



**Peter v Nkonge & 2 others (Succession Cause 52 of 2016)
[2022] KEHC 11881 (KLR) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 52 OF 2016**

**LW GITARI, J
AUGUST 4, 2022**

BETWEEN

WYCLIFFE GITONGA PETER APPLICANT

AND

EUSTACE KENT NKONGE 1ST RESPONDENT

PETKAY SHEN MIRITI 2ND RESPONDENT

BENSON MICHENI MACPETER 3RD RESPONDENT

RULING

1. Before this court is a summons which is brought by the applicant Wycliff Gitonga Peter one of the administrators of the estate of the deceased Peter Njeru M'Ukiria (deceased). The summons is brought under Section 47 of the *Law of Succession Act* and Rules 49 & 73 of the Probate and Administration Rules. The application is dated 18/5/2022 and was filed on 19/5/2022. The application seeks various prayers some of which were granted in the interim. The application seeks the following orders:
 - a. That the court be pleased to order fresh subdivision schemes of L.R. Magumoni/Thuita/384 strictly in adheres to the judgment of the honorable R.K. Limo delivered on 8th October 2019.
 - b. That the court be pleased to order and direct that the fresh subdivision of L.R. Magumoni/Thuita/384 be carried out after all the administrators agree on how best the judgment of honourable justice R. K. Limo can be put into effect.
 - c. That before the new subdivision scheme are carried out the late Eustace Kent Nkonge, 2nd administrator who has passed on, be substituted for purpose of the substitute articulating the interest of house no. 1 which was represented by the late Eustance Kent Nkonge.
 - d. That the court do order and direct that each administrator or any interested party within the estate of the deceased be at liberty to avail a private surveyor to be present when the district



surveyor shall be carrying out new subdivision scheme to avoid any bias of undue influence (whether real or perceived being impacted upon the district surveyor).

- e. Costs of this application be provided for.
2. The application is based on twenty seven (27) grounds on the face of the application and is supported by the affidavit of the applicant sworn on 18/5/2021. By way of a summary, the complaint by the applicant is that after Judgment was delivered in this matter by my brother Justice Limo on 8/10/2019 the 3rd and 4th respondents consulted the district surveyor without involving him and that the subdivisions which were carried out were in breach of the said Judgment in that:-
 - i. They have exercised a portion of land of the 4th House that was currently planted with maize beans, bananas, avocado trees and macadamia trees.
 - ii. Excised a big portion of the 4th house compound, a clear report to the Judgment of the court.
 - iii. The District Surveyor took a portion of the 4th house land and shared it out to the 4th house land and shared it out to the 3rd respondent and one Kenneth Mbaya P, Njeru who is not an administrator
 - iv. That the survey works already carried out have the 4th houses tea bushes several gravellier trees, cassava, mango trees and yet here is land elsewhere to cater for the 4th respondent. The applicant contends that he has occupied 4.25 acres out of the entire estate and the surveyor had no business to touch on the land occupied by the 4th house but that he was entitled to 0.25 acres. The various grounds in support of the application hinged on these contentions. The ground in support of the application are reiterated verbatim in the supporting affidavit.
 3. The applicant has also sworn a supplementary affidavit. He has urged this court to order that new subdivisions schemes be carried out after the substitution of the late Eustace Kent Nkonge.
 4. The respondents have opposed this application through the replying affidavit sworn by Petirary Shen Miriti. The 3rd administrator who has sworn the affidavit dated 18/6/2021 on his own behalf and on behalf of the other respondents i.e 2nd and 4th. The contention by the respondents is that after the Judgment of this court was delivered, the government surveyor visited the suit land and rightly involved all the parties but that it is the applicant who has been un-cooperative of all the subject households. It is also the contention by the respondents that the subdivision started on 7/5/2021 and the Surveyor went ahead to place beacons on various parts of the land but unfortunately the applicant has since illegally uprooted the beacons. He depones that the surveyor involved all the parties and visited the land in the company of the area chief and security and after the survey of Parcel No. 384, through reconnaissance the surveyor suggested that since the land is vast and lies in different terrains, all households were to get equal portions of parts touching the tarmac which is prime, equal portions touching on plateau and equal portions touching on the steep valley. He deposes that all parties were agreeable including the applicant and the applicant and subdivisions commenced. He further avers that permanent buildings were not touched and it was agreed that parties would be allowed to harvest the crops and physical occupation take place thereafter. That the surveyor went ahead and put beacons in place but the applicant uprooted the beacons.
 5. The respondent avers that 1st household which was represented by Eustace Kent Nkonge does not wish to substitute the administrator and wishes that they be represented by the 3rd administrator. The respondents urge the court to let the process of sub-division be completed by the surveyor and the report be filed in court.
 6. The instant application was canvassed by way of written submissions.



7. On his part, the Applicant filed his submission on August 2, 2021. It was his submission that him and the 2nd Respondent were never involved in the preliminary discussion before the subdivision of the suit land took effect. According to him, the surveyor appointed is biased as he sides with the Respondent and leaves out the Applicant. He further submitted that the current subdivision scheme is not in conformity with the judgment of this court. The Applicant thus urged this court to order and direct that there be a fresh subdivision scheme and that he be allowed to avail a private surveyor for the process.
8. The Respondents filed their written submissions jointly through their advocate on record on October 28, 2021. It was their submission that it is not necessary to substitute one of the deceased administrators as the surviving three administrators can administer the estate without any problem whatsoever. It was further submitted that Justice Limo appointed a District Surveyor in order to subdivide the estate into the four (4) houses of the deceased and that the Surveyor appointed followed the order of this to the letter by involving all the parties concerned and considering the terrain. Finally, it was the Respondents' submission that the Applicant has not approached this Court with clean hands and that the surveyor should be allowed to proceed to complete the subdivision of the estate and file his report.
9. The parties framed the issues they feel that this court should determine as follows:
 - a. Whether substitution of the deceased administrator is really necessary.
 - b. Whether the Government Surveyor followed the law and orders in the Judgment delivered by Learned Justice Limo.
 - c. Whether the survey should be repeated.
10. Below is an analysis of the above issues.

a. Substitution of the deceased administrator

11. Section 81 of the *Law of Succession Act* (hereinafter the "Act") provides as follows:

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.” (Emphasis added)

12. In this case, vide an order of this court dated 5/9/2021, the applicant and the respondents, all four administrators that were appointed to administer the estate of the deceased. These included the Applicant and the three (3) Respondents herein. The 1st Respondent herein is now deceased. As per the clear provisions of Section 81 of the Act, and as correctly submitted by the Respondents, powers and duties of the administrators is now vested in the three surviving administrators. For avoidance of doubt, these are the Applicant and the 3rd and 4th Respondents herein. The law is well settled under the above cited provision that death of one administrator does not render the grant inoperative but the duties and powers of the administrators shall vest in the surviving administrator.



b. Compliance of the judgment of this Court by the Government Surveyor

13. In the judgment of this Court that was delivered on 8th October 2019, the Learned Justice Limo rendered himself as follows:

“In order to bring this matter to an end, I direct the same surveyor Mr. Ken Opunge to revisit the estate once again this time in the company of the Area Chief and police officers to be availed by Chuka Police Station for purposes of security and as much as practicable carry out subdivision as per the judgment of this court taking into consideration the developments (permanent buildings in order to avoid (as much as it is practicable) moving beneficiaries from their current homes. The sketch map provide by the 2nd to 4th administrators as shaded if it is a true reflection of the ground should provide a useful guide.”

Needless to say, this cause was determined vide the Judgment which was delivered on 8/10/2019 where it was held that the estate be distributed equally among the four houses (representing four (4) wives of the deceased.

14. In my view, the import of the above holding of this Court is that the one Mr. Ken Opunge was to revisit the estate and carry out subdivision as per the judgment of this court. No appeal was referred against the said judgment. In addition, no report is on record from the said Mr. Ken Opunge. Further, the interim orders granted restrain the said surveyor from continuing with the subdivision and filing his report as per the judgment of this Court. The Judge specifically stated that each house was to get 4.5 acres out of land parcel No. Magumoni/Thuita/384.
15. The applicant in his grounds in support of the application tend to show that he admits that the surveyor embarked on the subdivision as ordered by this court. The respondents have in the replying affidavit demonstrated that the surveyor complied with the orders of this court by taking into account the developments on the land to avoid moving the beneficiaries from their current homes. The applicant has not in his affidavit averred that this is not the case. I find that the surveyor should be given a chance to complete the work. I therefore order that the surveyor shall proceed and complete the survey as directed by this court, Limo Judge, in the Judgment without interference. Security shall be provided as ordered in the Judgment. I note that the respondents have shown that the applicant interfered with beacons which the surveyor put. I direct that the beacons shall be replaced. The surveyor to complete his work and file his report in this court within thirty (30) days.
16. The upshot is that this application is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF AUGUST 2022.

L.W. GITARI

JUDGE

4/8/2022

The ruling has been read out in open court.

L.W GITARI

JUDGE

4/8/2022

