



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 659 OF 1989**

**IN THE MATTER OF THE ESTATE OF PATRICK MBUGUA NJOROGE**

**(DECEASED)**

CATHERINE WANJIKU MURIITHI .....APPLICANT

VERSUS

STEPHEN NJOROGE MBUGUA .....1<sup>ST</sup> RESPONDENT

MARY NYAMBURA MBUGUA .....2<sup>ND</sup> RESPONDENT

ELIZABETH WAMBUI MBUGUA .....3<sup>RD</sup> RESPONDENT

**R U L I N G**

1. The application for determination before this Court is dated 30<sup>th</sup> April, 2015 and is brought by way of Notice of Motion. It is brought under **Order 51 Rule 1** of the Civil Procedure Rules and **Section 3A** of the **Civil Procedure Act Chapter 21 Laws of Kenya**. The Applicant seeks from Court, orders that the Respondent do grant and open the Applicant's access to all that parcel of Land known as L.R. No. 3589/123; that the O.C.S. Langata Police officer or other officer of the rank above an Assistant Inspector of Police do provide security and police assistance for the execution of the above orders.

2. The application is based on grounds that on 20<sup>th</sup> March 2006 the court gave orders on the mode of distribution of the Estate of the Patrick Mbugua Njoroge. That the Applicant and her brother Stephen Mbugua Njoroge (hereinafter the 1<sup>st</sup> Respondent), were given L.R. Nos. 3589/123 and 3589/124 respectively, which are adjacent to each other. That the Applicant is unable to access her property since then.

3. The Applicant complains that several attempts on her part to access the property, have been met with violence by the 1<sup>st</sup> Respondent and his Agents. That the Respondent has placed a guard on the property to ensure that the Applicant does not access the property since the year 2006 when the order was made.

4. The application is supported, by the affidavit of the Applicant, sworn on 30<sup>th</sup> April 2015 in which she reiterates the grounds of her application. She also avers that her attempt to sell the property was not successful because, when she visited the site with the would be purchaser, the 1<sup>st</sup> Respondent's guard chased them away with machetes. The Applicant asserts that there is no reason why the 1<sup>st</sup> Respondent has denied her access to her property, yet he has developed his portion.

5. In her submissions M/s. Wanjiku learned counsel for the Applicant stated that Rawal J, as she then was distributed the deceased's property on 20<sup>th</sup> March, 2006. She also reiterated what the Applicant had stated in her supporting affidavit.

6. Counsel urged further that the report of the Director Urban Planning, obtained at the behest of the court, shows that the other plot owners have curved out an illegal route to access their plots, because the Respondent has closed the only road of access. That unfortunately the Applicant has no other route other than through the official road which has been permanently closed by the 1<sup>st</sup> Respondent.

7. Counsel submitted that on 12<sup>th</sup> October, 2015 the court ordered the Director of City Planning, accompanied by the Deputy Registrar and the Parties herein to visit the site and furnish a report on the status obtaining on the ground. Counsel stated that the visit was made but the 1<sup>st</sup> Respondent did not attend although he had been served.

8. No submissions were filed on behalf of the 1<sup>st</sup> Respondent although he was served with the application and the submissions of the Applicant. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Mary Nyambura Mbugua and Elizabeth Wambui Mbugua respectively, were served though none filed any responses to the application or submission of the Applicant.

9. The brief history of this cause is that the estate of the deceased Patrick Mbugua Njoroge comprised of four properties being

1. L.R. No. 3589/123

2. L.R. No. 3589/124

3. L.R. No. 3589/125

4. L.R. No. 3589/126

The deceased was survived by four beneficiaries being:

1. Catherine Wanjiku Githinji – daughter

2. Mary Nyambura Mbugua – daughter

3. Stephen Njoroge Mbugua – son

4. Elizabeth Wambui Mbugua – daughter

The deceased's wife predeceased him. A dispute arose as to the distribution of the estate and Rawal J as she then was, before whom the matter was considered the rival contestations and gave a ruling on 20<sup>th</sup> March 2006.

10. Before Rawal J, the 1<sup>st</sup> Respondent contended that since he had a medical condition requiring constant care due to a long standing infection in his right leg and was due to undergo three operations, he needed a larger share. He argued further that he was also studying and had always been dependent on the deceased when he was alive. Mary Nyambura Mbugua agreed with him.

11. The Applicant on the other hand proposed that the 1<sup>st</sup> Respondent be given the family homestead being L.R. No. 3580/124 which comprised of three houses and was generating Kshs.45,000 in rent per month at the time. She stated that further rent was expected from the third house under construction on the family homestead.

12. The Applicant also proposed that the last property which was bringing in income of Kshs.35,000/= per month be given to the last born child in the family Elizabeth Wambui Mbugua. The Applicant further proposed that the first and third properties which were empty plots and were equal in measurement, be allocated to the Applicant and Mary Nyambura Mbugua respectively.

13. The court considered the rival arguments and observed that the 1<sup>st</sup> Respondent had so far collected and used rent proceeds from three houses in the homestead alone, since July, 2002 and that the amount so collected was quite substantial. The court noted that he could have a steady income from these houses in future if the family homestead was given to him and that being a son, he would be the most appropriate person to hold the family homestead.

14. The court considered that the administratrix had taken into account the youngest sister as the person to be given the prime property and also that the three sisters were married with their own families, and proceeded to make orders for the estate of the deceased to be distributed as follows:

**“1. Stephen Njoroge Mbugua be given L.R. No.3589/124 absolutely and shall keep the rent proceeds received by him so far so that he can spend them on his medical treatment.**

**2. Catherine Wanjiku Muriithi to get first property i.e. L.R. No.3589/123 absolutely.**

**3. Mary Nyambura Mbugua be given third property i.e. L.R. No.3589/125 absolutely.**

**4. Elizabeth Wambui Mbugua to be given  $\frac{3}{4}$  share of last property i.e. 3589/126 and remaining  $\frac{1}{4}$  to be shared amongst the other three children of the deceased. She is to share the rent income in the same proportion.”**

15. From the record none of the beneficiaries appealed the orders of the court on the distribution of the estate. Each beneficiary took possession of their portions save for the Applicant herein who claims to have been shut out of her portion when the 1<sup>st</sup> Respondent closed the only road of access.

16. Following the current application on 12<sup>th</sup> October, 2015 the court gave orders for the Director Urban Planning, accompanied by the Deputy Registrar of the Family Division and the Parties in the cause to visit the site and furnish the court with a report of the status obtaining on the ground. The Director Urban Planning did visit the site and in a report filed on 5<sup>th</sup> February, 2016, he observed that :

**“The subject parcel is not landlocked reading from the attached survey plan where it is shown to be**

**served by a 9 Meter cul-de-sac.”**

The Report of the Director Urban Planning made the following recommendation:

**(ii) Being a public road of access, the 9 meter cul-de-sac needs to be opened and freed of any Encroachments. This will allow due access to all subplots that resulted from subdivision of L.R. No. 3589 Mukinduri road.”**

17. For ten years however the 1<sup>st</sup> Respondent has shut the Applicant out of her share of the inheritance by cordoning off the cul-des-sac which acts as the access road. The 1<sup>st</sup> Respondent has thus made it practically impossible for any of his sisters to access their portions using the proper road of access. Where two of the sisters had an option (albeit illegal), to curve out other routes to access their properties, the Applicant is completely landlocked.

18. In essence the Applicant’s application is for an order of injunction. The simple definition of an injunction in Black’s Law Dictionary Ninth Edition is **“A court order commanding or preventing an action.”** In the instant case the court has been called upon to command the Respondent to open the road

access.

19. To get the orders of injunction sought, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted. An injunction commands an act which the court regards as essential to justice, or restrains an act which the court esteems contrary to equity and good conscience.

20. The 1<sup>st</sup> Respondent's act of cordoning off a public road of access is not only contrary to equity, it is also repugnant to good conscience. In the premise the court finds that the application dated 30<sup>th</sup> April 2015 has merit and is allowed with the following orders:

(a) Being a public road of access, the 9 meter cul-de-sac needs to be opened and freed of any Encroachments. This will allow due access to all subplots that resulted from subdivision of L.R. No. 3589 Mukinduri road within seven (7) days of this ruling.

(b) That the O.C.S Langata Police officer or other officer of the rank above an Assistant Inspector of Police do provide security and police assistance for the execution of the above orders.

There are no orders as to costs.

**SIGNED DATED and DELIVERED** in open court this **27<sup>th</sup> day of October, 2016.**

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**L. A. ACHODE**

**JUDGE**