differently, still the persons on the ground would still have to pursue the beneficiaries and later seek to retain the portions that



they occupy. The action by the 1<sup>st</sup> Petitioner herein is thus to throw a spanner in the works instead of accepting the reality that the family land had been lawfully sold and has shrunk in size. I must therefore reject the request sought regarding the survey report.

7. As regards the prayer for cancellation of the new titles namely Kimilili/Kamukuywa/1359 and 1360, it is noted that the said portions are as a result of sub division of Parcel Kimilili/Kamukuywa/368 pursuant to a survey report which has since been successfully challenged by the Petitioners leading to the latest survey report dated 8/12/2023 which has come up with new sizes. It is instructive that there is a restriction entered on the register at the lands office as the original title has not been surrendered. Since the parties had proposed the new survey, it is imperative that the two new titles should be cancelled so that the same reverts to the name of the deceased for purposes of distribution. To that extent, I find merit in prayer No. 2 of the application and I allow the same.
8. In view of the foregoing observations, it is my finding that the 1<sup>st</sup> Petitioner's application partly succeeds in terms of prayers 2 and 5 only. The rest of the prayers lack merit and are dismissed. The following orders are hereby issued:
  1. That the new titles namely Kimilili/Kamukuywa/1359 and Kimilili/Kamukuywa/13560 be and are hereby cancelled and that the same do revert to LR Kimilili/Kamukuywa/368 in the name of the deceased Keresent Wanjala Mukitang'a for purposes of distribution.
  2. That the survey report dated 8/12/2023 is a proper and true reflection of what obtains on the ground regarding occupation of LR Kimilili/Kamukuywa/368 and that the same is the point of reference regarding the distribution of the estate once the summons for confirmation of grant are filed.
  3. That the Petitioner are hereby directed to file summons for confirmation of grant within thirty (30) days from the date hereof and that the schedule of distribution shall be as proposed in the survey report dated 8/12/2023,
  4. That the status quo regarding the current occupation shall be maintained pending determination of the summons for confirmation of grant scheduled to be filed.
  5. Each party to bear their own costs.

**DATED AND DELIVERED AT SIAYA THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024**

**D. KEMEI**

**JUDGE**

In the presence of:

Erick Wamalwa Wanjala.....1<sup>st</sup> Petitioner/Applicant

Patrick Waswa.....Objector/Respondent

Ogendo/Diana.....Court Assistant

