



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 84 of 1990

IN THE MATTER OF ESTATE OF MUTUAMWARI MURAGA (DECEASED)

EUSTACE KABURU..... ADMINISTRATOR

VERSUS

DAVID NJERU MUGUNA.....APPLICANT

RULING

The applicant DAVID NJERU MUGUNA through an application dated 28th July, 2011 brought under Rule 73 of the Probate and Administration Rules(Cap.160) and Section 128 of the then Registered Land Act (Cap.300) Laws of Kenya and all enabling provisions of the law sought an order of inhibition to be registered against land parcels Nos. Mwimbi/Chogoria/5066,5067, 5068, 5069, 5070, 5071 and 5072 pending hearing and determination of this application or until further orders of this Honourable Court.

That the Land Registrar Meru South District be directed to cancel all land subdivisions made on land parcel Mwimbi/Chogoria/1036 as the same are unproportionate and contrary to the judgment of the court delivered on 4th June, 2000. The applicant further seeks that land Parcel No.Mwimbi/Chogoria/1036 be subdivided afresh apportioning all beneficiaries portions of flat, developable and accessible areas that can be occupied and in the proportion set out in the confirmed grant dated 4th June, 2010.

The application is supported by grounds on the face of the application and affidavit of the applicant dated 28th July, 2011and supplementary affidavit dated 12th March, 2012 and scene visit report by Deputy Registrar dated 12th July, 2012 and sketch plan attached to the report.

The application is on the other hand opposed by the respondent/administrator, through a replying affidavit sworn on 23/1/2012 and through affidavits dated 14th March, 2012 by Wilberforce Micheni Asah and Daniel Chabari. The respondent/Administrator also relies on the scene visit report by the Deputy Registrar and sketch plan attached thereto dated 12th July, 2012.

When the matter came up for hearing the court heard oral submissions by Mr. Igweta, learned Advocate for the applicant and Miss Nelima, learned Advocate for the respondent/administrator. The court has very carefully considered the oral submissions by both applicant's and respondent's counsel. It has also carefully considered the pleadings, affidavits, scene visit and report by the Deputy Registrar together with the attached sketch plan and the court's judgment delivered on 4th June, 2010.

The issue for determination in the application dated 28th July, 2011 is whether the subdivisions made over land parcel No.Mwimbi/Chogoria/1036 are contrary to the court's judgment dated 4th June, 2011 and

whether applicant has satisfied the court that subdivision made to land Mwimbi/Chogoria/1036 should be cancelled and fresh apportionment of the same be carried out to all beneficiaries portions on flat, developable and accessible areas that can be occupied in respect of proportions set out in the confirmed grant dated 4th June, 2010.

In the instant case judgment was delivered on 4th June, 2010 by Honourable Lady Justice Kasango who from page 14 of her judgment stated:

“Having considered the evidence on record and the written submissions of the interested parties, I find that those who are entitled to inherit parcel number 1036 are, Idah Gaji M’Arachi- 3 acres, Beatrice Mutea Mutuamwari – one acre, Linus Marangu Matiri- 1 acre, Lawrence Njoka- 1 acre and the balance to be shared between Mugambi Murungi and David Njeru Muguna. David Njeru Muguna will however get one acres less having sold it to Lawrence Njoka. It is in the interest of justice that each of the beneficiaries do get the portion of land where they occupied and developed.”

The confirmed grant was issued on 4th June, 2010. The applicant in his affidavits dated 28th July, 2011 and 12th March, 2011 averred that land Mwimbi/Chogoria/1036 was subdivided to land parcels Nos.5066-5072. That the subdivision he avers were to be done freely and fairly in the proportions set out in the confirmed grant of 4th June, 2010. He averred that on 17th November, 2010 the respondent/Administrator in company of one of the beneficiaries Mugambi Murungi and a Surveyor subdivided the main land Mwimbi/Chogoria/1036 without consent of the Land Control Board. That the applicant averred that his share was plotted on a steep and stoney valley yet his share was supposed to be on flat area and bordering the road. The applicant further averred that the respondent fraudulently subdivided Mwimbi/Chogoria/1036 into L.R.

No.Mwimbi/Chogoria/5066,5067,5068,5069,5070,5071,and 5072. That the applicant’s share was plotted as land parcel No.Mwimbi/Chogoria/5068 on a steepy and stoney valley yet his share is supposed to be on a flat area bordering the road similar to Mugambi Murungi’s share which now forms Mwimbi/Chogoria/5067 and borders the road. The applicant further contends that the subdivision was unjustifiably and unfairly done with the road connecting his supposedly Mwimbi/Chogoria/5068 extracted from his own portion despite his acreage not totaling to acreage awarded by the court as per mutation form annexed as “DM3”.

The applicant main complaint in this application is the unfair and unjustifiable subdivision of the land parcel and particularly the mode of distribution that was made between Mugambi Murungi and himself. The applicant contended the land was not shared as per court’s judgment. The applicant denied there being meeting to discuss distribution of the deceased assets and that he complained about subdivision at the time surveying was being carried out. The applicant further averred that he was not opposed to visiting locus in quo which he hoped would bring to light the irregular, unfair and unjustifiable subdivision which would enable court to determine this matter.

The respondent in his reply contends that the applicant’s application contains allegations which are absolutely untrue and meant to discredit his character and honour bestowed upon him as the administrator of the estate of the deceased by this court.

The respondent averred that he fully implemented the orders of the court as per the grant issued to him. The court’s order was to the effect that Beatrice Mute Mutuamwari get 1 acre absolutely, Idah Gaji M’Arachi, 3 acres absolutely Linus Marangu Matiri- 1 acre absolutely, Lawrence Njoka – 1 acre absolutely, balance to be shared between David Njeru Muguna and Mugambi Murungi with Mugambi getting one extra acre over and above that which is given to David Njeru Muguna.

He further contended the court’s order stated clearly that beneficiaries were to get the portion of land they had developed and occupy. The respondent contends that the applicant does not live on the land parcel Mwimbi/Chogoria/1036 nor does he have any developments on the land except tea bushes planted on 0.6 acre part which initially belonged to the mother of Beatrice Mute Mutwamwari. That other beneficiaries have extensively developed their portions by planting coffee and tea and have built their houses and some

have even sub-divided their portions to their children. The respondent further contends that on 16th October, 2010 he called all beneficiaries and informed them about surveying and surveyor's charges and all agreed to appoint a surveyor and each paid Kshs.20,000/- for the exercise including the applicant. That all were informed the day of Surveying as being 15th November, 2010 as per annexure "EK5" and on the material date all beneficiaries including the applicant participated in the surveying exercise. That all titles save for applicant has been processed. The delay on applicant's titles is due to his failure to supply copy of his National Identity card and his photographs. Applicant's titles are Mwimbi/Chogoria/5068 and 5069. The respondent averred that before he embarked on the subdivision exercise all the necessary Land Control Board consent were obtained and forwarded to the Surveyor. That after subdivision the beneficiaries got their land as follows:-

- a. **IDAHA GAJI M'ARACHI** - 3 ACRES
- b. **MUGAMBI MURUNGI** - 5.68 ACRES
- c. **DAVID Njeru MUGIRA** -4.69 ACRES
- d. **LINUS MARANGU** - 1 ACRE
- e. **BEATRICE MUTE** - 1 ACRE and
- f. **LAWRENCE NJOKA** - 1 ACRE

The respondent further contended that the beneficiaries got their respective areas where they live and have developed. He further averred that the flat side of the suit land is contained in parcels Nos. 5069, David Njeru Muguna, 5070, Linus Marangu, 5071, Beatrice Mute, 5072, Lawrence Njoka, and small part of 5067 Mugambi Muriungi.

The respondent contends that David Njeru Muguna the applicant was given parcel No.5069 measuring about 0.66 acres bordering parcel No.5072 of Lawrence Njoka to whom he had sold 1 acre at the flat area. The respondent further contended it would be impossible to move the other beneficiaries from their developed portions to give applicant the 4.69 acres he is entitled to be given considering that there are developments of a permanent nature therein and that the applicant does not live on the said land. That apart from the applicant respondent deponed that other beneficiaries such as Idah Gaji M'Arachi and Mugambi Murungi have their portions on a slope but planted tea and coffee therein and applicant's portions borders them and are not complaining.

He further contended due to geographical location of the suit land it is not possible to allocate one person on the flat side and as such some have to share the sloppy side and as such the beneficiaries cannot interchange their respective portions. He further averred that part of applicant's land of 0.6 acres is on the road which is parcel No. 5069 whereas land 5068 is fully developed by Mugambi Murungi who lives on the said portion. The respondent in his further affidavit dated 14th March, 2012 averred that it is not true that applicant was ever chased from suit land as he never lived on the said land. He also averred that the applicant and his mother were not chased by Assistant Chief one Wilberforce Micheni who was present and not Fredrick Ndoto. Wilberforce Micheni Asah an Assistant Chief of Chogoria sub-location and acting Assistant Chief of Gianchuku sub-location in his affidavit dated 14th April, 2012 averred that on 16th October, 2010 the respondent invited him to a family meeting over sub-division of deceased estate as per court's judgment and confirmed grant. That all beneficiaries were present including the applicant and parties agreed on sum to be contributed by each of them at Kshs.20,000/=. That he attended sub-division on 15/11/2010 on which date security had been provided and subdivision was carried out fairly in his presence without any complaint. That he came to learn of applicant's objection later. The Surveyor, Mr. Daniel Chabari, swore an affidavit dated 14th March, 2012 stating how he received instructions from the respondent and that he proceeded to the scene after substantial part of his fees had been paid by all beneficiaries. That on arrival at the land he met all the beneficiaries and surveyed the entire parcel of land and embarked on sub-division as per the confirmed grant and judgment of the court. He established all

beneficiaries save applicant lived on the land and have extensive developments in respect of their relevant portions having planted tea, coffee and bananas. That he established the entire flat land is about 5.1 acres occupied by Lawrence Njoka, Beatrice Mute, Linus Marangu and Mugambi Murungi while the sloppy one is occupied by Idah Gaji and Mugambi Murungi. That he subdivided the flat land giving Lawrence Njoka 1 acre, on his developed portion, Beatrice Mute 1 acre, on her developed portion, Linus Marangu 1 acre on his developed portion, Mugambi Murungi 1.5 acres where he lives and has planted coffee and David Muguna(applicant) 0.6 acres where he had planted tea. The Surveyor further averred the rationale of giving applicant 0.06 acres were two fold, that he does not live on the land but at Mwimbi/Chogoria/131 where he has built his home and developed and secondly 1 acre portion occupied by Lawrence Njoka belonged to the applicant but he had sold it to Lawrence Njoka leaving the 0.6 acres where he had planted tea. That on sloppy area Mugambi Murungi got 4.183 acres and David Njeru Muguna(applicant) 4.0278 acres. That after subdivision the Surveyor averred all parties expressed satisfaction and instructed him to pursue the new titles. That he filed the mutation and drew the field diagram and observation site and allocated various portions No.5066-5072 and indicated the portion of each respective beneficiary save applicant who has not provided him with his photograph and copy of identity card.

On the other hand both parties referred me to the visit locus report by Deputy Registrar dated 12th July, 2012 which was done in presence of Counsel and parties. The Deputy Registrar's visit locus report is similar to the matters deponed upon by the Surveyor. The sketch field diagram by Deputy Registrar agrees with that of the Surveyor. The applicant including the portion he sold has 1.667 acres whereas Mugambi got 1.5 acres. The road access to applicant's land was hived from Land Parcel No.5067 of Mugambi Murungi to serve land NO.5068. I find that the subdivision considered the contents of the court's judgment and the confirmed grant not only in terms of occupation and development of the land by the beneficiaries but also the respective sizes of beneficiary acres portions of land. Each beneficiary got what was awarded to him/her by the court as per its judgment.

Having considered the affidavits in support and in opposition of the application and having considered the court's judgment dated 4th June, 2010 which specifically stated:

“It is in the interest of justice that each of the beneficiaries do get the portion of land were they occupied and developed.”

I am satisfied that the Surveyor carried out subdivision independently and fairly in presence of all beneficiaries. The occupation and developments of each beneficiary was considered. The applicant who contends parcel No.5067 and 5068 should be resurveyed so that each can get some flat area and road frontage did not seek review of the court's judgment when it was made and which is clear that each beneficiary is to get the portion where they had occupied and developed. The applicant do not live on the suit land but the flat area where he had sold 1 acre to Lawrence Njoka was considered as his share and he was given 0.667 acres on which portion the Surveyor stated the applicant had tea bushes. Applicants share including the portion he had sold is 1.667 acres whereas Mugambi Murungi is 1.5 acres. The applicant is settled on another parcel of land Chogoria Mwimbi/131 where he has built his home and developed. The road access to applicant's land was curved out of plot 5068 of Mugambi Murungi who has raised no complaint at all. The rest of beneficiaries are satisfied with the subdivision and have since taken their titles. The applicant has no claim over titles of the other beneficiaries save that of Mugambi Murungi plot No.5068.

I find there was no basis of the applicant seeking orders of inhibition against plots Nos.5066,5067,5069,5070, 5071 and 5072. Further I find no basis of him seeking other titles be cancelled.

The allegation by the applicant that the portions of land created through subdivision are unproportionate and contrary to judgment of the court delivered on 4th June, 2010 are without any basis. The applicant has failed to demonstrate that the subdivision was not done freely and fairly in accordance to the confirmed grant dated 4th June, 2010. The applicant further failed to demonstrate that the respondent unfairly and unjustifiably subdivided the land parcel No.Mwimbi/Chogoria/1036, into parcel

No.5066,5067,5068,5069,5070,5071 and 5072. The court order was in respect of subdivision as per occupation and development by the beneficiaries. The court did specifically order that all parties get a portion of the flat area. The applicant was aware of the court's judgment dated 4th June, 2010 and did not, if he was aggrieved by the same, seek a review or sought to appeal against the said judgment. He is bound by the said judgment and cannot now be heard to say someone got a flat area whereas he did not; though he got a bigger portion of the flat area. He can only challenge the court's judgment through an appeal or review but not through the current application which is not in any way an application which is not for review of the court's judgment.

Having found that the subdivision of Mwimbi/Chogoria/1036 was as per court's judgment, that it was fair to all beneficiaries, I find the applicant's application dated 28th July, 2011 to be without any merits. The same is therefore dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF APRIL, 2013.

**J. A. MAKAU
JUDGE**

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Igweta for the applicant
2. Mr. Ogoti h/b for Mr. Mosota for the respondent.

**J. A. MAKAU
JUDGE**