



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**IN THE MATTER OF THE ESTATE OF NELLIE NJERI MWATHI (DECEASED)**  
**SUCCESSION CAUSE 1314 OF 2001**  
**(SUCCESSION CAUSE 103 OF 1988 KIAMBU LAW COURTS**  
**SUCCESSION CAUSE 182 OF 1989 HIGH COURT NAIROBI)**  
RAHAB NYAMBURA WAINAINA.....APPLICANT  
-VERSUS-  
BETH MBENE MWATHI.....1<sup>ST</sup> RESPONDENT  
GRACE ANJIRU MWATHI.....2<sup>ND</sup> RESPONDENT  
DISTRICT SURVEYOR, COUNTY OF KIAMBU...3<sup>RD</sup> RESPONDENT  
LAND REGISTRAR COUNTY OF KIAMBU.....4<sup>TH</sup> RESPONDENT

**JUDGMENT**

This Court delivered its Judgment on 3<sup>rd</sup> April 2017, where the Court ordered that;

1. The Applicant and Respondents shall conduct joint survey by the Kiambu County Surveyor within 30 days to implement judgment and orders of 14th January 2011 and pursuant to judgment of Hon. L.J. R. Nambuye;
2. The parties shall indicate to the Surveyor their respective developments on the land which should not be interfered with unless any party is ready and willing to compensate the other party;
3. As far as is practically possible each party to have a portion on the road and by the river without interference with permanent developments;
4. The surveyor may consider the existing valuations and surveys reports to inform the way forward;
5. The surveyor to consider the possibility of one access road;
6. All objections by parties shall be recorded and alternative proposals;
7. The Surveyor may seek the protection by the nearest Police Station to carry out the exercise;
8. The parties to share survey costs equally;
9. The matter shall be mentioned on 6th June 2017.

Pursuant to the Ruling, parties sought variation of these orders and they gave directions on 27<sup>th</sup> November 2018 that each party was to give proposals on how to ensure the distribution of the estate.

**PW2 Rahab Nyambura Wainaina** told the Court that the borehole is shared in joint portions and her late husband's grave is on their portions. The Applicant disputed the ownership and division of the shops. The Applicant reiterated, she and her late husband bought the stores in 1957 and later built them into shops from 1988 and the Respondents did not contribute to their development so they cannot have the shops. She produced copies of Tenancy agreements to prove this fact. That is why she objected to the mutation forms of the proposed subdivision. She also instructed a surveyor to subdivide the suit property so as to retain her home, shops, borehole and her late husband's grave. If the various developments are to be taken away then she should be compensated.

**DW2 Simon Kahiro Mwaura** Land Surveyor said on 29<sup>th</sup> October 2014, he visited the suit property **Kabate/Kibichiko/754** on instructions of the Respondents to subdivide the land into 3 equal partes. He did not interfere with the Applicants matrimonial home except chicken rearing portion. He was not aware and was not informed of the ownership of the shops. He concentrated on equal subdivision of the suit property and not the structures on the land. He made provision for the access road and the rest of the land was divided in 3 equal parts.

**DW3 Beth Mbene Mwathi** testified in Kikuyu through an Interpreter, she admitted that at the road there are shops that belong to the Applicant Rahab Nyambura. She demanded that she removes her shops on her portion of land so that she also put up her shops. Rahab sold land and she built her shops on the land. She reiterated that they obtained orders from **Hon. Justice Musyoka** that the land be divided into 3 equal portions. She sought equal share in acreage and value as per the Surveyor's proposal. She informed Court that subdivision and transmission had taken place with orders from Court and when the Applicant filed the instant application, when matters came to a halt and seeks compensations for funds expended in the subdivision.

**DW4 Grace Wanjiru Mwathe** testified in Kikuyu through an Interpreter and supported DW3's testimony that she wants her equal share of the suit property and as proposed by the Surveyor DW2. She proposes that the structures shall be removed and each will use their own portion of land. She wanted Rahab to remove her shops but was not willing to compensate her for the same.

### **PROPOSAL BY THE 1<sup>ST</sup> RESPONDENT**

The 1<sup>st</sup> Respondent's (Beth Mbene Mwathi) proposal on the issue of equality, access road, the water tank , and of the land on the high and low scale is, as seen on the surveyors report dated 7<sup>th</sup> July 2017, the said Rahab Nyambura Wainaina has a water tank on **Parcel E** and which parcel belongs to Grace Wanjiru Mwathe. **Her proposal is that she can forfeit the same or in the alternative this court makes an order that she removes the tank and erects it on her parcel.**

She said that Rahab Nyambura Wainaina has her husband's grave on **parcel F** which belongs to Beth Mbene Mwathi **and proposed that Rahab exhumes the remains of her husband Julius and buries them at her parcel A where her homestead is.**

On issue of equality, *the Constitution of Kenya 2010 provides that;*

***“every child is equal to the other in the presence of their parents. She wished that Rahab Nyambura Wainaina can have the spirit of reconciliation for the purposes of finding a permanent solution to this problem. In the alternative the court to issue an order to vacate her forcefully.”***

It was the government surveyor's opinion, which he did reiterate to this court vide his report dated 7<sup>th</sup> July 2017 that the land was subdivided equally and in a fair manner and there was no other way that the land could have been subdivided to ensure fairness.

The access road serves all plots ensuring that they are easily accessed and there was also no objection raised against it.

The Applicant has and continues to have structures erected illegally on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents adjacent plots **B** of **No. 3237** and **C** of **No. 3236** respectively which plots are very prime and have a high value that plots there down as they are on the road front. **The said illegal structures were erected after the death of Nelly Njeri Mwathi and the land was yet to be subdivided amongst her benefactors. Such actions to my humble opinion shows that the Applicant has assumed all risk that would be occasioned by the outcome of the succession matter once the court had heard the case and reached its final decision. The Applicant has never made efforts to remove the illegal structures even after learning of the court's decision but has instead opted for an exercise in futility through dragging this matter in this Honourable Court. The actions of the Applicant infringes on my constitutional right subject to Article 40 which provides for protection of right to property.**

The Applicant has also been using their financial might to assert pressures on her to the effect that she sells the land on which the illegal structures are erected; plot **C** of **No. 3236**. She has constantly intimated to them that she will not be able to sell the Plot due to the sentimental value she holds on it and also because of the fact that it is the only share she was allocated that is economically viable to her family. It is her humble proposal that this Honourable Court issue an order as to stop the Applicant from putting her to such pressures.

The titles to the subdivided plots have since been withheld by the 4<sup>th</sup> Respondent herein pursuant to an order made by a ruling delivered on the 24<sup>th</sup> November 2014. This has caused her a lot of difficulties in subdividing the plot allocated to her amongst her benefactors. She would kindly appeal to this court to issue an order as to the effect that the 4<sup>th</sup> Respondent do issue the said titles to enable her to further deal.

She would also like to put this Court on notice that the Applicant has been collecting rent from the said structures amounting to approximately **Ksh 60,000** per month for a period of four years. She humbly appealing to this court that, it will be in the interests of justice that this court orders the Applicant to share the proceeds gained from rent collected from the said structures erected on plot **B** of **No. 3236** with Her the rightful owner of the said plot **C** of **No. 3236** at a 50% basis in which this courts deems fit.

### **THE 2<sup>ND</sup> RESPONDENTS AFFIDAVIT IN SUPPORT OF THE PROPOSAL**

The 2<sup>nd</sup> Respondent Dickson Njenga, deponed that on 27<sup>th</sup> November 2018, this Honourable Court directed each of the 3 beneficiaries to the Estate of Nelly Njeri Mwathi (Deceased) to render their proposals on the mode of subdivision of **Kabete/Kibichiko/175** (hereinafter “suit property”).

That pursuant to the Judgment of this Honourable Court (Lady Justice R. N. Nambuye, as she then was) delivered on 14<sup>th</sup> January 2011, this Honourable Court ordered that the suit property be distributed amongst the deceased’s children in equal share irrespective of gender.

That to achieve this equality of value and acreage, each of the 3 beneficiaries should have their portions touching the Wangige –Mwimuto tarmac road (herein after ‘the main Road’) from the frontage and the river from the rear.

That he therefore urges this Honourable Court to adopt the proposed subdivision plan dated June 2013 as reflected in the impugned Mutation Form dated 9<sup>th</sup> October 2014. Annexed and marked **DN. 1** is a copy of the proposed subdivision plan whereby each of the beneficiaries has their parcels touching both the road from the front and the river from the rear.

That they are opposed to the Kiambu District Surveyor’s proposed subdivisions plan which proposes to allocate the Applicant the entire frontage of the suit property (area marked A on the surveyor’s plan) which touches the main road on the basis that it has her permanent structures for the following reasons:-

- a) The Applicant was not settled at the parcel by the Deceased during her lifetime or at all;**
- b) The Applicant has indeed conceded that together with her late husband, they made developments at the prime part of the parcel after the death of the deceased. See paragraph 2 (iv) of the Applicant’s further affidavit sworn on 20<sup>th</sup> February 2015 and filed in this Honourable Court on even date where she avers that her shops and rental premises were constructed in the 1990s before the Grant herein was issued or confirmed. Again in her re-examination testimony made in this Honourable Court on 21<sup>st</sup> September 2015, the Applicant stated that they started construction of the building after the mother of the husband had died;**
- c) The developments by the Applicant on the most prime area of the property were therefore mischievous and deliberate acts of intermeddling devised to confer upon themselves an undue advantage over the other beneficiaries.**

That accordingly, it would be unjust to allocate the Applicant the entire frontage of the suit property touching the main road and the other beneficiaries the lesser valuable rear parcels as proposed by the District Land Surveyor, in view of the circumstances under which the Applicant erected her structures as aforesaid above.

That in respect to the Applicant’s borehole and tank which are located along the borderline between her parcel and that of the estate of Grace Wanjiru Mathi, while they are well aware of the consequences of developments made on the suit property without a grant as stated herein before, they are nonetheless willing to compensate the Applicant for that specific development and hence that borderline should not be altered.

#### **APPLICANT’S SUPPLEMENTARY AFFIDAVIT**

The Applicant deponed that with the leave of Court he wished to demonstrate the current status on the ground as follows:-

- a) The proposed access road as shown in the surveyor’s diagram cuts through my homestead hence resulting to the demolition of his permanent gate. He annexed photographs showing how his homestead had metamorphosed to the current position.**
- b) That he cannot access his house through the proposed road since the garage has encroached the access road and his homestead hence the Respondents are now operating their garage right outside his doorstep. He annexed photographs of the garage as encroached on the access road and his homestead.**
- c) That one cannot access the proposed access road from the main road since the garage had encroached on the proposed access road from the main Road as shown in annexed photograph from the front view.**
- d) The parcel indicated ‘GARAGE’ which is between parcels marked A and D is his semi permanent structure. It is not the Respondent’s Garage as depicted on the survey’s report.**
- e) The boundary between parcel marked D (his Homestead) and parcel marked E (2<sup>nd</sup> Respondent’s Homestead) has his Water Tank and his borehole also falls inside the same parcel marked E.**
- f) Further to (e) above 2<sup>nd</sup> Respondent removed his livewire fence by separating the two homesteads and also demolished his chicken pen house – wooden structure which was next to his water tank.**
- g) He previously used to access my homestead from the main road through the alternative access road (between Skinners hardware and Kifka hardware) which is about 5 meters wide but it has also now been encroached by the 1<sup>st</sup> Respondent’s garage.**

That his proposal is that the proposed access road encroaching on his homestead be extended a few meters away both in width and length and a boundary created as he will not require accessing his homestead through that side because of the Respondents' garages.

The proposed access road can be extended a few meters towards parcels marked **B** & **C** which has been proposed to belong to the Respondents and that way garage marked **B** belonging to the 2<sup>nd</sup> Respondent will be able to access her garage without interfering with his homestead.

That he is ready and willing to surrender his semi- permanent structures on portion between part marked **G** and his Homestead marked **D** as proposed by the surveyor on condition that 4 meters is left behind the semi permanent structures from the marked **G** all the way to the area marked **D** which he will use to access his homestead. He suggested that the four meters can be reduced from his area next to area marked **G**.

The Applicant is ready and willing to have his water tank and borehole remain on 2<sup>nd</sup> Respondent's homestead on condition that the 2<sup>nd</sup> Respondent will compensate for the entire amount of money he used during construction of both the water tank and borehole so as to enable him construct a new water tank and borehole since that is his only source of water for both his personal consumption and feeding his livestock.

He said he is advised that the surveyor is in a position to introduce a kink/bend on the boundary between parcel marked **D** (His homestead) and parcel marked **E** (2<sup>nd</sup> Respondent's Homestead) so as to have my Water tank and borehole and borehole situated on my parcel.

### **DETERMINATION**

The Court reiterates the legal position held by L. J. Nambuye and this Court that the estate of the deceased ought to be divided equally between the children of the deceased as prescribed by **Section 380** of LSA.

However, we cannot lose sight of the following issues as confirmed from the Court record;

**a) Pursuant to the proceedings that culminated to the Judgment by LJ Nambuye, the Respondents averred that they were marginalized by being given by their mother small portions of land to cultivate while the larger portion was left to the sole surviving brother and son Julius Wainaina late husband of the Applicant herein. That means the Applicant and her husband put up the said developments with their mother's consent at the time.**

**b) Julius Wainaina Mwathi the Respondents brother was/is the source of the dispute, he died in 2007 and his widow the Applicant took over the proceedings, the issue of developments having been carried out after their mother's demise cannot legitimately be visited upon her to remove the permanent structures. There was no Court order to prevent/stop the same.**

**c) Now to the enforcement of Court orders to achieve equality and or equitability of distribution of the estate, the Court notes that parties have made concessions;**

**d) The 2<sup>nd</sup> Respondent is willing to compensate the Applicant for the borehole and tank and hence the borderline should not be altered;**

**e) The Applicant is willing to surrender the semi permanent structures on Portion Marked G and her homestead marked D as proposed by Surveyor;**

**f) The Surveyor's recommendation for kink/bend boundary between Parcel marked D and Parcel E is accepted as an alternative to compensation by 2<sup>nd</sup> Respondent to compensate the Applicant for the water tank and borehole;**

**g) The Applicant accept that the chicken pen maybe removed to allow access**

**Therefore these concessions shall be undertaken by the respective surveyors with a view to ensuring each party has a portion equal or almost equal in value of the suit property.**

**No demolition of permanent structure shall be allowed without compensation. No body will be exhumed. Any other proposal will be taken into account to complete the distribution and have the mutation forms signed.**

**The Final proposal agreement/any challenge shall be addressed before any Court within Family Division.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 31<sup>ST</sup> MAY 2019.**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**ROSE NJERI GACHUKA H/B BETH MBENE MWATHI FOR THE APPLICANT**

