



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 558 OF 2013

IN THE MATTER OF THE ESTATE OF M' MUTUA M'KIRIGUA (DECEASED)

CHARITY GACHERI MUTUA.....APPLICANT

Versus

KINOTI M' MUTUA.....1ST PETITIONER

ERICK KIMATHI MUTUA.....2ND PETITIONER

RULING

Costs of survey of land

[1] This Succession Cause has seen twists and bends on a rather straight-forward issue; survey of the estate property. On 31st May 2016, this court inter alia directed as follows:

“Accordingly I call upon the surveyor herein to attend and inform court whether;

1. He took into account the existing development plans on the land when he surveyed it; and

2. The house in issue has been affected by the subdivision therein.

Upon receipt and consideration of the report by the surveyor, I will thereafter, give my final orders on this application. In the meantime, the interim orders remain in force and the petitioners shall not in any way harass or threaten with eviction or evict the Applicant from the suit land until I issue my final orders on the application. It is so ordered.”

[2] On 21st September 2016, the court further issued the following orders:

“...I find that the survey herein was done in a manner that was prejudicial to the Applicant, as it deliberately alienated the house she put up and was living in to another beneficiary. For that reason I order the cancellation of the earlier subdivision of, and direct the Petitioner to engage a surveyor preferably KIZAK LAND CONSULTANTS to carry out a fresh subdivision of L.R ABOTHUGUCHI/RUIGA/469 so as to keep the house in question within 2 acres to which the Applicant is entitled. The said surveyors did the earlier survey and are already familiar with the facts of this case; they are better placed to make adjustments to

their survey and achieve the ends of this order without much disruption. The assignment herein shall be done within 60 days of today. The cost of the subdivision shall be shared pro rata according to the beneficial interest of each beneficiary.....”

[3] Although I am yet to receive a report by the surveyor, it seems however from the affidavit filed by the Applicant on 10th February 2017 that the estate property was surveyed on 27th January 2017 as per my order above. The only outstanding issue is on costs of the said survey. On 14th February 2017, this court directed that it would give its ruling on the issue of costs on 26th April 2017. The Petitioner appeared to intimate to court that the Applicant should bear the costs of the surveyor’s fees as she did all the things herein alone and on her own choice. He further stated that the Applicant did not pay the earlier costs and that the Petitioners had paid their costs on each portion. Doubtless, on 21st September 2016, this court cancelled the earlier survey of the estate property and directed that a fresh survey be conducted in respect of the suit property within 60 days. By that decision, the old subdivision fell by the way side with all its attendant costs. I do not, therefore, understand why there be any difficulty on costs of the new subdivision when I rendered myself in no uncertain terms that:

The cost of the subdivision shall be shared pro rata according to the beneficial interest of each beneficiary.....”

This position has not changed and there are no circumstances which suggest the contrary. I lament that I have had to waste precious judicial time and ink on such clear matter as this. However, for emphasis and clarity I reiterate my earlier decision that:-

The cost of the subdivision shall be shared pro rata according to the beneficial interest of each beneficiary.....”

As I have stated, I have not received a survey report on implementation of my orders herein although the undated affidavit by the Applicant which was filed on 10th February 2017 seems to suggest that the survey was carried out on 27th January 2017 which retained her house on his two acre portion of land as ordered by this court. Accordingly, I direct KIZAK LAND CONSULTANTS to file the report herein within 21 days and to also indicate the fee charged for the assignment. The costs shall then be shared as I have ordered and the Petitioners shall reimburse the Applicant the portion due from them within 10 days of the confirmation by the surveyor of the fee paid. On filing the survey report, this matter will be deemed to be concluded. It is so ordered.

Dated, signed and delivered in open court at Meru this 26th day of April 2017

F. GIKONYO

JUDGE

In the presence of:

1st petitioner and applicant.

F. GIKONYO

JUDGE