



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 3305 OF 2004**

**IN THE MATTER OF THE ESTATE OF KARIUKI KAGWE (DECEASED)**

**LEAH GACHUI GITIRO.....APPLICANT**

**VERSUS**

**PURITY MICERE KARIUKI.....RESPONDENT**

**RULING**

1. The Applicant herein filed an application dated 25<sup>th</sup> July, 2018 under Certificate of Urgency asking the court to: interpret clauses 5 and 6 of its ruling delivered on 20<sup>th</sup> May, 2015 in respect of the subdivision of the property land reference number Mwerua/Kanyokara/207, which is the sole asset of the deceased whose estate is in issue herein; consolidate the parcels belonging to the Applicant and those of her children to keep the family together and order the Kenya Police and in particular the OCS Baricho Police Station to extend necessary assistance for enforcement of the court order made herein.
2. The application is premised on the ground that the Respondent has subdivided the property contrary to the mode of subdivision directed by the court in its order of 20<sup>th</sup> May, 2015. That if the subdivision proceeds as proposed by the Respondent, the Applicant stands to suffer loss. Further that there is real and present danger that the property will be wasted to the detriment of other beneficiaries.
3. In her affidavit sworn on 25<sup>th</sup> July, 2018 in support of the application, the Applicant deposed that on 28<sup>th</sup> April, 2018, a surveyor subdivided the property in the presence of all the beneficiaries, which mode was agreed upon by all beneficiaries. Later on 17<sup>th</sup> May, 2018 the parties attended a Land Board meeting which confirmed the mode of subdivision as had been agreed upon on 28<sup>th</sup> April, 2018.
4. The Applicant averred that on 20<sup>th</sup> July, 2018 the Respondent and members of her household enlisted a surveyor to resurvey the property and subdivide it in a manner different from that which had been agreed upon by the parties. The subdivision has seen the Applicant separated from her other children as their proposed allocations are quite distant from the Applicant's current homestead.
5. On 17<sup>th</sup> September, 2018 the Respondent filed a replying affidavit sworn by herself on 17<sup>th</sup> September, 2018 in which she deposed that both parties agreed on the original subdivision conducted on 28<sup>th</sup> April, 2018 but that the subdivision was not in conformity with this Court's ruling of 20<sup>th</sup> May, 2015. That the initial subdivision would have dislodged the beneficiaries from their homesteads and developments.
6. It was the Respondent's assertion that on 5<sup>th</sup> July, 2018, the Area Chief called a meeting at his office in which all the parties hereto agreed to have the Surveyor repeat the subdivision of the land parcel to conform to the court ruling. The repeat subdivision took place on 20<sup>th</sup> July, 2018. The Respondent urged that it is the repeat subdivision that conforms to the ruling issued by this court and reflects the position on the ground.
7. The Respondent asked the court to dismiss the Applicant's present application and order the parties to abide by its ruling of 20<sup>th</sup> May, 2015 which remains in force. She averred that the application is an afterthought calculated to circumvent the court ruling and take advantage of the developments previously made on the land parcel by the other parties. She urged that the subdivision proposed by the Applicant will prejudice her family as it is fashioned to interfere with the developments they had previously made on the land parcel.
8. On 21<sup>st</sup> September, 2018 the Applicant filed an affidavit dated 18<sup>th</sup> September, 2018 in response to the Respondent's Replying Affidavit in which she denied the Respondent's allegations that the initial subdivision would have dislodged beneficiaries from their houses and developments and stated that the developments were taken into consideration during the said subdivision. She asserted that none of the members of her household were in attendance at the meeting held in the Area Chief's office and did not therefore consent to the 2<sup>nd</sup> subdivision as alleged as. That they only came to learn of the subdivision when the Surveyor called to inform them that he had instructions to alter the boundaries on the land parcel.

9. The Applicant contended that while the ruling of 20<sup>th</sup> May, 2015 indicated that the proposals of both parties should be upheld, there was no proposal submitted from her end. She urged the court to uphold the initial subdivision which was fair to all the parties. She suggested that in the alternative, the parcel should be divided into two portions, one for the Applicant and another for the Respondent, for each to subdivide amongst the beneficiaries in their respective households.
10. On 4<sup>th</sup> October, 2018, Charles Muthii Kariuki, a son to the Respondent herein, filed an affidavit sworn by himself on 3<sup>rd</sup> October, 2018 in support of the Applicant's case. Charles deposed that all the beneficiaries had agreed to the first subdivision and he was surprised to learn that the Respondent had requested to have the land parcel re-subdivided. He contended that some of the beneficiaries had planted coffee and put up their houses on the portions allocated to them in the first subdivision. That re-subdividing the land would therefore only cause confusion and waste the property.
11. None of the other beneficiaries however came forward to state that they had put up developments or planted crops on the portions allocated to them during the first subdivision of the land parcel as alleged.
12. Charles echoed the Applicant's statement that the subdivision done on 28<sup>th</sup> April, 2018 was fair and mutually agreed upon by all the beneficiaries. That it is the second subdivision, which was orchestrated by the Respondent that is unfair. He urged the court to uphold the subdivision done on 28<sup>th</sup> April, 2018 in the interest of justice.
13. M/s Njagi & Company filed written submissions dated 14<sup>th</sup> November, 2018 on behalf of the Respondent and stated that the ruling delivered on 20<sup>th</sup> May, 2015 was ambiguous as it made reference to two different sketches. Counsel urged that it was impossible to divide one parcel of land using two different subdivision sketches and satisfy both parties. Further that what the Applicant presented was a sketch map showing the portion she occupied in contrast to the proposed mode of subdivision presented by the Respondent.
14. Counsel contended that the initial subdivision was mutually agreed upon by the parties and took into account existing developments and structures and access of each party to the main road ensuring that both families share the slope and flat land equitably. Counsel asserted that the present application was only filed because the Respondent reneged on the agreement thereby upsetting the initial subdivision against the best interest of the beneficiaries of the estate.
15. Counsel contended that the Applicant's suggestion to have each of their portions consolidated for later subdivision amongst each of their children, is to ensure that neither the Applicant nor the Respondent have their homes far off from those of their children.
16. Charles Muthii Kariuki filed brief submissions on 22<sup>nd</sup> November, 2018 in support of the Applicant's case and reiterated that the second subdivision was orchestrated by his mother, the Respondent herein, without consulting either him or the Applicant. He urged that the second subdivision only serves to benefit his brothers and the Respondent to the detriment of the Applicant's family and himself.
17. In opposition to the application, Mr. Gicheha Kamau Advocate for the Respondent filed written submissions dated 28<sup>th</sup> November, 2018 in which he urged the court to uphold the Respondent's proposal as per the proposed mutation form and dismiss the Applicant's proposal.
18. Mr. Gicheha Kamau submitted that the Respondent's proposal and mutation as annexed to her Replying Affidavit and marked 'PMK3' is reasonable and practical as it causes least disturbance to the current occupation of the land and is in accordance with the ruling of 20<sup>th</sup> May, 2015.
19. According to the mutation, a feeder road is to be extracted from the main road next to plot 206 to feed all portions arising from the entire land. This the Respondent says will ensure each beneficiary can access their respective portions. That after extraction of the feeder road, the remainder land will be easily subdivided into one (1) and half ( $\frac{1}{2}$ ) acre portions to conform to the court's ruling.
20. The Respondent proposes that upon extraction of the feeder road, the land which is rectangular in shape should be divided along the length as shown on the mutation form such that each portion shall have a width of at least 19.5 meters and a length of 97.5 meters. This she says will ensure the resulting portions are economically viable for future use and development.
21. It is the Respondent's averment that the Applicant's proposal is to have the land subdivided along the width such that each portion touches the main road and the Applicant gets the first three (3) portions each measuring half ( $\frac{1}{2}$ ) an acre.
22. According to the Respondent, this proposed mode of subdivision will result in her losing a part of her homestead, her graveyard and her coffee crop. Further that the subdivision will result in portions measuring a width of 9.5 meters which is too narrow and a length of 207 meters which is too long. That the Applicant's proposal is therefore prejudicial to both parties and will not ensure sustainable and productive development and use of the land.
23. With regard to the Applicant's proposal to have the land subdivided into two portions which each party can subdivide amongst their children, Mr. Gicheha Kamau Advocate submitted that the suggestion does not offer a solution to the situation at hand since it does not specify which particular portion should devolve to each household.
24. Mr. Gicheha Kamau further submitted that Charles Muthii Kariuki had failed to demonstrate how the Respondent's proposed subdivision was prejudicial to him and to substantiate the allegations that some of his brothers had leased or sold the portions of land assigned to them in the initial subdivision.
25. The deceased whose estate is in issue herein died on 14<sup>th</sup> August, 1994 domiciled in Kenya. Letters of Administration Intestate to all his estate being land parcel reference number Mwerua/Kanyokara/207 were granted to his widow Purity Micere Kariuki, the Respondent herein,

and to Leah Gachui Gitoro, a widow of the deceased's brother and the Applicant herein. This was following a determination that part of the land parcel was held by the deceased in trust for his late brother Charles Gitoro Kagwe's family. The land parcel was divided into two (2) portions: 3 acres were assigned to the Respondent's household and 1½ acres assigned to the Applicant's household.

26. Both the Applicant and the Respondent filed separate summons for confirmation of grant with proposals on the mode of distribution of the deceased's intestate estate. During the hearing of the applications on 29<sup>th</sup> April, 2015 by consent of the parties, the two summonses, dated 11<sup>th</sup> March, 2014 and 5<sup>th</sup> April, 2014 respectively, were consolidated for purposes of confirmation of grant.

27. On 20<sup>th</sup> May, 2015, this court issued a ruling in which it confirmed the grant to the parties hereto jointly and ordered that their respective portions of the land parcel be distributed in accordance with their respective proposals.

28. Paragraph 5 of the ruling delivered on 20<sup>th</sup> May, 2015 which the parties hereto seek an interpretation of states thus:

*“In the circumstances the court confirms the grant issued on 18<sup>th</sup> September 2013 to the two widows jointly. Their respective portions of the suit parcel of land shall be distributed in accordance with their respective proposals.”*

29. A further reading of the ruling reveals that its paragraph 6 goes on to expound on how the said subdivision should proceed. The relevant part thereof provides that:

*“Leah shall retain her homestead to be held jointly with her daughter Tabitha Wangithii Gitoro to the extent that it measures half an acre. Her two sons, Peter Muriithi Gitoro and Nahashon Miano Gitoro shall each inherit half an acre absolutely in the portion where Leah plants her food crop and coffee as indicated in their respective plans.*

*Purity and her seven married daughters being...shall inherit 1 acre from their portion of three and half acres of land. The four sons of Purity being...shall inherit half an acre each.*

*The remaining half acre shall be held in trust by Purity on behalf of the surviving minor children of Ruth Wemwirua Kariuki being Philip Mutugi and Millicent Wakio respectively.”*

30. From Paragraph 6 of the ruling, it is not in doubt that the Applicant was to retain her homestead to hold jointly with her daughter Tabitha as her share of the deceased's estate and only to the extent that it measured half (½) an acre. Further that her two (2) sons were to each inherit half (½) an acre from the portion on which the Applicant plants her food crop and coffee. This leaves three and a half (3½) acres of land which was to be shared between the Respondent and her children in the proportions specified in Paragraph 6 of the ruling.

31. The Respondent was to inherit one (1) acre of her family's portion together with her seven (7) married daughters, and her four sons to inherit half (½) an acre each out of the remaining portion. The Respondent was to hold the remaining half (½) acre in trust on behalf of the surviving children of her deceased daughter. The family was given the option of enlisting the services of a surveyor to ascertain the sizes of their respective shares.

32. Before its ruling of 20<sup>th</sup> May, 2015, this court had directed both parties hereto to file a proposed mode of subdivision. The Applicant filed a sketch plan of the land parcel while the Respondent annexed a proposed mode of subdivision to her further affidavit sworn by herself on 27<sup>th</sup> June, 2014.

33. Both the sketch plan presented by the Applicant and the proposed subdivision presented by the Respondent show the current occupation of the land parcel and indicate the portion on which each of the parties have their homesteads, food crop and coffee. It is from the portion occupied by the Applicant that she and her children were to obtain the 1½ acres assigned to them by this court, after which the Respondent and her household would share the remaining 3½ acres.

34. It is noteworthy that neither the sketch plan presented by the Applicant nor the proposed subdivision presented by the Respondent indicate how the land parcel should be divided amongst the beneficiaries of the deceased's estate. All they do is state which portion is occupied by which of the parties and how each portion has been utilized but fail to indicate the acreage of each portion or how the portions should be distributed. It was on this basis that the court directed that the parties were at liberty to enlist the services of a surveyor to ascertain the sizes of their respective shares.

35. To give effect to this court's ruling of 20<sup>th</sup> May, 2015 the land parcel should have been divided into nine (9) portions each measuring the acreage assigned to each beneficiary.

36. The mutation map annexed to the Respondent's replying affidavit has the land parcel divided into nine (9) portions labeled A, B, C, D, E, F, G, H and J. The map does not however specify to whom each portion should devolve to. There is also nothing on the record to show the result of the first subdivision said to have taken place on 28<sup>th</sup> April, 2018.

37. Save for the Applicant, the Respondent and the beneficiary known as Charles Muthii Kariuki, none of the other beneficiaries have expressed their discontentment or otherwise with either the first subdivision of 28<sup>th</sup> April, 2018 or the second subdivision of 20<sup>th</sup> July, 2018.

38. While the Respondent suggested that the Applicant and her household should inherit the land next to their family grave yard, I note that this is not a welcome suggestion as it will only serve to displace the Applicant from her homestead.

39. The parties hereto allege that Paragraphs 5 and 6 of the ruling of 20<sup>th</sup> May, 2015 were ambiguous. However, as demonstrated above, it is evident that this is a baseless argument. Paragraph 5 of the ruling states how the property should be shared amongst the members of the two households and paragraph 6 expounds further on the subdivision thereof.

40. Nowhere in the ruling is it stated that either party should not be separated from their children as suggested by the Applicant. If anything, the court was cautious to see that neither the Applicant nor the Respondent were displaced from their respective current homesteads, or the land which they previously cultivated. It is on this basis that the court directed that the children of the respective households should inherit from the shares previously utilized by their families.

41. A cursory glance at both the sketch map and the proposed subdivision reveals that the portion on which the Applicant has her homestead and that which she farms are not joined. It is against the ruling of 20<sup>th</sup> May, 2015 for the Applicant to claim that she and her children should inherit land adjacent to each other. Such an order will only serve to upset the subdivision further and interfere with the developments and food and cash crops of the Respondent and her household.

42. In the premise therefore, I find that there is no ambiguity in Paragraphs 5 and 6 of the ruling dated 20<sup>th</sup> May, 2015. The Applicant's half (½) acre to be held jointly with her daughter Tabitha should be extracted from the portion on which she has her homestead. Her two sons should each inherit half (½) an acre from the portion on which the Applicant has her food crop and coffee. The remaining portion of land is to be shared between the Respondent and her household as specified by the court in its ruling. After all, both parties in the proposal and the plan indicated that the two families have hitherto utilized the land in the manner ordered by the court save to identify the specific percentage of the share to be held by each beneficiary. It is for the purposes of ascertaining these shares that the court gave the parties the liberty of enlisting a Surveyor.

Reasons wherefore the application is found to be lacking in merit and is dismissed.

**SIGNED DATED and DELIVERED in open court this 28<sup>th</sup> day of March 2019.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of G. Kamau Advocate for the Applicant.**

**In the presence of M/s Githinji Advocate for the Respondent.**