



**In re Estate of Gideon Kilongosi (Deceased) (Succession Cause
542 of 2007) [2023] KEHC 23680 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 542 OF 2007**

FR OLEL, J

OCTOBER 18, 2023

IN THE MATTER OF THE ESTATE OF GIDEON KILONGOSI (DECEASED)

BETWEEN

LEORNARD KITUKU WAMBUA 1ST PETITIONER

GREGORY KITUKU WAMBUA 2ND PETITIONER

ALBARN WAMBUA KITUKU 3RD PETITIONER

AND

JUSTINA MBENEKA KILONGOSI APPLICANT

RULING

Introduction

1. The application before this court for determination is the notice of motion application dated August 24, 2022. The said application is brought under provisions of section 1A & 3A of the [Civil Procedure Act](#), order 51 rule 1 of the [Civil Procedure Rules](#), section 73,91 and 94 of the [LRA](#) (cap 300), article 40 of the [Constitution](#) of Kenya 2010 and all other enabling provisions of law and the applicant seeks for orders that ;
 - a. That this honorable court be pleased to issue an order directing the Machakos county land registrar to remove the caution on land parcel No Muputi/kiima-kimwe/2348 unconditionally.
 - b. That the honorable court be pleased to issue an order directing the Machakos county government land surveyor to sub divide land parcel no Muputi/kiima-kimwe/2348 into two equal portions; one ½ for the estate of Gideon wambua Kilongosi and the other ½ for Jusine Mbeneka Kilongosi.



- c. That the honourable court be pleased to issue an order directing the Machakos county government land registrar to register the ½ share of Justina Mbeneka Kilongosi in to her name as absolute proprietor and issue a title deed accordingly.
 - d. That this honourable court be pleased to issue any other order that it deems fit and just in the circumstances for justice to prevail.
 - e. That costs of this application be provided for.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of Justina Mbeneka Kilongosi dated August 24, 2022 and her supplementary affidavit dated April 12, 2023. The petitioners/respondents did oppose the said application by their replying affidavit dated March 24, 2023.
 3. The applicant did state that, she jointly owns parcel Muputi/kiima-kimwe/2348 (hereinafter referred to as the suit parcel) with the Gideon Wambua Kilongosi (deceased) with each party owning ½ share therein (As proprietors in equal share). The family of the late Gideon Wambua Kilongosi were still undertaking the succession process and one Nguku Kilongosi had on March 16, 1987, placed a caution on the entire parcel forbidding any dealing over the said suit parcel and thereby interfering with her proprietary rights over her ½ share. She was not a member nor claiming any share of the deceased estate. It was just and prudent that the suit parcel be sub divided and each party get their own portion.
 4. There was already a court order issued in this cause dated November 3, 2008 where the petitioners/respondents were allowed to administer ½ share of the suit parcel, while under the same order the court did vest the other ½ share of the suit parcel to her as the absolute owner. The petitioners herein were encroaching on her ½ share and there was urgent need for the suit parcel title deed to be partitioned and she be given her separate title deed. The prayers as sought were sought in good faith and there was no reasonable ground to refuse the same.
 5. The respondents denied frustrating the applicant and stated that she had wrongly moved this court as she was not a beneficiary of the estate in question herein, and should have moved to the ELC court to file her claim as it was purely a ownership dispute. In the alternative, respondents did state that it was true that the applicant owned ½ share of the suit parcel, but had sold several portions thereof to third parties who had made extensive developments therein. If the court was minded to grant the prayers sought, then the portions already sold by the applicant to third parties had to be taken into consideration as being part of the ½ share and when the Machakos county land surveyor is undertaking the exercise all parties should be present so that the exercise is not carried out to their detriment.
 6. The applicant did file a supplementary affidavit, where she too pointed fingers at the respondents equally being guilty of selling the suit parcel to third parties and indeed witness several agreements on their behalf. She too admitted selling portions of her ½ share to third parties and it was for that reason that she needs to have her own title deed to enable her deal with the said purchasers. Further there was no need to go to the ELC court as there is already an existing order in this file dated November 3, 2008 acknowledging that she was entitled to ½ share of the suit property.

C. Analysis

7. I have carefully considered the application, supporting affidavit, the respondent's replying affidavit, supplementary affidavit, as well as the written submissions filed and discern that the issues which arise for determination is whether the court had jurisdiction to deal with the prayers as sought and whether the suit parcel should be partitioned and the applicant allowed to get her own title deed.



8. It is common ground that the suit parcel of land Muputi/kiima-kimwe/2348 measuring approximately one decimal three eight hectares (1.38ha) was registered in the joint names of the Gideon Wambua Kilongosi (deceased) and Justina Mbeneka Kilongosi on July 7, 1963 and title deed issued on May 15, 1985. They are joint proprietors thereof and each party is entitled to half share thereof.
9. Further the court order by Justice Lenaola dated November 3, 2008 specifically order that;
 - a. Alban Wambua Kituku be joined as an administrator of this estate.
 - b. The administrators shall administer half share of Maputi/kiima-Kimwe/2348 and the other half to be administered by Justina Mbeneka Kilongosi as absolute proprietor.
 - c. Anges Kilongosi Kituku be included as a beneficiary in the half share to be administered by the joint administrators.
10. In light of the above court order, the respondent's contention that the court has no jurisdiction to deal with this matter on basis that it is a land ownership dispute, has no foundation as it is an issue already determined. But even otherwise by virtue of provisions of sec 47 of the Succession Act and rule 73 of the Probate and Administration Rules this court has the powers to entertain this application, determine any dispute under this Act and to pronounce such decree and or make such orders therein as maybe expedient to deal with the same. See Rose Wanjiku Kuria v Nganga Mugwe (2003) eKLR.
11. I am persuaded by the applicant's contention that there is need to partition the suit parcel into two portions to enable each party administer and deal with their portion. Article 40 of the Constitution of Kenya 2010, also guarantees the applicant her right to own and enjoy peaceful use of her land. The restriction placed on the suit parcel obviously infringes on this right and no justification has been put forth to justify its non-removal

Disposition

12. Taking all relevant factors into consideration I do find that;
 - a. The notice of motion application dated August 24, 2022 is merited and the same is allowed in terms of prayers (1), (2) and (3) thereof.
 - b. The applicant will pay the requisite government fee for the sub division and partition of the suit parcel.
 - c. The said sub division exercise to be carried out in the presence of the applicant and the respondent's and/or in the presence of their chosen representatives.
 - d. Each party shall bear their own costs for this application
13. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 18th day of October, 2023.

In the presence of;

.....Appellant



.....Respondent

.....Court Assistant

