



**In re Estate of Samuel Mwaura King'ang'i (Deceased) (Succession Cause
1430 of 1997) [2023] KEHC 24456 (KLR) (Family) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1430 OF 1997
MA ODERO, J
OCTOBER 19, 2023
IN THE MATTER OF THE ESTATE OF SAMUEL MWAURA KING'ANG'I (DECEASED)**

BETWEEN

LUCY WANJIKU MWAURA APPLICANT

AND

JAMES KUNG'U KIBUI 1ST RESPONDENT

JOHN MUNGAI MWAURA 2ND RESPONDENT

RULING

1. Before this Court for determination is the notice of motion application dated October 13, 2020 by which the applicant Lucy Wanjiku Mwaura seeks the following orders:-

- “1. Spent.
2. The honourable court be pleased to issue an order directing the District Surveyor to seclude the burial area and the road reserve before coming up with the sub-division.
3. The honourable court be pleased to issue an order directing the District Surveyor to draw a new map of the parcel of Land LR No Kabete/Lower Kabete/3030 using the original title as directed by the court on January 29, 2019.
4. The sub-division exercise be carried out in the presence of the deputy registrar, all parties and their advocates.



5. The costs of this application be provided for.”
2. The application which was premised upon sections 1A, 1B, 3A and 63 (c) of the [Civil Procedure Act](#) order 40 rules 1 and 4 order 51 rules 1 & 3 of the [Civil Procedure Rules](#) and all enabling provisions of the law was supported by the affidavit of even date and the Further supporting affidavit dated June 4, 2022 sworn by the applicant.
3. The respondents James Kung’u Kibui and John Mungai Mwaura both opposed the application through the replying affidavit dated June 2, 2022. The matter was canvassed by way of written submissions. The applicant filed the written submissions dated October 13, 2020 whilst the respondent relied upon their written submissions dated March 13, 2023.

Background

4. This Succession Cause relates to the estate of the late Samuel Mwaura King’ang’i (hereinafter ‘the Deceased’) who died intestate on July 31, 1993. A copy of the Death Certificate serial Number 268xxx is annexed to the petition for Grant of the letter of Administration Intestate dated February 12, 1997.
5. The deceased was survived by the following persons:-
 - (1) Judith Nduta - Widow
 - (2) James Kung’u Kibue - Son
 - (3) Joseph Mukiru - Son
 - (4) John Mungai - Son
 - (5) Jane Njoki - Daughter
6. The estate of the deceased comprised of only one asset being the parcel of land known as LR No Kabete/Lower Kabete/303 (hereinafter the ‘suit property’).
7. Following the demise of the Deceased Grant of letters of Administration Intestate was on October 28, 1997 issued to James Kung’u Kibui. The grant was duly confirmed on February 13, 1998.
8. On September 25, 2009 the parties entered into a consent regarding the distribution of the estate which consent was duly adopted by the court on October 29, 2013.
9. The consent read as follows:-

“By consent, it is hereby agreed between the applicant and the respondents that the land subject matter in this suit be shared equally between John Mungai Mwaura, the applicant and James Kung’u Kibue, the respondent and that if there were any properties of any party on the other party’s portion of land such party be free to remove them. It is further agreed between the applicant and the respondent that all cases pending in court in respect of Land Title Number LR Number Kabete/Lower Kabete/303 be discontinued.”
10. An application seeking to set aside this consent was dismissed by the court *vide* the ruling delivered on October 2, 2014. On September 16, 2019 hon Lady Justice Achode (as she then was) delivered a ruling directing how the suit land was to be sub-divided.
12. The applicant now claims that the sub-division was not properly done as the district surveyor failed to take into account the existence of a family cemetery in which seven (7) family members had been buried, which cemetery fully covers the applicants portion of the land measuring 0.25 hectares.



13. Further that the district surveyor failed to take into consideration the expansion of a nearby pathway into an access road. The Applicant now prays that the court orders the surveyor to draw a new map of the suit land as directed by the court on January 29, 2019.
14. The 2nd respondent in opposing the application averred that each of the two Houses left behind by the deceased had their own portion of land clearly demarcated in which they had resided for over sixty (60) years.
16. The respondents assert that the claim that the family cemetery covers the applicant's portion of lands is misleading and is a lie as each household has its own graveyard/cemetery. That this application arises from infighting in the 2nd house and does not concern the respondents at all. That the 2nd household should resolve their own issues without dragging the 1st house into their squabbles.

Analysis and Determination

15. I have carefully considered the application before this court the reply filed thereto as well as the written submissions filed by both parties.
16. The applicant does agree with the 1st respondent that the deceased had demarcated the land prior to his demise and it is agreed by both parties that both homes have grave yards on their portion of the land.
17. In the ruling delivered of September 16, 2019 the hon Judge states as follows:-

“ 13. In the circumstances, this Court adopts the first report which was prepared by the District Surveyor and finds a basis to interfere with the said Report by:

- i. The 1st respondent James Kungu Kibue, shall relinquish 3.6 meters at the bottom end of his portion of land to provide an alternative access road for the 2nd respondent John Mungai Mwaura.
- ii. The amendments of the report to be implemented such that the parcel boundaries identified on the ground by the district surveyor shall be honoured.
- iii. In case there is variance between the map and the ground position, the land registrar and the district surveyor ought to make the necessary amendments to their records in conformity with the law.
- iv. Each party to bear their own costs.”

18. The applicant's complaint is that the district surveyor failed and/or neglected to take into account certain realities on the ground.
19. I note that both parties do not refute that the deceased had demarcated the suit land between the two homes.
20. In Kisii ELC No 1163 of 2016: Andrew Marigwa Versus Josphat Ondieki Kebati (formerly HCC No 82/2011) the Judge stated that:-

“ Recognizing the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made a reference of the matter to the Land



Registrar and the county surveyor who are the persons mandated under the Act to deal with disputes relating to boundary. The land registrar is the custodian of the records relating to land, have the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the *Land Registration Act.*”

21. The court stated that:-

“From the observations and findings by the land registrar and the Surveyor there is in fact a need for the registry index map to be amended to reflect the correct status as appears on the ground. [own emphasis]. The applicant by his application seeks an order that the land registrar’s and the surveyor’s report be disregarded and the matter fixed of hearing. What would the court proceed to hear? The dispute would still remain a boundary dispute which the court cannot entertain under the provisions of section 18(2) of the *Land Registration Act, 2012.* My view is that the land registrar’s reports have finally disposed of this matter. I hereby endorse the reports as judgement of the court and direct that same be implemented.”

22. My view is that the district surveyor has the technical expertise which this court lacks to determine fix and establish boundaries of land. Further the issues being raised by the applicant are issues which ought properly be addressed in the Environment and Land Court not in this Probate Court.

23. Based on the above I find no merit in this application. The same is dismissed in its entirety. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

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MAUREEN A. ODERO

JUDGE

