



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 231 OF 1998**

**IN THE MATTER OF THE ESTATE OF BENSON NDIRANGU MATHENGE (DECEASED)**

**SAMWEL NDEGWA -----PETITIONER/APPLICANT**

**VERSUS**

**MIRIAM NYAMBURA NDIRANGU ----- OBJECTOR/RESPONDENT**

**RULING**

1. This ruling is in respect of the summons dated 27/4/2015 brought under **Rule 73** of the **Probate and Administration Rules** whereby Samwel Ndegwa (hereinafter, the Applicant) seeks orders;

1. **THAT** this Honourable do order that the District Surveyor do resurvey the estate of the deceased in accordance with the judgment of this Honourable Court dated 21st January, 2003.

2. **THAT** upon such resurvey the portion marked 12 on the annexed sketch map be allocated to first widow of the deceased through **HANNAH KABURA NJUGUNA** who bought the same from her.

3. **THAT** the portion marked 5 on the annexed Sketch map be allocated to **KARANJA NDIRANGU** who has built a house and developed the said portion.

4. **THAT** costs of this application be provided for.

2. The summons is premised on the grounds that;

(a) **THAT** the private surveyor who surveyed the estate was inconsistent in that in some sections of the road reserve the beacons are 12, 14 and 7ft inside the estate of the deceased.

(b) **THAT** the private surveyor also has marked all those houses on the estate except on portion No. 5 of the annexed sketch map where he failed for sinister motives to mark house belonging to **KARANJA NDIRANGU**.

(c) **THAT** the widow used to occupy the portion marked 12 on the annexed sketch map and before her unfortunate death she had sold the same to one **HANNAH KABURA NJUGUNA** who has developed the same and thus she should be allocated the portion.

(d) **THAT** it is incumbent and in the interest of justice that the District Surveyor do resurvey the land and the said portions be allocated to the aforementioned respectively.

3. The Applicant has further sworn a supporting affidavit.

4. The gist of the grounds and the supporting affidavit is that the surveyor's work when subdividing the estate was wanting in that in some portions of the road reserve he erected beacons upto 14 ft inside the estate. Houses on the land were to be marked but the surveyor failed to mark a house on portion number 5 where there was a house belonging to Karanja Ndirangu.

5. It is averred that the Applicant's mother used to occupy the portion marked 12 on the sketch map and had before her death sold the same to one Hannah Kabura Njuguna who has developed the portion and therefore the said portion should go to Hannah Kabura Njuguna.

6. The application is opposed and in a replying affidavit by Joseph Kimani Ndirangu and a further affidavit by Grace Muthoni the allegations by the Applicant are denied.

7. It is the Respondent's case that the surveyor carried out his work in strict compliance with the judgment of the Court and all beneficiaries apart from the Applicant are fully in support of the distribution the surveyor had done.

8. It is admitted that on portion 5 there is a temporary house belonging to Grishon Karanja but all are agreed that the same should be moved from the said portion as the same belongs to the 1st house.

9. The said Grishon had agreed to move to the portion marked 12 which portion belongs to the 2nd house to which he is a member.

10. The alleged sale of land to Hannah Kabura Njuguna is denied as the estate had not been distributed then to give Elizabeth Wangari the capacity to sell any portion. That claim was not raised in court at the hearing of this matter.

11. It is urged that the intention of the Applicant is to disinherit the children of his late brother Samwel Kiboi of their lawful inheritance of the portion marked 5 as he chased them out of the land after his (Kiboi's) death.

12. That fact is confirmed by Grace Muthoni in her further affidavit. She states that Karanja Ndirangu who has constructed on that land has agreed to move to the portion marked 12 so that Grace Muthoni and the children of Samwel Kiboi can take their rightful share.

13. The Application was canvassed by way of written submissions.

14. I have had occasion to consider the summons, the grounds and affidavit in support. I have had regard to the replying and further affidavit and the learned submissions of counsel.

15. Of determination is;

i) Whether the survey work has been in strict compliance with the orders of Court.

ii) Whether Elizabeth Wangari sold land to Hannah Kabura Njuguna and if in the affirmative whether the land should go to Hannah Kabura Njuguna.

16. I will begin with the issue number 2 whose answer in my view is straight forward. The named Hannah Kabura Njuguna is said to lay a claim on portion of land marked 12 having allegedly bought the same from 1st widow Elizabeth Wangari. This assertion by the Applicant is preposterous in addition to being legally unsound at this stage.

17. Firstly, the said Hannah Kabura Njuguna has not raised the claim herself. The begging question is what capacity the Applicant has to lay the claim on her behalf. Strictly speaking, there is no valid claim before Court.

18. Secondly, even if Hannah was to lodge such a claim before Court at this stage, such a claim would be overtaken by events the grant herein having been confirmed without the claim being raised during the hearing of this petition.

19. In addition, that is a proprietary claim over land against the estate. As held in the **Estate of Pius Ondiek Sure (Deceased) [2016] eKLR**, the family court is not the appropriate forum for the determination of such a claim. **Justice Majanja** quoted from the decision in **Jackson Kamau Nthiga vs. Humphrey Kirimi Mbuba & Another [2016] eKLR** where the Court stated;

**“The net holding in those decisions was that the jurisdiction of a family court dealing with a Succession Cause is limited. Such a court's sphere of inquiry is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate. Such a court cannot delve into establishing the validity of a claim such as the one before this court. In the case before this court, there are serious issues that need to be established and or ascertained by either the lower court or the court which has jurisdiction to entertain a claim to land. That however, does not bar a family court from ascertaining if one is a creditor of an estate. In the circumstances of this case, the Interested Party and the Objector have not yet been so determined by a court of law. This court cannot determine their claims in these proceedings.”**

20. The claim coming as it does through the Applicant is legally untenable and in any event raised untimeously and in the wrong Court forum.

21. As regards the appropriateness of the surveying, suffice it to note that in the judgment of Court it was clear that the estate was to be subdivided into 12 units. The issues of who had built where was not canvassed.

22. I need to flag out a misconception generally held by parties in succession causes that where parties have built or settled on in a estate must be bequeathed to them. True, the Court exercising the principles of equity and fairplay would put into consideration such factor to meet substantive justice.

23. Unless, however, there is a complete gift *inter vivos*, the estate of the deceased person remains for distribution in accordance with the provisions of the **Law of Succession Act**, in our particular case **Section 40** thereof and in the absence of an agreement, no party would be at liberty to claim a preferred portion.

24. I have looked at the sketch map of the subdivisions and noted that the surveyor has curved out the 12 portions out of the land comprising the estate in compliance with the Court order.

25. The Applicant, again without capacity, purports to speak for one Karanja Ndirangu whom he states should get the portion marked 5 as he has built there.

26. Strangely, there is no whimper of a complaint or claim from the said Karanja Ndirangu himself. Indeed, Joseph Kimani Ndirangu and Grace Muthoni aver in their affidavits that the said Karanja Ndirangu is ready and willing to move to his designated portion. This assertion is not controverted. The Applicant's contention then becomes hot air with no substance.

27. The claim on road reserves eating into the estate, too, remains unsubstantiated. No alternative survey report is produced to prove the allegations stated. The Court is left with the word of the Applicant to rely on. Whoever alleges must prove. The Applicant alleges. He fails to prove. On the whole, the motive of the Applicant in bringing the present application is highly questionable. It is an unwelcome attempt to delay a legal process that a Court of competent jurisdiction has finally adjudicated upon. It is intended to defeat justice.

28. The application the herein is completely without merit. The same is dismissed with costs to the Respondent.

**Dated and Signed at Nakuru this 24th day of May, 2018.**

**A. K. NDUNG'U**

**JUDGE**