

IN THE MATTERS OF THE ESTATE OF NDERITU KARIUKI KOIGI – (DECEASED)

THEURI KAHONYA GITUNE.....APPLICANT/RESPONDENT

VERSUS

MARGARET G. NDERITU.....1ST RESPONDENT

DANSON MWAURA MWANGI.....2ND RESPONDENT/APPLICANT

RULING

Following judgment given by this court (Mugo, J) on 18th September, 2009 and a subsequent order to the respondent to execute transfer documents, plot No.NYANDARUA/SOUTH KINANGOP/7 was surveyed and subdivided into NYANDARUA/SOUTH KINANGOP/9765 measuring 2.024Ha and 9766 measuring 0.6765Ha. The former was registered in the name of the applicant while the latter was retained by the respondent.

It happened that the applicant's portion upon survey and subdivision was found to encompass part of the respondent's parcel on which there are three timber structures, which the respondent is unwilling to remove.

In this application, it is the applicant's prayer that he (the respondent) be ordered to remove those structures failing which the applicant be at liberty to do so at the respondent's expense.

On his part, through his son to whom he has given the power of attorney on account of his age (93 years), it has been deposed that the administrator of the estate, who is a party to this matter is deceased; that it would be unconscionable for the respondent Theuri Kahonya Gitune who has lived on the portion in question for over 40 years to be evicted; that while the applicant is entitled to 5 acres of the original title, the family of the deceased ought to have been involved in identifying the portion instead of insisting on the demolition of the respondent's (Theuri's) only home.

I have considered these arguments. In particular, I note that after the judgment of Mugo, J, the 1st respondent has been reluctant to co-operate with the applicant in the survey of the property in question. Indeed, the court had to order the Deputy Registrar of the court to execute on his behalf transfer documents. Be that as it may and although I have been urged to issue the orders of eviction/demolition, because court orders are not in vein, this is a court of equity. Considering the age of the 1st respondent and his averments which have not been challenged that he has been on the portion under consideration for over 40 years and the structures sought to be demolished constitute his only home, the issue in my view, ought to be approached more carefully. I note from the mutation form that the portion occupied by the respondent (Theuri) is somewhat in the centre of the property in question. That perhaps explains the quagmire in which the surveyors may have found themselves. But I believe that with the cooperation of Eliud Gitune who has indicated his willingness and that of the family to the deceased to assist in this matter and given the expertise of the surveyors, eviction and demolition can be avoided or minimized.

For the reasons given, the respondent (Theuri) through his attorney Eliud Gitune must within twenty one (21) days make an offer to the surveyors and the applicant on how the judgment of the court will be realized. Of course if no progress is made in that direction, the court retains the power to order demolition of the structures that make it impossible to curve court the five (5) acres belonging the applicant.

I award the costs of this application to the applicant.

Mention on 29th November, 2011 for further orders.

Dated, Signed and Delivered at Nakuru this 5th day of October, 2011.

**W. OUKO
JUDGE**