



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 784 OF 1990**

**IN THE MATTER OF THE ESTATE OF MWAURA GITACHU (DECEASED)**

**SAMUEL KARURU MWAURA.....APPLICANT**

**VERSUS**

**HENRY GITACHU MWAURA.....1<sup>ST</sup> RESPONDENT/EXECUTOR**

**DR. JOSHUA GITACHU MWAURA.....2<sup>ND</sup> RESPONDENT/EXECUTOR**

**RULING**

1. The application dated 12<sup>th</sup> February 2021 by the applicant Samuel Karuru Mwaura complains that LR No. Loc. 1/Mugumoini/338 that belonged to his late father Mwaura Gitachu (the deceased herein) was subdivided by M/s Spartial Design Solutions Surveyors but not in accordance with the sketch plan of his brother Hezekiah Njuguna Mwaura and which was consented to by the family of the deceased and adopted by the court on 15<sup>th</sup> December 2020. The respondents Dr. Joshua Gitachu Mwaura and Henry Gitachu Mwaura admit that there was variation during the subdivision by the surveyors but state that the valuation was necessary to be able to implement the consent. The respondents are also brothers of the applicant.

2. The deceased had three houses and left a written Will in which he appointed the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Hezekiah Njuguna Mwaura and as the joint executors. Each executor represented a house. The actual sharing on the ground of Loc.1/Mugumoini/338 has been quite contentious and is the subject of this application.

3. Stephen Njenga of the surveying firm swore an affidavit to explain that they implemented the subdivision as per the consent recorded and as per the Will of the deceased. He stated that the total acreage on the sketch plan that was consented to exceeded the acreage in the title deed. He stated that the sketch plan by Hezekiah Njuguna Mwaura was not as per scale when juxtaposed with his sketch plan; that what was consented to had distributed 23.264 acres bearing only 0.76 acres for the graveyard and roads. Yet, the road acreage totaled 1.008 acres. His evidence was that the road directing to a dried well was agreed by the beneficiaries to be unnecessary and wasteful; and that every house got its bequest as per the Will and the distribution avoided waste, opening the land to public by creating roads which would have given public access and avoided undue fragmentation of the land. He swore that the subdivision followed best practice and sought, as much as possible, to accord with the Will and the consent.

4. The applicant, in his affidavit and further affidavit in response to the surveyor queried the distribution and claimed that it was in contempt of the consent and order of the court. He complained that his consent was not sought during the variation.

5. Teresiah Wangumo Mwaura is a sister to the applicant. She stated in her replying affidavit that the survey followed the family meeting of 2<sup>nd</sup> November 2019 at the applicant's home which left minutes that both the applicant and his wife had signed.

6. It is material that the rest of the family have accepted the sharing by the surveyor.

7. The explanation by the surveyor Stephen Njenga shows why it became necessary for them to vary the sketch that the parties had agreed on. The sketch plan had, in terms of acreage, exceeded what was in the title deed, and therefore on the ground. The sketch plan had provided 0.76 acres only for the roads, grave and well. Yet the roads only have taken 1.008 acres. Adjustments had to be done and had to affect all the beneficiaries. The alignment of the road and the subdivision that gave each beneficiary a frontage on the road meant that each beneficiary be affected. Yes, the variation affected the applicant. But it also affected all the other beneficiaries.

8. These are the reasons why I do not find merit in the application dated 12<sup>th</sup> February 2021 that sought that surveyors do restrict their survey to the consent that was recorded. The application is dismissed with costs.

**DATED AND DELIVERED IN NAIROBI THIS 27TH DAY OF APRIL 2022.**

**A.O. MUCHELULE**

**JUDGE**