



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO. 80 OF 2017

IN THE MATTER OF THE ESTATE OF GATHOGO WAGACHA ALIAS

GATHOGO WAGACHA GATHOGO (DECEASED)

AND

MARY GATHONI GATHOGO.....APPLICANT

VERSUS

CHRISTOPHER CAXTON GATHOGO KARIUKI.....RESPONDENT

RULING

1. The Applicant herein through an Application dated 17th January 2020 sought the following orders: -

i. Spent

ii. Spent

iii. That the honorable court be pleased to amend and or rectify the decree issued herein on 8th July 2015 to further include the following orders:

iv. The deceased died intestate leaving behind three issues namely

· Jane Waitherero

· Christopher Caxton Kariuki

· Mary Gathoni

v. The title deed obtained by Caxton on 7th December 2007 was procured fraudulently and illegally and is hereby cancelled

vi. That the honorable court be pleased to amend, vary or review its judgement delivered on 15th May 2015 as follows:

vii. To change the acreage of parcel no. Nyandarua/Milangine/139 from 27 acres to 11.3 hectares or 27.96 acres

viii. To particularize the acreage area forming the homestead to 2 acres

ix. To order for cancellation of title deed obtained by Caxton Kariuki Gathogo on 7th December 2007 with all subsequent subdivisions emanating therefrom

x. To order that a certificate of confirmation of grant be issued as per distribution contained in the decree

xi. That the costs of this application be borne by the Respondent.

2. The application is premised on the grounds set forth on the face of the application and the supporting affidavit of even date sworn by the Applicant.
3. The Applicant also filed written submissions dated 27th August 2021 however counsel or the Applicant seemed to be submitting on and referring to the application dated 6th April 2021 and not the instant application.
4. On the other hand, the Respondent replied vide the grounds of opposition dated 10/9/2020 whereby he contended that:
5. That the orders issued on 15th June 2019 have already been executed and the land subdivided and title deeds processed thus the application has been overtaken by events
6. That this honorable court is barred from further adjudicating on the matters as they are res judicata and thus court is barred from adjudicating as if on appeal over its own decisions.
7. That no appeal has been preferred against the judgement of thus court and the same having been executed already, there is nothing more that this court adjudicate upon
8. That litigation should come to an end and the application is an attempt to over litigate on issues so as to defeat justice

RESPONDENT'S SUBMISSION

9. The Respondent submitted that the suit land has already been subdivided using cross method subdivision pursuant to the orders issued on 25/6/2019 and the title deeds processed as follows: -

- *Nyandarua/Milangine/5324- 12 ½ acres – Mary Gathoni Gathogo*
- *Nyandarua/Milangine/5325- 2 acres- Jane Waitherero Gachuhi*
- *Nyandarua/Milangine/5326- the area forming part of the homestead*
- *Nyandarua/Milangine/5327- 12 ½ acres – Christopher Caxton Gathogo Kariuki*

10. It was the Respondent's averment that the area forming part of the homestead falls within the Respondent's entitlement.

11. Reliance was placed on ***John Florence Maritime Services Limited & another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR.***

12. The Respondent reiterated that the Applicant was present and represented by counsel when the court made its pronouncements on the cross method approach of subdividing the land which the district surveyor recommended as the most appropriate method.

13. Lastly, it was the Respondent's contention that this succession cause has already been concluded and this court lacks further jurisdiction save for clerical errors on the face of the judgement and execution of the decree.

ANALYSIS AND DETERMINATION

14. From my understanding of this matter, the bone of contention is on the subdivision on the ground approach adopted after the court judgement dated 15th May 2015 however in response to the orders sought in application herein.

15. I find that there is no dispute as to who the beneficiaries of the estate are their respective shares i.e.

- **Jane Waitherero – 2 acres**
- **Christopher Caxton Kariuki – 12 ½ acres**
- **Mary Gathoni – 12 ½ acres**

16. I find no evidence that the title deed obtained by the Respondent on 7th December 2007 was procured fraudulently and illegally and therefore it is my view that it cannot be cancelled on that basis.

17. The Applicant prayed that the court changes the acreage of parcel no. Nyandarua/Milangine/139 from 27 acres to 11.3 hectares or 27.96 acres however the report from the district surveyor dated 28th June 2021 indicated that the registered acreage is 11.3ha but the ground acreage of the land is 10.84 which is less than the registered acreage by 0.46ha therefore the prayer cannot be granted.

18. However, the court visited the scene of the suit land on 3/6/2021 to establish the cause of the problems on the ground spawned by the subdivision of the suit land. Both parties and their advocates were present plus the land registrar and district surveyor. We were shown the

whole land, subdivisions and the terrain of the land. Both surveyor and land registrar were directed to make reports on the situation and specifically on;

- ***the ground acreage of suit land***
- ***Alternative methods of subdivision of the suit land.***

19. The land registrar confirmed that the entire land was registered in petitioner/administrator's name but had since subdivided and transferred to other purchasers and she presented green cards for the prove of same. There was no parcel of land in the name of Mary Gathoni Gathogo.

20. The survey confirmed that the registered acreage is 27.92 acres but on the ground it was 26.79 acres a shortfall of 1.14 acres. On subdivision, he provided 3 alternatives;

- ***longitudinal which he was of the view that it was inappropriate because of the terrain inter alia, see report***
- ***Cross method which was most appropriate for agriculture, see report***
- ***Hybrid of above two which is the fairest, see reason***

21. Pursuant to court orders of subdivision the court was advised the best method was cross-cut method which is most appropriate according to the surveyor but not the fairest to the parties thus when applied applicant was thrown to the steep area which is substantially uninhabitable and uncultivable to a greater extent thus precipitated the recycling of instant dispute. The respondent with speed subdivided the land and transferred parts of the land abutting the tarmac to himself and third parties thus aggrieving applicant greatly.

22. The court observed the layout of the land and noted that the steep side of the land abutting the river was allotted to applicant though not yet transferred to her and one abutting tarmac is for respondent and the persons who purchased from him. Thus dispute has been escalated thus call for cancellation of titles issued to warrant fair distribution on the ground due to the discrepancies on terrain and topography of land on the ground. The court noted that, the previous judge was not appraised on all 3 methods of subdivision in terms of fairness and equity on the ground, thus this court is justified in interfering with subdivision on the ground for equity and fairness to the beneficiaries. Thus the court makes the orders;

i. All titles arising from subdivision of Nyandarua/Milangine/139 are cancelled and the land to revert to the names of Christopher Gathogo Kariuki for distribution as ordered by the court in decree herein as follows:

a. Caxton Kariuki Gathogo to get 12 ½ acres of which 1 acre will be curved for AIC Mutarakwa Church.

b. Mary Gathoni Gathogo 12 ½ acres.

c. Jane Waitherero 2 acres.

d. Homestead 0.96 acres.

ii. The subdivision of designated areas for applicant and respondent to be subdivided using hybrid cross-cut /longitudinal method described by surveyor as the fairest. And the beneficiaries get registered in allotted portions as proprietors accordingly vide sketch plan (Hybrid method (cross cum longitudinal method) in report of J. Nyabola for County Surveyor Nyandarua dated 28th June, 2021.

(ii) Parties to bear their costs

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER, 2021.

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CHARLES KARIUKI

JUDGE