



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 416 OF 2011**

**In the matter of the Estate of JACOB MWATHE MUTAVO Alias MWATHE MUTAVO Alias NJERU  
MUTAVO (Deceased)**

**NICETA WEVETI NJERU.....APPLICANT**

**VERSUS**

**SILVANO KINYUA MWATHE.....RESPONDENT**

**R U L I N G**

The applicant Niceta Weveti Njeru in her summons (General Form) dated 6th February 2013 against the respondent Silvan Kinyua Mwathe brought under Rules 59, 63, 73 and Section 47 of the Laws of Kenya seeks for the following orders:-

1. *That the restriction lodged by Mr. Mungai Kivuti & Co. Advocates on behalf of the respondent against LR. NO. GATURI/NEMBURE/2574 is lifted.*
2. *That the Land Registrar and District Surveyor, Embu be ordered/authorized to set and determine the exact boundary between GATURI/NEMBURE/2574 & 2575.*
3. *That the Area Chief, Gatari South Location be ordered/authorized to provide the necessary security during the determination of the boundary.*

The application is grounded on the applicant's affidavit sworn on 6th February 2013.

By a consent of the parties this application was disposed of by relying on the parties affidavits and the grounds of opposition. Mr. Eddie Njiru represented the applicant while the respondent appeared in person following withdrawal of his advocate in a notice dated 17th February, 2015.

The petitioner in his capacity as the son of the deceased Mwathe Mutavo Alias Njeru Mutavo filed this cause on 18/7/1997 petitioning for letters of administration intestate. The deceased had a polygamous household with two wives and nineteen children. The 1st widow is the applicant herein namely Niceta Weveti Mwathe while the second widow was Janet Muthoni Mwathe now deceased. Letters of administration intestate were granted to Patrick Ngugi Mwathe and the grant confirmed on 30th April 1998. The applicant filed an application dated 24/4/1999 seeking for orders that the Executive Officer be authorized to execute the grant on behalf of the administrator who had failed to co-operate with the beneficiaries so as to bequeath them of their shares. The application was allowed on the 5th July 1999.

Subsequently the grant was executed and parties given their respective shares. The applicant sought orders in her motion dated 18th January 2000 that her co-widow Jenet Muthoni Njeru to be evicted from the applicant's share LR. Gatari/Nembure/2574. The orders were issued by th court on 5th March 2000.

The applicant in this application avers that she was the beneficiary of Gaturi/Nembure/2574 and that the land is already registered in her name. She has attempted to have the land sub-divided but it was not possible due to a restriction placed by the respondent through his former counsel Messrs Mungai Kivuti & Co. The restriction was achieved by the respondent's counsel through letters from Mungai Kivuti & Co. annexed to the supporting affidavit. It is argued that the respondent took the route of placing a restriction after he lost an application dated 21/9/2011 of the same title Gaturi/Nembure/2574 against the applicant.

The applicant states that the said restriction is unfair to her, unreasonable, unlawful and unjustified and ought to be removed. There is an outstanding boundary dispute between LR. Gaturi/Nembure/2574 and 2575 which cannot be resolved due to obstruction by the respondent.

The respondent did not swear an affidavit. He filed grounds of opposition in which he argues that the administrator of the estate died and that no step should be taken in the cause until substitution is done. He argues that he is a beneficiary in the estate and placed the restriction to prevent overreaching on the part of any other beneficiary. He further argues that the restriction serves the interests of all the beneficiaries and that it should be maintained.

From the background of this case, the correct position is that the estate of the deceased was distributed between his two houses on agreement of the administrator and the beneficiaries. Each of the two widows including the applicant's deceased mother were bequeathed their respective shares namely Gaturi/Nembure/2574 and 2575 pursuant to the grant confirmed on 30/4/1998. This is about sixteen years ago. There has been no revocation of the grant in this cause. The distribution of the estate was free of any controversy. The beneficiaries who are the widows are therefore at liberty to sub-divide the shares they received and bequeath to their children their respective shares or to do what they wish with their share.

The issue of substitution of the administrator may not arise unless there is a beneficiary with an issue he wants the court to deal with and which is likely to affect the confirmed grant. The applicant does not seem to have any such issue. As a beneficiary who has been bequeathed her share through registration in her name, the applicant has a right to defend her interests in her land Gaturi/Nembure/2574. The boundary dispute should also be resolved to enable the beneficiaries to move forward with any issues incidental to succession of their deceased husband's estate.

The restriction obtained through letters by the respondent's counsel without involving the applicant who is the owner of the land is unlawful. I agree with the appellant that the existence of the said restriction is oppressive and unfair to the proprietor of the land. The respondent ought to have filed an application for orders for a restriction in court to allow the applicant the opportunity to defend her interests. Contrary to the argument of the respondent, the restriction serves no one's interest except perhaps his own.

The respondent has not explained who he is in this cause and what his interest in the title Gaturi/Nembure/2574 is. However, drawing from his unsuccessful application dated 21/9/2011, it appears that upon losing the application whose ruling declared him a stranger in this cause, he resorted to unlawful means of holding the beneficiaries at ransom. The respondent's conduct is absolutely unacceptable considering that the estate has already been distributed.

It is my finding that the respondent has failed to demonstrate the purpose served by his unlawfully obtained restriction. It is my considered opinion that the applicant must be given her liberty to use the share bequeathed to her in the interests of the first house of the deceased.

I find the application merited and allow it in terms of prayers 1, 2 and 3. The respondent to meet the costs of this application.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF APRIL, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of the Respondent**