



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 301 OF 1997

IN THE MATTER OF THE ESTATE OF SAMUEL MURENGWA KAHUNGA (DECEASED)

BEATRICE WANJIKU MAREGWA 1ST ADMINISTRATIX/APPLICANT

MARTIN KAHUGU MAREGWA..... 2ND ADMINISTRATOR/RESPONDENT

WALTER MATHENGE MAREGWA 3RD ADMINISTRATOR/RESPONDENT

R U L I N G

1. Before me is the Chamber Summons dated 18th May 2020 brought under **Section 47 of the Law of Succession Act Cap 160 Laws of Kenya and Rule 73 of the Probate and Administration Rules.**

2. The applicant seeks orders;

1. THAT this application be certified urgent, service thereof be dispensed with in the first instance and the same be heard on priority basis.

2. THAT pending inter- partes hearing and determination of the application herein, a conservatory order be issued restraining the Respondents, their agents, servants, assigns and/or any other person claiming under them, from leasing, cultivating, ploughing, planting, herding on or in any other manner whatsoever interfering with portions and access to portions of land comprised in L.R. No. 6711, 6712, 1376/1, 1376/2 and 421/2/3 NAIVASHA which are in possession of the 1st administratix, her sons, agents, assigns and/or beneficiaries of the estate of the Deceased.

3. THAT the Officer Commanding Station, Gilgil, be directed to enforce and ensure compliance of the above order.

4. THAT the survey plans by Ndichu & Associates dated 16/12/2013 in respect of the proposed amalgamation and partitioning of L.R. No. 6711 and 6712 NAIVASHA on the one hand and L.R. No. 1376/1, 136/2 and 421/2/3 NAIVASHA on the other, be adopted by the Honourable Court.

5. THAT the parcels of land marked 'A' in the Survey Plans by Ndichu & Associates dated 16/12/2013 in respect of the proposed amalgamation and partitioning in L.R. No. 6711 and 6712 NAIVASHA on the one hand and L.R. NO. 1376/1, 1376/2 and 421/2/3 NAIVASHA on the other, be apportioned to the 1st Administratix.

IN THE ALTERNATIVE, a final determination, through a process of balloting or otherwise, be made by the Honourable Court on apportionment of each half of the amalgamated L.R. NO. 6711 and 6712 NAIVASHA on the one hand and L.R. NO. 1376/1, 1376/2 and 421/2/3 NAIVASHA on the other, between the two houses of the Deceased represented on the one part by the 1st Administratix and the 2nd and 3rd Administrators on the other part.

6. THAT costs of and incidental to the application herein be awarded to the 1st Administratix.

It is supported by the applicant's affidavit sworn on 18th May 2020 and the grounds of the face of the application.

3. The reason for this application is that two (2) houses of the late Samwel Maregwa Kahugu cannot, by themselves make an equitable sharing of property to the tune of 1680 acres he left them. These properties comprise of LR 6711, 6712, 1376/1, 1376/2 and 421/2/3 Naivasha.

4. The applicant's position is that when the grant was confirmed the two (2) houses were to share these portions of land EQUALLY, it is this "equally" that has bothered them since 2011 as they, by themselves cannot interpret on the ground what that means, or entails for each house.

5. While this is bothering them, the applicant's half of the family is suffering because they are not enjoying their share of the estate though bequeathed to them by that grant.

6. According to the respondents the matter was settled by a consent order recorded before my predecessor in this matter *Ndung'u J* on 1st October 2018, where it was agreed, that the proposed subdivision made by the 2nd and 3rd administrators in respect of LR Number 6711 and 6712 be adopted.

7. However, the record clearly shows that the applicant's counsel in writing to the respondent's counsel prior to the recording of the consent had clearly indicated the part his client would have wished to occupy. This does not appear to have been sorted by corresponding correspondence from counsel for the respondents.

8. When the consent was recorded it did not go into the specifics as to who between them would occupy the demarcated B1 or B2 of the consolidated parcels. This is reflected in the proceedings of 1st April, 2019 where counsel for the applicant raised the issue, was raised by Mr. Karanja for the applicant herein. The record states;

“Karanja: There is a consent of 1st October 2018 that Parcel 6711 and 6712. It was agreed we go by proposed sub-division proposed by 2nd and 3rd administrator. An issue has arisen. Initially the 1st administrator had made proposals. **The parties were to choose whichever side they chose. They did not. My client chose B1 side. 2nd and 3rd administrator want the 1st administrator to take B2. This morning an issue arose and Mr. Waiganjo's client says B1 and B2 are arable.** We have agreed to send the District Agricultural Officer Gilgil accompanied by Provincial Surveyor to confirm to this court **whether the sub-division is equitable in terms of whether both parcels are arable and percentage of the arable land and whether all have access to the road and access to water.**

Waiganjo: We can have timelines.

Wacuka: That is ok.

Court: The District/Sub-County Agricultural Office accompanied by the District/Sub-County Surveyor to visit the parcels No. 6711 and 6712 to establish whether the subdivision marked B1 and B2 by the 2nd and 3rd administrators are equitable and specifically to report on;

1. Whether both parcels are **arable**.
2. Whether both parcels (sub-divisions have **access to the road**).
3. Whether both sub-divisions have **access to water**
4. Report be filed within 30 days hereof.
5. OCS Gilgil to provide security.

Mention on 30th May 2019 for report by Agricultural Officer.”

9. By then my brother had been transferred and the matter landed in my docket.

10. The report by the Agricultural Officer had been filed on 29th May 2019 and it was not good. Clearly someone was stealing a match over the other. The report said;

“TO WHOM IT MAY CONCERN

As per the requirements of the high court of Kenya at Nakuru, succession case number 301 of 1997, here below is the report from the agricultural office who visited the site on Thursday 25th April 2019

The observation were as follows:-

1. Whether both parcels were arable

B1

The whole block is arable, has been under cultivation for several years.

B2

More than 95% is not arable, rock and cliffy, less than 5% of the area is arable and has been leased.

2. Whether both parcels (subdivisions) have access to road

B1

Has access to road

B2

Has no access to road

3. Whether both subdivisions have access to water

B1

Has access to water (There is a small spring at one corner of the parcel)

B2

Has no access to water

4. Security was provided by OCS Gilgil

Remark 1

B1 is very fertile and suitable for agriculture while B2 is not suitable for agriculture due to the terrain

Remark 2

This information and site visit led by the two sons of the petitioner no. 2, the office could therefore not ascertain the accuracy of the boundaries as the information was given by one side (i.e. the objector was not there nor represented)

Remark 3

Some parts of block 2 could not be reached by the agricultural officer due to the poor/rough terrain (could not be accessible).

COMPILED BY:

PHOEBE MUGANE AND SIMON KARIUKI

AGRICULTURAL OFFICERS,

GILGIL SUB COUNTY.”

11. The record bears the reasons why the Hon. Judge, despite the consent being in place, had made the order he did, for the Agricultural Officer’s report. Clearly it was to satisfy himself as to the equitableness of the equal distribution. It is clear to me therefore that on the face of it the consent orders as entered, it was not specified as to who would occupy which side of the estate yet the applicant’s counsel had specified the side his client would have preferred. In the end that is not what they got.

12. Counsel for the respondents conceded to the invitation of the Agricultural Officer into the picture. It could not have been in vain.

13. The Report has not been disputed by either of the two parties. Having seen the report, can it be said that the parties are enforcing the grant as confirmed by the court? No, clearly there is no fairness in the manner in which the respondents shared out the land into B1 and B2 taking all the arable land and leaving the less arable land to the applicant.

14. In the light of the report from the agricultural officer the only fair way would be for that land to be divided in such a way that each house got an equal share of the arable land and of the rocky land, each got access to the matter, and each got access to the road.

15. Having considered the affidavit of each party and the annexures and the court record and by the powers bestowed to this court by **Section 47 of the Law of Succession Act**, so as to meet the ends of justice and prevent further abuse of the process of this court by the multiplicity of applications to deal with just one issue, I make the following orders:

- i. That the parcels Number 6711 and 6712 be measured in terms of hectares.
- ii. That the consolidated portion be divided in two equal portions.
- iii. Each house gets the same number of hectares, the same size arable land,
- iv. Each house's share to have access to the water and access to the road
- v. 20 acres be excised from the consolidated parcel valued and sold to cater for this cost of this exercise.
- vi. Upon completion of the exercise any balance from (v) be shared equally between the 2 houses.
- vii. Regarding 1376/1, 1376/2 and 421/2/3 the same principle to apply.
- viii. The District Surveyor and Planner to carry out the both exercises.
- ix. The same be completed within ninety (90) days hereof.

Dated and Signed and Delivered at Nakuru this 3rd day of August, 2020.

Mumbua T. Matheka,

Judge

In the presence of: VIA ZOOM/Via Email to

Edna Court Assistant

Gatonye & Gatonye Advocates

Leina Morintat & Company Advocates

Waiganjo & Company Advocates

Mumbua T. Matheka,

Judge.

3/8/2020