



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.112 OF 1990

IN THE MATTER OF THE ESTATE OF CHABARI M'ITUANGONDU (DECEASED)

PETER MWONGERA..... 1ST APPLICANT

GERALD KIAMBI M'CHABARI.....2ND APPLICANT

VERSUS

PATRICK SAFARI MUINDI..... RESPONDENT

RULING

1. The applicants through a summons dated 17th December 2012 pursuant to Section 47 of the Laws of Succession Act and Rule 73 of the Probate and Administration Rule sought the following orders:-

(a) That the mutation form dated 31st May, 2012 be cancelled and the same be replaced/substituted with mutation form dated 12th March, 2010.

(b) That land parcels Nos. Abothuguchi/Makandune/1862, Abothuguchi/Makandune/1863, Abothuguchi/Makandune/1864 and Abothuguchi/Makandune/1865 be resurveyed and boundaries and/or position/location thereof be changed as per mutation form dated 12th March, 2010.

(c) That the relevant cadastral map in respect of land parcel Nos. Abothuguchi/Makandune/1862, Abothuguchi/Makandune/1863, Abothuguchi/Makandune/1864 and Abothuguchi/Makandune/1865 be amended as per mutation form dated 12th March, 2010.

(d) That the orders hereof be served upon District Surveyor and District Land Registrar, Imenti North District for compliance.

2. The summons is based on the ground on the face of the application which can be summarized as follows; that the administrator caused the deceased land parcel no. Abothuguchi/Makandune/448 to be unfairly sub-divided by taking away the applicants developed portion and allocating them where they had not developed before the confirmation of the grant; that after confirmation of the grant petitioner applied for sub-division of the deceased land parcel No. Abothuguchi/Makandune/448 as per Mutation form dated 12TH March 2010 whereby the applicants were allocated their respective parcels of land as per the

area they had extensively developed but the petitioner later secretly and without the knowledge of the applicants and /or their consent withdrew the mutation form dated 12th March 2010 and resurveyed the land as per mutation form dated 31st May 2012 as a result of which the location and/or position of the applicants parcel of land changed; that if mutation dated 31st May 2012 is not cancelled and substituted by the original mutation form dated 12th March 2010 and land parcel nos. Abothuguchi/Makandune/1862, 1863, 1864 and 1865 resurveyed as per mutation dated 12th March 2010 and the relevant cadastral map amended as per original mutation form dated 12th March 2010 they stand to suffer substantial loss and damages and that Abothuguchi/Makandune/1864 belongs to the 1st applicant herein while land parcel Abothuguchi/Makandune/1863 belongs to the 2nd applicant.

3. The application is supported by two separate affidavits dated 15th December 2012 drawn and deponed upon by the two applicants to which several annexures in support of the application are annexed. These annexures include sale agreement between the petitioner and 2nd applicant; pictures of 2nd applicants development; confirmation of grant dated 15th March 2004 indicating the applicants respective shares; title deed in respect of Abothuguchi/Makandune/1864 issued on 27.8.2012 in the name of the 1st applicant Peter Mwongera, Mutation form in respect of Abothuguchi/Makandune/448 dated 12th March 2010 duly signed by the petitioner showing parties respective portions of land on the ground; approved by the District/Licensed Surveyor on 18/05/2009, mutation form dated 31st May 2012 signed by one Muindi and not by Safari as it appears and approved by District Licensed Surveyor on 31st May 2012, changing the portions on the ground; a mutation form dated 17th May 2012 signed by one Muindi and not by Safari as it appears, still changing the position on the ground and approved on 30th May 2012 by District Licensed Surveyor. The applicants in their respective affidavits have reiterated the ground in support of their application as stated on the face of the application.

4. The petitioner/respondent is opposed to the application. He filed a replying affidavit dated 17th December 2014. He deponed that the applicant is a mere purchaser and he was shown his respective portion of land on the ground at the time he purchased it and was aware of the size being 2 acres; that he has not developed his portion as alleged. He depones that it is prudent that the court do visit the land before making its final determination. He further deponed that the application is intended to unjustly enrich the applicants and to give them unfair advantage over the rightful beneficiaries of the deceased estate and contended that the applicant is not entitled to the relief sought.

5. I have carefully considered the pleadings, the counsel rival submissions and the issues for consideration is whether the applicants have established their case to warrant the prayer sought?

6. In the instant case there is no dispute that a grant was confirmed in which the applicants and the respondent's shares of entitlement were specifically spelled out in the confirmed grant dated 15th March 2004.

7. The petitioner/respondent has not denied the contents of the confirmed grant attached to applicants application. He did not in his replying affidavit respond or controvert the contents of the affidavit of the 2nd applicant. He ignored it altogether. He did not deny that the 2nd applicant developed his portion before the confirmation of the grant and sub-division of the land nor did he deny the existence of more than one mutation form as alluded to by the applicants.

8. That the petitioner/respondent in his replying affidavit did not deny having carried out mutation dated 12th March 2010 in which the applicants were allocated their respective portions as per their developments. He did not deny the subsequent mutation forms in which he changed the applicants' portions on the ground. The 1st applicant was given a different portion from the one he had bought and developed. The 2nd applicant was similarly given a different portion from the one he had initially been given and developed. The petitioner in his replying affidavit has not given any reason why he had substituted the first mutation with two different others. The court has compared the signature in the

replying affidavit of the petitioner/respondent with the mutation forms dated 12th March 2010 and found them to be similar, whereas the ones on mutation forms dated 31st May 2012 and 17th May 2012 are different. I am satisfied the genuine form was the one dated 12th March 2010 as it bears the signature similar to that of the petitioner in his replying affidavit dated 17th December 2014 and secondly it was filed first and there is no evidence of its withdrawal with the knowledge and consent of the applicants as beneficiaries.

9. The respondent/petitioner has not offered any explanation for filing two different mutation forms after the first one of 12th March 2010. The petitioner did not do so for the benefit of the beneficiaries who he knew and who had been issued with title deed but he intended to cause the applicants injustice by denying them the portions they had developed and to which they were legally entitled. That if the subsequent mutation which were filed without the knowledge and consent of the applicants are not substituted as sought by the applicants, the applicants shall stand to suffer substantial loss and damage. I am therefore satisfied that in the interest of justice the applicants application ought to be allowed.

10. The upshot is that the applicants application is merited. I therefore make the following orders:-

(a) That the mutation form dated 31st May 2012 be and is hereby cancelled and the same be and is hereby replaced/substituted with mutation form dated 12th March 2010.

(b) That the land parcels no. Abothuguchi/Makandune/1862, 1863, 1864 and 1865 be resurveyed and boundaries and/or position/location thereof be changed as per mutation form dated 12th March 2010.

(c) That the relevant cadastral map in respect of the land parcel Nos. Abothuguchi/Makandune/1862, 1863, 1864 and 1865 be amended to comply or to be in accordance with the mutation form dated 12th March 2010.

(d) That the orders hereof be served upon the District Surveyor and the District Land Registrar Imenti North District for compliance.

(e) The applicants are awarded costs of this application.

Dated at Meru this 22nd day of October, 2015.

J.A. MAKAU

JUDGE

22.10.2015

Delivered in open court in the presence of:

M/s. J.G. Gitonga & Co. Advocates for applicant

M/s. Kevin Nyenyire & Co Advocates

M/s. Kiogora Ariithi & Associates for the petitioner

Court clerks – Penina/Mwenda