



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE ESTATE OF ISAAC MOTE KINITI (DECEASED)

SUCCESSION CAUSE 1432 OF 2003

PENINAH KIBUI NJUGUNA.....1ST OBJECTOR

GLADYS WAMUHU KINITI.....2ND OBJECTOR

JANE WANGUI KINITI.....3RD OBJECTOR

LOISE NYAMBURA KINITI.....4TH OBJECTOR

VERSUS

PETER NJUGUNA KINITI.....RESPONDENT

RULING

PLEADINGS

The deceased died on 1st June 1977.

According to the judgment delivered by Hon Justice L. Kimaru on 24th November 2011; the Objectors filed objection to the grant and confirmed grant the Respondent obtained over the deceased's estate vide **Succession Cause 11 of 1985** filed in Eldoret High Court which was later transferred and is the subject of the instant case. By this time, the Petitioner /Respondent was registered owner of the suit properties that constitute the estate of the deceased; namely L.R.Kiambaa/Thimbigua/1141 (4.15 acres) and L.R.Kiambaa/Karuri/T.276A (1/8 of an acre)

After hearing oral testimony of all parties the Trial Court determined as follows;

1) Gladys Wamuhu Kiniti to inherit L.R.Kiambaa/Karuri/T. 276A . (1/8 of an acre)

2) L.R.Kiambaa/Thimbigua/1141 (4.15 acres) shall be distributed;

a) Peter Njuguna Kiniti.....2.3 acres

b) The children of Naomi Wanjiku Kiniti (deceased).....1.0acres

c) Gladys Wamuhu Kiniti.....0.5 acres

d) Peninah Kibui Njuguna.....0.3 acres

Each beneficiary was to be allocated land from where each beneficiary currently resides and has developed and if need be get another portion to fulfill the stated and required acreage as stated in the judgment.

Each beneficiary was to give up part of their beneficiary interest on part of the land for public utilities such as the road. Each beneficiary would contribute some land for utilities on prorata basis to one's share of the land.

On 2nd April 2014 the parties agreed by consent before the Trial Judge that Director of Planning and Director Survey Kiambu County were to attend Court on 8th May 2014 and it was ordered that they visit the scene and prepare a report to present in Court on 8th June 2014.

This matter was mentioned in Court on 7th October 2015 the survey report was filed in Court but the parties did not access it or obtain a copy of the said report. This Court preserved the estate of the deceased under **Section 45 of Law of Succession Act Cap 160** awaiting further orders on the subdivision report.

On 18th April 2016 Joseph Muchungu PW1Kiambu County Surveyor testified on his report. This Court found the report inconclusive as it did not reflect or identify the developments on the land and specifically who owned what and who resided where of the beneficiaries to the deceased's estate. This was crucial so as to aid and inform the Court on the proposed subdivision in light of the judgment of the Court.

On 13th June 2016, PW1 who visited the land again on 9th May 2016 (all beneficiaries were present and/or represented) had detailed maps dated 20th June 2016 on the proposed subdivision and he explained the marked developments as follows;

The suit land fronts Banana/Limuru main road; at the front near the road are developments on the land. The back part is cultivated land.

PLAN A' shows;

Permanent Stone building and semi permanent houses and shops

right next to the main road marked A' belonging to Peter Njuguna Kiniti

Permanent stone Rental Houses next to the Main Road and near Peninah Kibui Njuguna's portion belonging to Peter Njuguna Kiniti.

Permanent Stone Shops marked B' belonging to Peter Njuguna Kiniti

Stone house at its foundation marked C' belonging to Peter Njuguna Kiniti

Semi Permanent building marked D' belonging to Peter Njuguna Kiniti

Timber Kiosk next to the main Road belonging to Peter Njuguna Kiniti

Semi- permanent stall and Timber owned by Naomi and an adjacent timber house also owned by Naomi.

The witness intimated that some of the buildings were recently erected and were not on the land the last time he visited the scene on 27th May 2014 as scheduled by the Court.

From Plan B' each of the beneficiaries would have share of the suit property as per the judgment of the Court and from where each beneficiary resides and/or has developed except for Peninah Kibui Njuguna whose portion near the main Road is surrounded by recent permanent structures erected by the Respondent.

To attain and comply with the court orders, Peter Njuguna's Structures would have to be dismantled and demolished to facilitate Peninah Kibue Njuguna's portion.

PW2 John Thomas Ngugi Mbau County Director of Fiscal Planning Kiambu County stated that the suit property required road access of 12metres.

PW1 informed the Court that in light of 12 metres access road each beneficiary would cede some land of the suit property and each of the beneficiaries would have the remaining land as follows;

Peter Njuguna Kiniti.....2.60acres

Naomi Kiniti.....0 .99 acre

Peninah Njuguna.....0.27 acre

Gladys Kiniti.....0.45 acre

SUBMISSIONS

The parties beneficiaries through their respective Counsel made oral submissions on 3rd October 2016 highlighting the filed submissions. The Respondent was served as confirmed through affidavit of service filed on 27th September 2016.

The Plaintiff /Applicant's submissions were based on the Survey Report dated 10th June 2016 pursuant to this Court's orders and Judgment of 24th November 2011. The Applicant Administrator stated that since then his efforts to subdivide the suit property have been futile.

The Applicant developed most of his 2.3 acres of the suit property as per the judgment. However, he is ready and willing to demolish or forfeit the goat shed and the toilet as shown in Plan B. The Plaintiff proposes that Peninah Kibui Njuguna gets the portion of land where she resides which amounts to 0.05 acres and then she gets more land from the portion marked 38.7 on the map and she will have the 0.27 acre.

The Applicant sought that his matrimonial home be left intact as he is not in a position to put up another house as he is lost his legs and the house is adjusted for use of his situation.

The Petitioner was ready to forfeit the toilet and cowshed and Peninah to have the land where she currently resides. The petitioner consented to Plan B' in terms of subdivision.

In the 1st Objector's submissions of 30th September 2016 and 3rd & 4th Objectors submissions of 9th September 2016 were unanimous as follows;

That the 1st objector was entitled to inherit the parcel of land she currently resides in and acreage to increase to reflect the award made in her favour by the Court. Therefore the subdivision ought to be in line with the express order of the Court.

The Objectors alluded to the fact that pending judgment of the dispute, the Petitioner built permanent structures on the suit property in disregard of Court orders barring permanent developments. The petitioner refused the Objectors to develop any part of the suit property, apart from cultivating they could not put up permanent structures.

The pending Court orders were as follows;

- a) On 21st June 2002; in CIVIL CASE 3110 of 1992 Naomi Wanjiku Kiniti (deceased) obtained injunction restraining the plaintiff from erecting any structures on L.R. Kiambaa/Thimbigua/1141 until determination of the suit.**

b) On 19th February 2003 in the same matter; the Court ordered upon application by Naomi Wanjiku Kiniti; that the Administrators were restrained from disturbing the estate of the deceased until final determination of the suit matter.

c) On 18th February 2004, the Petitioner despite Court orders begun construction on the suit property, the Objectors returned to Court. Upon application; the Court ordered; the Respondent was restrained from encroaching upon the portion of 1/4 of an acre and in any manner whatsoever constructing, disturbing, cutting trees and vegetation.

d) On 7th July 2004 the Objectors went to court again and the Court ordered that the Respondent Peter Njuguna Kiniti be and is hereby restrained from constructing upon, demolishing existing structures, cutting trees or vegetation on the 1/4 acre occupied by Naomi Wanjiku Kiniti on L.R. Kiambaa/Thimbigua/1141 or otherwise interfering with that portion.

e) On 22nd July 2009, the Petitioner started building marked A in the attached plan. The Objector went to court and it was ordered that the Respondent complies with Court orders issued on 15th July 2009 dated 21st June 2009 in CIVIL CASE 3811 of 1986 and he was further restrained and ordered to stop construction of building in disputed family land Kiambaa/Thimbigua/1141 and Kiambaa/Karuri/T.275A. The Officer Commanding Karuri Station was to enforce order of the Court.

Therefore the Objectors moreso 1st Objector states that all the said buildings that encroached her portion of the suit property were developments carried out in clear disobedience of the above Court orders and were a deliberate effort to defeat the fruits of the Court's judgment. He ignored Court orders and should not be allowed to gain from disobedience of Court orders and deprive the 1st Objector her rightful share according to the judgment of the Court.

According to Map A, the building marked A' on the Surveyor's map was constructed in 2009 despite Court orders. The building marked B' was constructed after the Court judgment in 2011. This was contrary to the allocation of 0.3 acre to Peninah Kibui Njenga from where she resided as per the said judgment.

The building marked C' was constructed while the matter was pending in this Court. Infact the Surveyor's testimony was that on the 1st visit to the suit property, the construction of this building was not on but the 2nd visit on 9th May 2016 this building was on the ground.

The only building that was erected before the Court orders was building marked D' which is not permanent but a temporary structure.

Apart from the issues raised herein the Objectors agreed with the Surveyor and Planner's report of 20th June 2016.

DETERMINATION

The issue is whether the Surveyor's and County Planner's report of the proposed subdivision of the suit property Kiambaa/Thimbigua/1141 is agreeable to all beneficiaries or not.

The thrust of this matter is that there has been protracted litigation over the years over the suit property that culminated with the judgment of Hon. Justice L.Kimaru of 24th November 2011. The said judgment has not been appealed against, reviewed, amended, varied or set aside and therefore remains a valid order of the Court.

Various efforts have gone into compliance of the said judgment, however, there have been pitfalls curtailing fulfillment of the judgment.

With regard to the Replying affidavit filed on 1st April 2014, one Jane Kiniti a child of Naomi Wanjiku

Kiniti deposed that the administrator /respondent did not consult and involve the beneficiaries in confirmation of grant. Thereafter, the administrator/Respondent conducted subdivision without the presence of the beneficiaries.

Upon the SurveyorPW1 and Planner PW2 conducting a second survey on 9th May 2016 in line with the Court judgment and orders; all beneficiaries were present. After presentation in Court by PW1and PW2, the beneficiaries were agreeable except for the Petitioner/Respondent who developed the most prime part of the suit property by constructing permanent structures adjacent to the road. He claims that originally the suit property belonged to him as he inherited as the only son from his father. The Court held that the suit property was to be distributed amongst the beneficiaries and the Petitioner would have 1/2 of the suit property.

The Petitioner now demands the beneficiary Peninah Kibui Njenga who is entitled to 0.3 acres from where she resides, to have the remaining portion hived off from the other part of the suit property and she will have 2 titles.

This Court considers the above proposal unfair, because the Petitioner/Respondent has vast land in fact 1/2 of the 4 acres or so of the suit property compared to Peninah Kibui Njuguna who was allocated 0.3acre. Even with the small portion of land that she was allocated and accepted to be hived from where she resides; she is asked to take the remaining portion elsewhere on the suit property as the Petitioner erected permanent structures on the most prime part of the land adjacent to the Main Road. This proposal amounts to punishing the 1st Objector at the convenience of the Petitioner which is grossly unfair; the Petitioner has more land to sell or develop instead of denying the 1st Objector her rightful share.

This Court finds that the Petitioner/Respondent constructed permanent structures on the suit property contravening several existing and current Court orders prohibiting him from encroachment, construction and cutting trees and vegetation in the suit property until determination of the matter. The Petitioner/respondent ignored the Court orders.

In the case of **Kyangavo Vs Kenya Commercial Bank Limited and Another, [2004] 1KLR126 thus:**

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies.”

To ask the Court to protect and enforce one's rights where the same person has infringed and violated other persons rights in flagrant disobedience of the Court orders is to lower the dignity of the Court.

The Court aids only persons who come to Court with clean hands. A person cannot seek redress from the Court whose orders he or she shunned, ignored or violated.

In the instant case the Petitioner /Respondent ignored and disobeyed 5 court orders over the suit property, he cannot successfully ask the court to allow him retain the permanent structures he erected during the pendency of this matter and blatant disobedience of this Court's orders.

DISPOSITION

a. Therefore the Court allows/grants the subdivision of the suit property as per the proposed subdivision maps A'B'& C ' which are in compliance with the Court judgment of 24th November 2011and Orders save for the access road of 12 metres and land hived off from all beneficiaries on prorata what each beneficiary is entitled to.

b. The Petitioner's structures shall be demolished only where absolutely necessary to curve out the 0.3 acre of the 1st Objector from where she currently resides.

c. Only the Petitioner's matrimonial home shall be preserved in light of his debilitating health

condition incurring out the sub division in line with Judgment delivered on 24th November, 2011.

d. Each party to bear own costs.

DELIVERED SIGNED DATED IN OPEN COURT ON 12TH APRIL 2017.

M. W. MUIGAI

JUDGE

In the presence of:

Ms. Ouka holding brief Mr. Mugisha for the Applicant.