



REPUBLIC OF KENYA



**KENYA LAW**

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**In re Estate of Bethwel Gitau Karuma (Deceased) (Succession Cause E336 of 2007) [2023] KEHC 27302 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 27302 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE E336 OF 2007**

**SM MOHOCHI, J  
NOVEMBER 30, 2023**

**IN THE MATTER OF THE ESTATE OF BETHWEL GITAU KARUMA (DECEASED)**

**BETWEEN**

**PAUL MATURU GITAU ..... APPLICANT**

**AND**

**BONIFACE GITAU ..... RESPONDENT**

**RULING**

1. These Proceedings relate to the succession in the estate of the late Bethwel Gitau Karuma who died intestate on 6<sup>th</sup> October, 2006.
2. The 1<sup>st</sup> application by Paul Maturu Gitau a beneficiary, dated February 28, 2023 is by way of summons filed pursuant to section 47 of the Law of Succession Act, rule 73 and 49 of the Probate and Administration Rules seeking *inter alia*
  - i. Spent
  - ii. That, this honorable court, be pleased to issue an order of temporary injunction restraining the surveyor from continuing to further sub-divide all that parcel of land known as LR No.5630 South East of Lake Solai, pending compliance with the orders and/or directions given by this Honourable Court on the 13<sup>th</sup> day of February, 2023.
  - iii. That, this Honourable Court, be pleased to issue an order compelling the Surveyor to carry out the sub-division exercise afresh once the orders and/or directions granted by this Honourable Court on the 13<sup>th</sup> day of February, 2023 are fully complied with.
  - iv. That, cost of this Application be provided for.



3. The application is based on the affidavit of Paul Maturu Gitau and is anchored on the following twelve (12) grounds;
  - i. That, this Honourable Court gave directions and/or orders on the 13<sup>th</sup> day of February, 2023 that all the parties/ beneficiaries in this cause be called to a meeting to agree on the mode of subdivision and distribution of property known as LR No.5630 South East of Lake Solai but unfortunately to date such a meeting has not been conducted.
  - ii. That, contrary to the orders and/or directions of this Honourable Court, the Surveyor has gone ahead and began sub-division of the parcel of land known as LR No.5630 South East of Lake Solai, knowing full well that the directions/orders of February 13, 2023 are yet to be complied with as the beneficiaries of the estate are yet to be called to a meeting to agree on sub-division of the property and as such did not take into account the wishes of the beneficiaries of the estate.
  - iii. That, this matter is now scheduled for confirmation on the 3rd day of March, 2023 when the survey report as per the sub-division carried out without consultation and/or consent of most of the beneficiaries of the estate is likely to be adopted.
  - iv. That, the applicant is not agreeable to the mode of sub-division and distribution of the said property as proposed by the surveyor.
  - v. That, the sub-division is not equal and/or fair and that the same should be done afresh whilst taking into account the considerations and wishes of the beneficiaries.
  - vi. That, the Applicant's deceased father Bethwel Gitau Karuma had prior to his demise shown the Applicant his bequeathed share of land measuring approximately 25 hectares on parcel of land known as LR No.5630 South East of Lake Solai.
  - vii. That, the applicant has since taken possession of the 25 acres mentioned herein above and partially developed the same.
  - viii. That, at the moment and as per proposed subdivision of LR No.5630 South East of Lake Solai, the applicant herein has been allocated a parcel/portion marked as 11 on the attached sketch map which measure approximately 18.03 hectares contrary to the wishes of his father.
  - ix. That, it is imperative that the issues raised herein be amicably determined forthwith to avert disputes that may arise amongst the beneficiaries as well as law suits on the subject parcel from arising in the future.
  - x. That, the Applicant will suffer real prejudice if the orders sought herein are not granted.
  - xi. That, this application has been brought timeously and in good faith.
  - xii. That, it is in the best interest of justice that the prayers sought on the face of this application be granted.
4. The 1<sup>st</sup> Application is a general Application without a specified Respondent(s) and ordinarily the Applications such as this, should be against the executor or administrator of the estate.
5. The 2<sup>nd</sup> application is by Eunice Nyaruiru Gitau, a beneficiary, dated March 16, 2023, against seven (7) respondents that included three (3) Beneficiaries and four (4) non-parties to these proceedings, seeking blanket injunctive orders and a status quo order to preserve the subdivision of LR No 5630 South East



of Lake Solai as per the Surveyors sub-division proposal. That the 4<sup>th</sup> -7<sup>th</sup> Respondents are strangers that have unlawfully entered upon the land on her portion.

6. No directions were ever taken on this Application and as such the court shall only give Directions thereon.

### **The Applicant Paul Maturu Gitau's Case**

7. While the Applicant had leave to file written submissions in support of his case non-were filed and that the court nonetheless considered his case from the bare pleadings herein.
8. The Applicant depones that, he is one of the beneficiaries of the estate of Bethwel Gitau Karuma (Deceased) by virtue of being the son, from the second family.
9. That on the 13<sup>th</sup> day of February, 2023 this Honourable Court gave directions and/or orders that all the parties/beneficiaries in this cause be called to a meeting to agree on the mode of subdivision and distribution of property known as LR No.5630 South East of Lake Solai but unfortunately to date such a meeting has not been conducted nor have I been invited to one.
10. That, contrary to the orders and/or directions of this Court, the surveyor has gone ahead and began sub-division of the parcel of land known as LR No.5630 South East of Lake Solai knowing full well that the directions/orders of February 13, 2023 are yet to be complied with as myself and other beneficiaries of the estate are yet to be called to a meeting to agree on sub-division of the property and as such our wishes were not taken into as the beneficiaries of the estate, nor was our consent sought.
11. The Applicant contends that, this matter is now scheduled for confirmation on the 3<sup>rd</sup> day of March, 2023 when the survey report as per the sub-division carried out without our consultation nor our consent, is likely to be adopted.
12. The Applicant is not agreeable to the mode of sub-division and distribution of the said property as proposed by the surveyor as the sub-division is not equal and/or fair, and that the same should be done afresh whilst taking into account the considerations and wishes of all the beneficiaries.
13. The Applicant contends that, prior to his demise his father had bequeathed him a portion of land measuring approximately 25 hectares on the parcel of land known as LR No.5630 South East of Lake Solai.
14. That, the Applicant has since taken possession of the 25 acres and partially developed the same and that at the moment and as per the proposed subdivision of LR No. 5630 South East of Lake Solai, he has been allocated a parcel/ portion marked as "11" on the attached sketch map which measure approximately 18.03 hectares which is measures about 7 hectares less than that which his father had bequeathed him.
15. The Applicant contends that, it is imperative that the issues raised herein be amicably determined forthwith to avert disputes that may arise amongst the beneficiaries as well as law suits on the subject parcel from arising in the future.
16. The Applicant contends that, he will suffer real prejudice if the orders sought herein are not granted as he stands to lose a substantial part of the parcel that his father bequeathed him prior to his demise, which parcel he has since taken possession of and developed.
17. The Applicant urges that, it is in the best interest of justice that the prayers sought on the face of this application be granted as it has been brought timeously and in good faith.



## The Boniface Gitau Administrator's Case

18. The Administrator contends that, what is before the court for determination is an issue on the mode of distribution of the estate of the deceased brought forth by the proposed subdivision of parcel No. LR No. 5630 South East of Lake Solai as per the survey report dated March 21, 2023.
19. That, the deceased was survived by two families; the first family having 5 units while the 2-family containing 9 units. And that, efforts to have the beneficiaries agree on the individual portions of parcel No. L.R 5630 that they are entitled to have proved futile. The beneficiaries hence conducted survey and survey report was filed in court by the administrators.
20. That he filed an affidavit deponed on February 7, 2023 and annexed a copy of minutes from the family meeting held on 20.01.2023 elaborating on what portion the beneficiary is entitled to.
21. That he Boniface Gitau, is entitled to 45 acres, from the estate of the deceased. The same is captured in the survey report herein, save for the facts as outlined in the Affidavit of proposed distribution filed on 10<sup>th</sup> February, 2023 and the minutes annexed therein.
22. That, he Boniface Gitau, has developed a portion measuring about 25 acres, which portion has been allocated to his late mother, Jane Wanjiku (deceased) as per the survey report filed herein. Nonetheless, the family agreed to excise the said 25 acres to him who will in turn exchange the portion with 25 acres to which he is entitled.
23. That, he Boniface Gitau, urges that the court should take into consideration the family minutes of 20<sup>th</sup> January, 2023 in adopting the survey report filed herein dated 21<sup>st</sup> March, 2023. That he submits that, he has developed the said portion measuring about 25 acres.
24. Boniface Gitau, justifies his submissions based on the solo issue, as to whether the court should adopt the survey report dated 21<sup>st</sup> March, 2023 as the mode of distribution of LR No.5630 South East of Lake Solai to the beneficiaries of the Estate of Bethwel Gitau?
25. The Administrator submits that, It is common ground that the deceased died on October 6, 2006 intestate. His estate, therefore, is subject to the administration under the Law of Succession Act cap 160, thus the provisions of section 40(1) of the Law of succession act should be used in devolving the deceased's estate to the beneficiaries.
26. That section 40 of the Act, provides for guidelines for distribution of the estate of a polygamous intestate in the following terms:
  - “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children;
  - (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38”
27. That, the asset under contention for distribution is LR No.5630 South East of Lake Solai. The 1st Family vested their whole share measuring approximately, 21.853 Ha on the administrator, Muturi Karuma.



28. That, the second family opted to have their individual portions distributed to them by court; hence the survey report dated 21<sup>st</sup> March, 2023 filed in court for determination. The beneficiary, Boniface Gitau is entitled to 45 acres, which the family meeting of 20/01/2023 affirmed.

29. Reliance is placed on the case of *Scholastic Ndululu Sura v Agnes Nthenya Sura* [2019] eKLR, the Court of Appeal weighed in on the position of distribution of a polygamous person's estate and it held as follows:

It is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.

30. The Administrator submits that, the 2<sup>nd</sup> family is divided into 9 units and each unit is entitled to 45 acres. Hence, given that the Beneficiary, Boniface Gitau, has developed a portion of his late mother's, Jane Wanjiku's, portion, the court should take into consideration the said fact in adopting the survey report dated 21<sup>st</sup> March, 2023 in confirming the grant of the estate of the deceased.

31. The Administrator submits that, they are guided by the holding in the case, *Stephen Murithi M'magiri v William Mwiti Magiri & another* (2021) eKLR, where the court held as follows:

“This Court observes that both the Applicants and the Respondents want to go ahead with the subdivision exercise and they both want to do it in a manner that maintains the status of what is already on the ground. Indeed, this is the correct manner to proceed with the subdivision. I have previously dealt with this matter in the case of Meru Civil Appeal No. 157 of 2019 *Elijah Matumbi M'Nkanata v David Mutuma M'Nkanata* where I held as follows: -

“In the intestate distribution of estates, there is considerable merit in the proposition that regard should be had of the respective area or parcels or other property of the estate that various heirs may have over time with allocation by the deceased, been in possession although such possession is not perfected into title and where such heirs have developed such portions of the estate property during the period of their occupation, unless the size of the estate and scheme of sharing does not permit the heirs to retain all or part of such portion of the estate. In the absence of such or other compelling reason the portion held by the respective beneficiaries in the estate assets should be upheld so that there is minimal disruption of the long occupation of the beneficiaries.”

32. The Administrator submits that, the law is not cast in stone, and where a better proposal has been given by the beneficiaries that will encourage harmony and peace in the family, the court should adopt such a proposal.

33. The Administrator submits that, owing from the foregoing and the affidavit of proposed distribution by Boniface Gitau, of the 2<sup>nd</sup> house dated 7<sup>th</sup> February, 2023, they invite this court to consider the agreement of the members of the family of Bethwel Gitau (deceased) and adopt the survey report dated 21<sup>st</sup> March, 2023 as per the proposed amendments therein and Accordingly Adopt the Surveyors report.



### **1<sup>st</sup> Family Submissions**

34. Mr. Willy Kamau Gitau submitted that judgment dated 11<sup>th</sup> March 2021 determined the dispute between this estate and that of the Late Kamau Muchiri and that the respective estates were to proceed to confirm their respective grants upon availing a surveyor's subdivision plan.
35. That the 1<sup>st</sup> family is supportive of the filed surveyor's subdivision plan as being fair and conforming with the law.
36. That the mode of distribution was agreed upon and that the gift by the deceased to the Applicant falls short of gift inter vivos or causa mortis and is thus untenable.
37. Mr. Willy Kamau Gitau submitted that he is entitled to Mau Summit/Molo Block 5/5/520 as per the summons for confirmation with no objections which the court should endorse.
38. He urges the adoption of the Survey Report as having been undertaken by consent of parties and depicts the acreage, correct position of beacons and the plan and precise beaconing of the land as per the judgment herein and agreement of the parties on 23<sup>rd</sup> January 2007

### **Analysis and Determination**

39. The Judgment in this Probate was delivered on the March 11, 2021 the ruling herein is to clarify the Distribution on LR No 5630 South East of Lake Solai.
40. This is not a review of the judgment, and no Application for review or an appeal was ever preferred. This court notes that, the Application dated 28<sup>th</sup> February 2023, appears to attempt to reopen a consent judgment long after the fact by contesting the mode of distribution and shares thereof which ought to have been raised prior to the judgment.
41. The claim of entitlement to 25 Ha. or 25 Acres is not clear even to the Applicant who interchanges the measurements at will, both in his core pleadings and the affidavit in support.
42. The entitlement has not been proven on a balance of probability and appears to be an afterthought. The Appellant cannot be seen to be reneging on a consent judgment without basis.
43. The Application dated April 28, 2023 is found to be without merit and is dismissed accordingly.
44. This Court thus adopts the Surveyors Proposed subdivision scheme and survey report dated March 21, 2023 as the basis of distribution of LR No. 5630 South East of Lake Solai.
45. With regards to the Application dated 16<sup>th</sup> March 2023, by Eunice Nyaruiru Gitau, the same shall be served upon the Administrator and all named respondents a return of service shall be filed before further directions are given.
46. The Grant in the Estate of Gitau Karuma is hereby confirmed in relation to the portion of 729 acres LR No. 5630 South East of Lake Solai distributed as is proposed in the Surveyors Proposed subdivision scheme and Mau Summit/Molo Block 5/5/520
47. A Certificate of Confirmation of Grant with regards to distribution of LR No. 5630 South East of Lake Solai & Mau Summit/Molo Block 5/5/520 shall be issued.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**



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**Justice Mohochi S.M**

