



**Kinuthia v Kinuthia (Succession Cause 6 of 2019)  
[2023] KEHC 18197 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18197 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
SUCCESSION CAUSE 6 OF 2019**

**J WAKIAGA, J**

**MAY 23, 2023**

**BETWEEN**

**LYDIA WAIRIMU KINUTHIA ..... APPELLANT**

**AND**

**DANIEL WAIRIMU KINUTHIA ..... RESPONDENT**

*((Being an Appeal from the Ruling of the Hon. M.W. WACHIRA CM in  
Muranga CMC Succession Cause No 61 of 2005 delivered on 25<sup>th</sup> July 2019))*

**JUDGMENT**

1. This Appeal arises out of the Ruling by the Court on an application dated 1<sup>st</sup> April 2015 in which the Respondent sought for the orders that the subdivision carried out by the Appellant on the suit property be nullified /revoked and the exercise be done afresh by the land being subdivided into two portions vertically so that each beneficiary have the frontage adjacent to Kamahuha- Kahaini road.
2. The trial Court in finding for the Respondent, Court held that the subdivision was done in unsatisfactory manner which should not be done in Succession matters and that the Respondent was entitled to the frontage of the road and annulled the subdivision and directed that the Appellant and the Respondent to agree on the satisfactory mode of subdivision.
3. Being aggrieved by the said Ruling the Appellant filed this Appeal and raised the following grounds of Appeal;
  - a. The Court erred in not finding that the consent on the subdivision was binding having been arrived at by two consenting adults of sound mind.
  - b. The Court erred in fact and in law in granting the application so as to allegedly address an alleged injustice arising out of the earlier subdivision after the matter had been concluded before the Respondent came into the proceedings by way of substitution.



- c. The Magistrate wrongly rewrote the agreement between the original parties thereby arrived at a wrong decision.

### **Submissions**

4. Directions were given that the Appeal be heard by way of Written Submissions. For record purposes, at the time of this judgement, there was only on record the Respondents Written Submissions and the Appellant's reply to the said submissions. On behalf of the Respondent, it was submitted that the Appeal was an abuse of the Court's process as the Court has no power to rectify boundaries as that belongs to the Land Surveyor. It was contended that the Appellant should have filed a suit and the Environment and Land Court to compel the Surveyor to do its work.
5. The Appellant in her reply to the submissions by the Respondent contended that the lower Court should have dismissed the application dated 1.4.2015 for want of jurisdiction as it involved land matter to wit the subdivision of land which had been done by the Appellant and Virginia Wanjiku Njoroge in the year 2013.
6. This being a first Appeal, the Court is required to re-evaluate the proceedings before the lower Court and to come to its own determination. For the purposes of this Judgment the history of the litigation herein is very important. On 27<sup>th</sup> February 2019 the lower Court Hon. V. Ochanda RM delivered a Ruling on the application herein in which she found that the Court lacked jurisdiction as the matter was a land dispute as it was a claim on subdivision and not a distribution of the estate issue.
7. Having so found, the Court should have dismissed the application herein for want of jurisdiction but instead directed the parties to fix the same before a Court with requisite jurisdiction. It was therefore procedural for a Succession file to be placed before a Magistrate gazetted to hear Environment and Land matters.
8. On the merit of the Appeal I have noted that the trial Court did not address herself on the issue as to whether the subdivision was by consent and if so whether the Appellant had met the threshold for setting aside a Consent Order.
9. Having noted that the decision by Hon. Ochanda on jurisdiction was not challenged and or appealed against, it follows that Hon. Wachira did not have jurisdiction to sit on this matter being a succession matter even if she was gazetted as Environment and Land Court and therefore set aside her Order herein.
10. Once the Court had issued Grant to the parties, any dispute as to the boundaries should have been filed in the Environment and Land Court and not litigate in this file.
11. I therefore allow the Appeal, set aside the Ruling dated 25<sup>th</sup> July 2015 and grant leave to the Respondent if need be to file suit in respect of the disputes herein in the relevant Court.
12. This being a family dispute, each party shall bear their own cost and it is ordered.

**SIGNED DATED AND DELIVERED AT MURANGA THIS 23<sup>rd</sup> DAY OF MAY 2023**

**J. WAKIAGA**

**JUDGE**

**In the presence of :-**

Mr. J. Karuki for Mr. Mbuthia for Appellant

No appearance by T.M. Njoroge for Respondent



Jackline – Court Assistant

