



REPUBLIC OF KENYA



**In re Estate of Kimamu Kahungu (Deceased) (Succession Cause
384 of 1984) [2024] KEHC 3414 (KLR) (Family) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 384 OF 1984

HK CHEMITEI, J

APRIL 11, 2024

**IN THE MATTER OF THE ESTATE OF KIMAMU KAHUNGU
(DECEASED)**

BETWEEN

POLLY NYAMBURA KAHUNGU APPLICANT

AND

JOAN ANNITA WAMBUI 1ST RESPONDENT

PATRICIA NYAMBURA NJOROGE 2ND RESPONDENT

RULING

1. This ruling relates to the summons/ application dated 20th September, 2022 filed by the Applicant, Polly Nyambura Kahungu seeking for Orders That:
 - a. The Honourable Court be pleased to adopt the Regional Surveyor's Report and Recommendations dated 7th July, 2022, as Court Order hereto for enforcement.
 - b. Costs of this application be provided for.
2. The application is supported by supporting affidavit sworn by Polly Nyambura Kahungu on 20th September, 2022 stating *inter alia* that ruling made on 23rd April, 2021 and order issued on 2nd November, 2021 directed that she gets half portion of Dagoretti/ Uthiru/ 504 by virtue of her entitlement to half of Plot Dagoretti/ Uthiru/ 504 having been extinguished because the latter portion of land had been sub – divided and portions sold out. Further that a government surveyor to sub – divide Plot Dagoretti/Uthiru/1053 to give effect to Polly Nyambura Kahungu's entitlement while



ensuring, as far as possible, that the parties and their families remain on the portions they currently occupy and noting not to interfere with permanent buildings and graves on the parcel of land.

3. The application is opposed by replying affidavits sworn by Joan Annita Wambui & Patricia Nyambura Njoroge on 12th October, 2022 who aver that they are not opposed to the sub – division of Dagoretti/ Uthiru/ 504 as per the sub – division plan marked Annex A which is in line with the ruling delivered on 23rd April, 2021. They have proposed rectifications to the sub – division, vide letter dated 4th August, 2022 from Lawrence Mungai & Company Advocates – counsel on record for the Respondents, to wit Polly Nyambura Kahungu to get 0. 456 Ha; and Joan Annita Wambui and Patricia Nyambura Njoroge to each get 0. 128 Ha. The letter aforementioned was responded to vide letter dated 23rd August, 2022 from Gachie Mwanza & Co. Advocates – counsel on record for the applicant; noting the errors as well as the measurements and stating that the amendments have since been made with the proposed amended Annexes A and B enclosed to the letter.
4. Polly Nyambura Kahungu has filed a further affidavit sworn on 7th November, 2022 stating inter alia that as per the certificate of confirmation of grant dated 8th October, 2021, Joan Annita Wambui and Patricia Nyambura Njoroge are to receive 0. 256 Ha to hold for themselves and in trust for the following beneficiaries: Fiona Nyambura Kahungu, Linet Wanjiku Kahungu, Tyron Ngugi, Rayner Irungu Njeri, Savco Ngugi Ileri and Clinton Maina Njeri. They are not to receive the portions of land individually for further sub – division in equal portions.
5. That the proposal by the Regional Surveyor for the court to adopt Annex B is against the backdrop that fragmentation of land makes it uneconomical and unsuitable for proper use and fragmentation, and hence the need to maintain land as a single unit considering that land is emotive. The house alleged to be interfered with by the Regional Surveyor’s proposed sub – division under Annex B was built during the pendency of this matter and the respondents were informed by Judge Kimaru to continue building at their own risk as such construction will be brought down at the appropriate time, because an order for status quo to be maintained had been issued.
6. She went on to state that she has already foregone her right of inheritance to Plot Dagoretti. Uthiru/ T483 which had been disposed while she had an interest in it and cash at Standard Bank. She proposes for the Regional Surveyor’s proposed sub – division under Annex B to be adopted by this court so that she can retain her home adjacent to their land and not in the pockets of the portions here and there.
7. The applicant has filed written submissions dated 31st July, 2023 and has placed reliance on the following:
 - a. *Koinange Investments And Development Ltd v Nairobi City Council & 3 others* [2009] eKLR where the cited, with authority, the case of *Omega Enterprises (k) Ltd v KTDA* 1993 LLR 2525 (CAK) where the court stated at page 3 -4, “It is the plain and unqualified obligation of every person in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends to cases where the person affected by an order believe it to be irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid, whether it was regular or irregular. That they should come to court and take it upon themselves to determine such a question. That the course of a party knowing of an order, which whether null or irregular, and who might be affected by it, was plain. He should apply to court that it be discharged. As long as it existed, it must not be disobeyed.”



- b. *Joseph Nyaga Njeru v Thomas Nyaga Njuki (substituting Njuki Rabuta (deceased))* [2022] eKLR where the court, while relying on the expert recommendations by a surveyor, made the following finding: “In view of the above, I find that the surveyor lawfully executed the order of the court, which he had an obligation to. Further, the issue of ascertainment of acreage required expert evidence of a surveyor and evidence to be submitted by the parties on this issue would not, alone, be sufficient. It would require an expert, herein being a surveyor, to visit the ground and make such ascertainment and this was done. I find that the report filed by the surveyor is in order and sufficient to determine the acreage the plaintiff occupied. My considered view is that the defendant is un-necessarily trying to complicate an otherwise simple issue by calling upon the court to conduct what would amount to a mini – trial. Litigation must come to an end. Period.”
8. The Respondents have filed submissions dated 31st July, 2023 stating inter alia that Annex A complies with the ruling of 23rd April, 2023 save that it needs to be rectified to ensure that Polly Nyambura Kahungu gets 0. 456 Ha; and Joan Anita Wambui and Patricia Nyambura Njoroge to get 0. 128 Ha each. That annexure B does not comply with the ruling of 23rd April, 2023 and it will lead to the respondent’s eviction, preservation of the applicant’s home it does not show the permanent structures on the respondents’ portions and has disregarded the area with graves.
9. Reliance has been placed on the case of *Re Estate of Gathogo Wagacha (deceased)* [2021] eKLR where the court stated, “The court noted that, the previous judge was not appraised on all 3 methods of sub-division in terms of fairness and equity on the ground, thus this court is justified in interfering with sub – division on the ground for equity and fairness to the beneficiaries.”

Analysis and Determination

10. I have carefully considered the application, the responses as well as the written submissions filed by the parties and the issue for determination is whether this court should adopt the Regional Surveyor’s proposed sub -division A or B.
11. In *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR the court stated as follows:
- “ 57. Article 159 of the *Constitution* recognizes the judicial authority of courts and tribunals established under the *Constitution*. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy [Emphasis mine]. The judiciary acts only in accordance with the *Constitution* and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.”



12. I find that all the parties have complied with the orders issued by Hon. Justice M. Thande in the ruling delivered on 23rd April, 2021 save that they do not agree on which proposed sub – division report to adopt.
13. The main borne of contention is that there is a house/ permanent structure belonging to the respondents which will be affected if the Regional Surveyor’s Report proposed sub – division B is adopted. However, the applicant has averred that this house was constructed during the pendency of the proceedings in this matter and that Hon. Justice Kimaru cautioned them against the construction because it would have to be brought down if the applicant is successful in court. The respondents have not controverted these assertions by the applicant.
14. At the same time the surveyor cautioned against further fragmentation of the parcel of land an issue which the parties were made aware of.
15. In view of the said report and in view of the fact that the same accords with the grant herein I agree with the applicant that annexure B of the regional surveyor’s report is plausible and the same ought to be adopted.
16. Consequently, the application dated 20th September 2022 is allowed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 11TH DAY OF APRIL 2024.

H K CHEMITEI

JUDGE

