



In re Estate of Perminus M'Mugambi Mugambi (Deceased) (Succession Cause 213 of 1997) [2025] KEHC 339 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 339 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 213 OF 1997
EM MURIITHI, J
JANUARY 23, 2025**

ESTATE OF PERMINUS M'MUGAMBI MUGAMBI (DECEASED)

BETWEEN

LYDIA KURI MURERWA 1ST APPLICANT

CAROLINE GACHERI MURERWA 2ND APPLICANT

ERICK MUGUNA MURERWA 3RD APPLICANT

AND

FLORENCE KINAITORE IMATHIU RESPONDENT

AND

NORAH NTUI MUTAI INTERESTED PARTY

RULING

Introduction

1. Before the court is an application dated 14/9/2024 for the determination of the best proposal for the subdivision of a parcel of land parcel LR No. Nyaki/Kithoka/4875 measuring six (6) acres among the seven households of beneficiaries. There was no contest as to the heirs and the only question before the Court is the physical subdivision of the property into equitable portions in the circumstances. Those circumstances were that the six (6) beneficiaries represented by the Administrator had agreed, in view of the many individuals represented in the relevant households, to sell their interest in the land and secured a buyer, the Interested Party herein, and share the proceeds. The Applicants contested the selling price of Ksh.40 million and alleged that the plot was worth more, and in addition claimed that she had occupied a portion at the road frontage of the plot equal to her $\frac{3}{4}$ acre share.
2. The Court visited the site to observe the alleged occupation, cultivation and the feasibility of any proposed subdivisions. While the applicant wished to keep her road front portion which she alleged



to have occupied and worked for some time, the Respondent and the Interested Party urged the court to approve a subdivision where all the beneficiaries had a road front access. The Court noted that the applicant's alleged occupation of the frontal portion, even with the evidence of remnants of a wooden-posts fence and collection and oiling up of stones from the plot, must have been a recent event with a portion of 50x100 feet tilled and a clearing of 40x60 recently done in September 2024. The applicants stated that the fence had been put up in 2018 and removed by the respondent in September 2024 and the stones pile up was said to have been done in September 2024.

3. In an attempt to resolve the issue, by consent of the parties, the court following the site visit directed that (1) of the applicants provide a valuation of the property and (2) secure a purchaser for a price higher than Ksh.40 million to justify their objection to the proposed sale value; and (3) of the parties' surveyors to propose appropriate subdivision of the property for an equitable sharing of the estate asset among the seven household beneficiaries, and the parties to attempt a settlement.

No settlement

4. The parties were not able to agree; the applicants did not secure a higher bidder, and the matter of the subdivision was left to the Court to determine on the basis of affidavits, valuation by the County Valuer and the County Surveyor's report and respective proposals for subdivision plans filed by the parties, and ruling was set for 23/1/2025.
5. By an application dated 28/11/2024 seeking to arrest the ruling and cross-examination of the person who made the survey proposal contained in a report dated 22/11/2024 in response to the court order of 13/11/2024 for "the County Surveyor to a report on the possibility of subdivision of property as proposed by the parties", the applicant moved the Court for a further consideration of the matter of the subdivision plan proposals in subsequent proceedings held on 18/12/2024.
6. The Court examined Mr. Martin Mutwiri Nkonge, the Surveyor maker of the County Surveyor's Report who signed off for the County Surveyor, as well as Mr. Moses Mathibu Nderitu, the County Surveyor himself, on the matter of the circumstances surrounding the undertaking of the survey and making the report thereon dated 22/11/2024 and filed in court on the same date.
7. It came out in court that the Surveyor's Report dated 22/11/2024 by Mr. M. M. Nkonge, while done with the authority and mandate of the County Surveyor Mr. Moses Nderitu, was limited by Mr. Nkonge's professed misunderstanding of the order of the court for "the County Surveyor to a report on the possibility of subdivision of property as proposed by the parties." It appeared that the Surveyor did not consider several subdivision plan possibilities for the property and only restricted himself to what the parties that he met at the site told him. The parties that he had met were solely on the side of the respondent. Both the Surveyor and the County Surveyor agreed that the property was amenable to several other subdivision plans, up to 3 other subdivision plans as according the County Survey, in addition to those presented by the two opposing parties.
8. The Court, with consent of the parties' counsel, at the hearing of 18/12/2024 invited the County Surveyor to make proposals on possible subdivisions of the suit property, which report dated 20/12/2024 and filed on the same date, and ruling date was maintained for the 23/1/2025.

Determination

9. The Court has considered the matter in light of the two surveyors' reports, submissions by counsel for the parties and the court's observation of the suit property during the court site visit on and the expressed wishes of the parties at the site meeting.



10. The facts are not in serious dispute. It was clear from the court site visit and the affidavits filed by the parties that the applicants have only recently occupied, or attempted to occupy and cultivate, a $\frac{3}{4}$ acre portion on the suit property at the road frontage of the plot along Kithoka – Ruiru Road. The applicants claimed to have been in occupation since 2018, but what appeared to have provoked the dispute is the recent attempts at occupation and cultivation by the pile up of stones, fencing and the clearing of a section of the $\frac{3}{4}$ acre portion. The Court observes and it is common ground of the parties that there are no buildings on the parcel of land, so its subdivision is wholly malleable and unfettered by any existing construction.

The law is clear.

11. A beneficiary as with any other person cannot lawfully grab an asset of the deceased or a portion thereof without the authority of the Court upon any appropriate order under section 47 of the Law of Succession Act; an appropriation by an Administrator/Executor as a personal representative of the Deceased under section 82 (d) of the Act; and or inconsistently with a Grant of Letters of Administration, as that would make her an intermeddler within section 45 of the Act. Therefore, the claim and contention by the applicants that they had been in occupation of a $\frac{3}{4}$ portion of the suit property abutting the Kithoka-Ruiru Road is without legal authority and invalid. The applicants as with the other households must await the distribution of the estate asset or seek the authority of the Administrator or court order.
12. There is no dispute as the right to equal sharing between the beneficiaries. The dispute only relates to the positioning of the applicants' $\frac{1}{7}$ share of the particular estate property.

Equitable sharing

13. The object of the Court's determination on the matter of the suit property herein must be the equal and equitable sharing of the estate asset. Because of its situation with a main road frontage on one side (the front side) of the four sides of the parcel of land and a minor road at the back (the back side), the court must in seeking equitable distribution ensure that as far as practical all the beneficiaries are equally advantaged by the siting of the plot, with none disadvantaged by reason of the positioning of their respective subdivision portion. As an accommodation, if equal access to the more valuable front side is not possible by reason of size of the subdivided units, then a larger portion ought to be reserved for the beneficiary or beneficiaries who get the disadvantaged portions of the asset on the back side with access only to the minor road. The court accepts that the option where the applicants take exclusively the entire frontage of the plot abutting the Kithoka-Ruiru Road is unconscionable as it deprives the other beneficiaries who are in equal degrees of priority with the applicants, and adversely affects, their ability to attract a purchaser at the value already secured in view of the positioning of the remainder of the plot making up the six (6) shares of the asset that will, consequently, go to the other beneficiaries.
14. For the reasons of equality and equity in the distribution, the Court must therefore reject the proposals for uneven distribution, with some portions touching the main road which others do not, as set out in Annex I and Annex II of the County Surveyor's Report dated 20/12/2024 as well as the Annex I to the Surveyor's report dated 22/11/2024, which gives a portion marked "A" measuring 0.33 ha, as with the rest of the portions, regardless of the fact of its positioning at the back of the parcel of land without access to the main road, Kithoka – Ruiru Road. For equity, the parcel of land marked "A" on Annex I in Surveyor's report of 22/11/2024 must be proportionately larger than the better positioned portions, which enjoy access to the main road.



The practical solution

15. It is possible, and probably desirable in the interests of justice, to make alternative orders for the distribution of the suit property and to allow the applicants to choose the one to apply. The applicant's right to her 1/7 share of the plot must be preserved as against the other six beneficiary groups who have agreed to sell their respective interest to the Interested Party. Of course, as a purchaser, the Interested party if only interested in the relatively attractive part of the plot with a main road frontage.

Option I

16. The applicant takes an equal share measuring 1/7 or 3/4 of an acre of the plot with subdivision aligned to the front and back sides so that each portion has access to both the two roads at the front and back of the plot. This corresponds to the subdivision proposal in Annex II of the Surveyor's report dated 22/11/2024.

Option II

17. A bigger option at the back of the plot as shall adequately compensate the beneficiary who takes the back portion. In the estimation of this Court, a portion measuring one (1) acre shall be adequate recompense for the disadvantaged back shareholder. The rest of the beneficiaries as one block who wish to sell their interests to the Interested Party would take the remaining five (5) acres. This would correspond with Annex No. 1 of the Surveyor's report dated 22/11/2024 with an amendment that the parcel marked "A" at the back of the parcel of land with access only to the minor 9-metre road will measure 1 acre (0.40 ha).

Option III

18. It is possible to give the applicants a frontage access to the main road Kithoka – Ruiru Road and still retain six other beneficiaries in one block for purposes of the sale of their collective interest to the Interested Party. Such subdivision plan will involve granting a road access only to a portion at the back of the plot, and it will require that the applicants take the portion of the plot at the back of the Plot so that the other can sell their portions as one whole to the Interested Party. This corresponds with the subdivision proposal Annex III in the County Surveyor's Report dated 20/12/2024. In the event, the applicants elect for this option, they will take parcel marked as "G" measuring 0.27 ha as the others but with access to the main road Kithoka-Ruiru road by a 9-metre access road as shown on Proposal No.3.
19. In recognizing the minority interest of the Applicants, the Court will grant them the right to choose which of the three options shall apply, and failing such election within seven (7) days, the court-ordained option shall carry the day.

Orders

20. Accordingly, for the reasons set out above, the Court makes the following orders:
 1. The Court directs that the Estate asset known as LR NO. Nyaki/Kithoka/4875 measuring six (6) acres shall be distributed among the 7 households of the Deceased in equal shares and in portions striding across the parcel of land and stretching from the front of the parcel along the Kithoka – Ruiru Road to the minor road at the back of the parcel, as shown on the subdivision plan proposal in Annex II of the Surveyor's report dated 22/11/2024.
 2. The implementation of the subdivision plan set out at paragraph (1) above shall be stayed for seven (7) days and be subject to the election of the Applicants LYdia Kuri Murerwa, Caroline



Gacheri Murerwa And Erick Muguna Murerwa to accept and receive either of the portions at the back of the parcel of land as shown in Annex No. 1 of the Surveyor's report dated 22/11/2024 with an amendment that the parcel marked "A" at the back of the parcel of land with access only to the minor 9-metre road will measure 1 acre (0.40 ha) or the portion marked "G" the subdivision proposal Annex III in the County Surveyor's Report dated 20/12/2024.

3. In default of such election within seven (7) days from the date of this ruling, the Subdivision Plan directed by the Court under paragraph (1) hereinabove, being the proposal in Annex II of the Surveyor's Report dated 22/11/2024, shall be decreed and implemented.

21. There shall be no order as to costs.

Orders accordingly.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mutuma J. for the Administrator.

Mr. Muthomi, J. with Mr. A. Muguku for the Applicants.

Mr. Mutuma G. for the Interested Party.

