



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 336 OF 2007

IN THE MATTER OF THE ESTATE OF BETHWEL GITAU KARUMA (DECEASED)

WILLY GITAU.....PETITIONER/RESPONDENT

VERSUS

ANTHONY MWANGI KARIUKI.....1ST PROTESTOR

ELVIS CRISPUS MACHARIA.....2ND PROTESTOR

JUDGMENT

1. The Judgment herein relates to a dispute between the **Estates of Kariuki Muchiri (Deceased) High Court Succession Cause Number 173 of 1995** and **Bethwel Gitau Karuma alias Gitau Karuma (Deceased), High Court Succession Cause Number 336 of 2007**.
2. From the affidavits filed in the matter, the two (2) deceased persons owned two (2) properties – **L.R. 6911 North of Nakuru Municipality** and **L.R. 5630 Subukia**, together with two (2) others named as Naboth Owino and Fredrick Atanya.
3. In their lifetimes the four gentlemen entered into an agreement whereby the two (2) properties were divided into two (2) shares, one **L.R. 6911 North of Nakuru Municipality** going to **Naboth Owino** and **Fredrick Atanya** the other share, the subject of these proceedings **LR 5630 measuring 412.38 Ha** going to **Gitau Karuma** and **Kariuki Muchiri**.
4. These two (2) Gitau Karuma and Kariuki Muchiri went on to start a business partnership with shares at the ratio of 75%: 25% Gitau Karuma :Kariuki Muchiri.
5. In Succession cause 173 of 1995, the Administrators were Antony Mwangi Kariuki and Elvis Chrispus Macharia, the protesters herein in 336 of 2007, Willy Gitau and Anne Wanjiru Gitau (deceased).
6. On 21st September 2011 beneficiaries in Cause 336 of 2007 filed the following consent for purposes of issuance of a Certificate of Confirmation;-

“CONSENT

THE DEPUTY REGISTRAR

HIGH COURT OF KENYA

NAKURU.

We the undersigned have the honour of requesting that you please record the following orders by consent.

1. THAT the parcel of land known as LR NO. 5630 South East of Lake Solai measuring approximately 413.9 Ha be distributed and vested in the beneficiaries as follows;

(a) 21.853 Ha to be registered in the name of MUTURI KARUMA.

(b) Jane Wanjiku to be registered as the owner of the portion of the farm measuring approximately 18.17 Ha with the farm house compound and grave site.

(c) The remainder of the property be distributed equally amongst the units as follows;

(i) 1st family – 5 units

(ii) 2nd family – 9 units

(d) The 1st family's share (5 units) be consolidated and hived off to border next to Isaiah Mathenge's farm.

2. THAT the subdivision be as per the proposal contained in the sketch annexed hereto and the 1st family shall remain on one side taking plots 2, 3, 4, 5 and 6 of the sketch.

3. THAT there are seven (7) genuine squatters on the farm, LR NO. 5630 each of whom is to be allocated 0.0505 Ha.

4. THAT all the beneficiaries to contribute equally for the survey costs relating to excision of the portion that JANE WANJIKU is entitle to.

5. THAT Muturi Karuma and Paul Maturu do cater for the surveyor's costs in respect of their portions.

6. THAT the property known as MAU SUMMIT/MOLO BLOCK 5/520 measuring approximately 0.045 acres to devolve to WILLIE KAMAU GITAU.

7. THAT the survey costs for the rest of the subdivision to be paid by each of the beneficiaries in equal proportions.

8. THAT each family to meet the legal fees of their respective counsel on record.

SIGNED BY THE BENEFICIARIES

1ST FAMILY

1. WILLY K. GITAU
2. SHADRACK GITAU
3. SAMMY GITAU
4. (Estate of LUCY WANJIRU)
5. (Estate of FOUZIA MURUGU)

2ND FAMILY

6. JANE WANJIKU GITAU
7. RUTH WAITHERA GITAU
8. RAHAB NJERI GITAU
9. HELLEN WAIRIMU GITAU
10. FLORENCE WAMBUI GITAU
11. PAUL MATURO GITAU
12. VERONICA WAGIKUYU GITAU
13. EUNICE NYARUIRU GITAU
14. BONIFACE NDOGO GITAU
15. MUTURI GITAU KARUMA

16. KEES VAN LOON

(Estate of ANN WANJIRU GITAU)

DATED at NAKURU this 21st day of September, 2011.

MIRUGI KARIUKI & CO.

ADVOCATES FOR THE PETITIONERS

H & K LAW ADVOCATES

ADVOCATES FOR THE OBJECTOR

DRAWN & FILED BY:

Mirugi Kariuki & Co. Advocates

Inder Singh Building, 2nd Floor

P.O. Box 1689 – 20100,

NAKURU.

7. On learning about this consent, the administration in cause 173 of 1995 filed an objection;

“1. THAT the Objectors are the administrators of the estate of the late KARIUKI MUCHIRI in HIGH COURT SUCCESSION CAUSE NO. 173 OF 1995 who was also a partner in ownership of L.R. 5630 (LEASEHOLD).

2. THAT the objectors do hereby objects to the acreages claimed by the family of BETHWEL GITAU KARUMA (DECEASED) in LR 5630 (LEASEHOLD) as per the agreement entered into by the administrators of the estate of the late KARIUKI MUCHIRI GITAU KARUMA and the administrators of the estate of the late KARIUKI MUCHIRI dated the 3rd day of May 2018.”

8. They swore a Joint Affidavit where they averred *inter alia* that Gitau Karuma and Kariuki Muturi could not agree on their individual shares in LR 5630 until the Provincial Administration intervened in 1983, and determined that Gitau Karuma would have 730.566 acres and Kariuki Muchiri 268.26 acres. That this was not agreeable to their father, who passed on before the dispute was settled. That thereafter a meeting was held between themselves and Gitau Karuma where it was agreed that he would surrender an extra 21 acres to their father’s estate. However he died before the boundary was demarcated.

9. That in 2017, representatives of the two estates met and finally agreed to settle the dispute at 16 acres so that their father’s estate would measure 268.208 *plus* 16 acres and Gitau Karuma’s 730.566 *less* 16 acres. That this agreement was signed by both families in the presence of the chief on 3rd May, 2018. The agreement stated as follows:

“Agreement reached between the family of KARIUKI MUCHIRI and GITAU KARUMA.

Extra 16 acres were agreed to be demarcated from 295.65 Hectares from the farm of Gitau Karuma and added to 108.54 Hectares of Kariuki Muchiri.

The above agreement was witnessed by the following;

KARIUKI MUCHIRI

ANTHONY MWANGI

ELVIS MACHARIA

GITAU KARUMA

WILLIE GITAU

MAIMUNA NYAMBURA

MARIAM WARUKERA

BONNY KARUMA

SALOME GITAU

ROBBIN M. GITAU

MUTURI KARUMA”

10. On 11th May 2018 the same parties met and agreed to bring their surveyors to demarcate the boundary. That it was necessary for the boundaries to be amended on the ground before the grant was confirmed as per the consent.

11. On 2nd May 2019, the two (2) administrators in Cause 173/1995 filed an Affidavit of Protest to the confirmation of the grant as consented by the beneficiaries in Cause 336/2017. Their protest was that the intended Confirmation of Grant was contrary to and in variation with the agreement whereby the family of Gitau was to **excise 6.47497 Ha. 16 acres** from their share of **295.65 Ha (730 acres)** from LR 5630, making their share, **114.931 Ha (284 Acres)**. That their advocates were not parties to the consent filed on 16th October 2018 made in the following terms;

“CONSENT

THE DEPUTY REGISTRAR

HIGH COURT OF KENYA

NAKURU

We the undersigned have the honour of requesting that you please record the following orders by consent:

1. THAT of the 250 acres occupied by KARIUKI MUCHIRI’s family an extra 16 acres be added so that the said family shall now occupy 266 acres (107.64 Ha) to be excised from the main title before distribution to the beneficiaries. This shall settle the claim by Kariuki Muchiri’s family as set out in NAKURU HIGH COURT SUCCESSION CAUSE NO. 173 OF 1995.
2. THAT the remaining land after settling the Kariuki Muchiri family is agreed to be 306.26 Ha and the same is to be distributed amongst the beneficiaries as per the consent filed in court on 21st September 2018.
3. THAT the grant issued to MUTURI GITAU KARUMA on 1st August 2007 be reinstated and confirmed in terms of the consent filed herein.

DATED at NAKURU this 16th day of October 2018.

MIRUGI KARIUKI & CO.

ADVOCATES FOR THE PETITIONERS

H & K LAW ADVOCATES

ADVOCATES FOR THE OBJECTOR

DRAWN & FILED BY:

Mirugi Kariuki & Co. Advocates

Inder Singh Building, 2nd Floor

P.O. Box 1689 – 20100,

NAKURU.”

12. Through an affidavit sworn on 2nd May 2019, Willy Gitau the administrator in 336/2007 deponed that his father and Kariuki Muchiri signed a Partnership Deed after they separated their share from that of Naboth Owino and Fredrick Atanya. He annexed the Separation Agreement, dated 31st July 1975, and the deed of partnership dated 24th December, 19975.

13. The deed of partnership stated that it commenced on 1st September, 1975, and was named Mukima Farm. In the following clauses it states:

“3. The business of the partnership shall be carried on at Subukia, Kenya aforesaid or at such other place or places as the partners shall from time to time agree upon.

5. Subject to the provisions of this Deed the partners shall be entitled to the capital and property for the time being of the Partnership in the following shares, that is to say, the First Partner’s share shall be 75% (Seventy Five Per centum) and the Second Partner’s share shall be 25% (Twenty Five Per centum).

6. The Capital of the Partnership shall be such sum as may be necessary which shall be contributed by the partners in the share in which they are hereinbefore declared to be entitled to the capital and property of the Partnership.

7. The profit and loss of the business (including loss of capital) shall be divided between and borne by the Partners in the following shares:-

Gitau Karuma – 75% (Seventy Five Per centum)

Kariuki Muchiri – 25% (Twenty Five Per centum)

14. He deponed further that the issue of costs was settled in respect of Nakuru Civil Appeal 77 of 1990 by Gitau Karuma.

15. He deponed further;

8. THAT the agreement that was reached at the Chief’s office was reflected by minutes relating to the meetings held on 3rd May 2018 and 11th May 2018 was reviewed by both the families of Kariuki Muchiri and Bethwel Gitau Karuma and subsequent thereto parties recorded a consent in open court on 16th October 2018 with the family of Bethwel Gitau Karuma excising an extra 16 acres to the family of Kariuki Muchiri making the total acreage in their occupation 266 acres (107 Hectares).

9. THAT the said Consent was recorded in Open Court in the presence of all the Counsels for parties, including the Protestor’s advocate whose brief was held by Ms. Ngugi who confirmed the terms of the consent and

10. THAT the family of Bethwel Karuma out of good faith had agreed to excise the extra 16 acres from their land as gift to the Kariuki Muchiri family as a gesture of good neighbourliness.

11. THAT notwithstanding I am duly advised by my Advocates on record that the agreement that was reached at the meeting held at the Chief’s Office was a nullity and of no legal effect as the law does not cloth the Chief with jurisdiction to conduct any parallel proceedings/make a determination in relation to a succession matter which is before a Court of competent jurisdiction.

12. THAT in any event, if parties were minded to revisit the agreement reached at the Chief’s office on 3rd May 2018 and 11th May 2018 then they would have recorded the Consent on the terms agreed at the meeting held at the Chief’s office.

13. THAT I am duly advised by my advocates on record that the agreement that was reached at the Chief’s Office is void ab initio as the same was entered into in the absence and without the consent of some of the beneficiaries of the estate of Bethwel Gitau for instance Shadrack Gitau, Sammy Gitau as well as the administrator of the estate of Ann Wanjiru Gitau.

14. THAT having set aside clauses 1 and 2 of the Consent apportioning the family of Kariuki Muchiri the extra 16 acres in open court, it is evident from the Partnership Deed that the Kariuki Muchiri (Protestors) rightful share to the suit Property translates to 103.095 Hectares while the family of Gitau Karuma entitlement to the suit property translates to 309.285 Hectares.

15. THAT the Protestors’ claim have been in bad faith with an intent to unfairly enrich themselves.

16. THAT the allegations contained in the Protest are a furtherance of the Protestor’s ulterior and fraudulent motive of depriving the family of Bethwel Gitau Karuma of their property through unconstitutional, illegal, surreptitious and unorthodox means.

16. In addition to Willy Gitau’s affidavit, Boniface Ndogo Gitau one of the beneficiaries swore an affidavit in response to the affidavit in protest on 20th July 2020. He deponed that in the Partnership Deed LR 5630 formed part of the property. That the two (2) parties shared the land at 75%:25%. That LR 5630 was about 412.38 Ha was about 1000 acres and therefore share for each estate was 750:250 acres.

17. That to his knowledge there was an agreement to give the estate of Kariuki Muchiri 16 acres, as compensation for the farm house and store that was on Gitau Karuma’s side of the share and therefore that they were only entitled to 266 acres and no more than that. That the protest lacked merit and ought to be dismissed.

18. The protestors filed their submissions on 26th January, 2021.

19. It is submitted that the two (2) families agreed to share LR 5630 at 108.54 Ha, and 295.65 Ha and reliance was made on the agreement of 3rd May 2018 where, it was submitted that *it was agreed that 16 Acres (Approximately 6.47497Ha) be excised from the 730.567 Acres of GITAU KARUMA and the same be added to the share of KARIUKI MUCHIRI as compensation for costs awarded to the said KARIUKI MUCHIRI in NAKURU COURT OF APPEAL NO. 77 OF 1990.*

20. On the jurisdiction of the court they also relied on **Rules 40(6), and 41(3) of the P & A Rules**, and in **Re Estate of Julius Ndubi Javan (deceased) [2018] eKLR**; and on the issue whether the prayers sought are tenable, on **Re Estate of Julius Ndubi Javan (above)** and **Section 2 of the Law of Succession Act**.

21. It was argued for the protestors that as matters stood there was a dispute as to the ownership of LR 5630 and therefore the protest ought to be allowed.

22. The petitioners did not file any submissions instead relying on their affidavit evidence.

23. Having considered the evidence on record, the submissions and the authorities cited, it is my considered view that the issue for determination is **whether the shares of the two (2) deceased persons in LR 5630 have been determined to allow the Confirmation of the Grant in Cause 336/2007**.

24. To determine this we must answer the questions; **whether the Deed of Partnership determines the shares?; Whether the consents entered by the parties before the chief on May 3rd and May 11th 2018 can be deemed valid or the whether the consent entered by counsel dated 16th October 2018 is binding?**

25. It is not in dispute that the deceased persons owned the LR 5630. In the agreement of separation, it defines the two (2) deceased persons as the 2nd party. With regard to the share it simply states that;

“The 1st party (Naboth Owino & Fredrick Atanya) shall transfer their respective rights to, titles and interest in L.R. 5630 in favour of the second party (Gitau Karuma and Kariuki Muchiri).”

It is noteworthy that this agreement does not speak of their specific shares in LR 5630. It only states that they would be the beneficiaries of all the respective rights, titles and interests of Naboth Owino and Fredrick Atanya as transferred by the two.

26. The Deed of Partnership on its part, refers to the two (2), Gitau Karuma as 1st partner, Kariuki Muchiri as 2nd partner. A plain reading of the deed clearly states that the two shall;

“become partners in the trade or business of farming and dairy produce....”

The Deed speaks about the partners' entitlement to the **capital and property** of the partnership at 75% and 25%.

The deed states that the capital of the partnership shall be the sum contributed by the parties. The profit and loss would also be shared at the same percentages.

27. I have carefully read through the Deed of Partnership, there is no mention of the LR 5630, either as property or capital which would be subject to the 75%:25% share. The parcel of land is not mentioned and it is my view that if the LR 5630 was subject to the said shareholding of the partnership, it would have been the easiest thing for the two (2) gentlemen to write it out there as they wrote out everything else.

28. Regarding the other three consents, the one of 3rd May 2018, and that of 11th May 2018, neither of them was adopted as the order of the court, and the one of 16th October 2018 was set aside by consent on 11th June, 2019. Hence, as it is now there is no consent order on record with regard to the sharing of the LR 5630 by the two (2) deceased gentlemen or their families.

29. For the grant in Cause 336 of 2007 to be confirmed the provisions of the law with regard to distribution of the estate must be complied with. The court can only distribute the property that falls within the estate of the deceased. **"Estate"** is defined as the free property of a deceased person and **"free property"**, in relation to a deceased person, as the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

30. In **Re Estate of Julius Ndubi Javan** (above) the court stated.

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified, thus, where issues of ownership of the property of the estate are raised in a Succession Cause, they must be resolved before such property is distributed.”

The same was held in **Re Estate of Asitia Mabeya Mogaka (deceased) [2020] eKLR**.

31. Can L.R. 5630 be described as the free property of Gitau Karuma or Kariuki Muchiri? Clearly the answer to this is no. Why? Because although the property was transferred to both, the share that each of them was entitled to not, was stated in the agreements they signed at the time of sharing the property.

32. Does that amount to a dispute as to the ownership of the LR 5630? Again my considered answer is No. Why? Because the evidence on record is that the whole parcel was transferred to the two (2) gentlemen herein Gitau and Kariuki. The two of them own that parcel of land. The administrators and the beneficiaries to their respective estates do not dispute that. The only dispute is, **what is the share of each one of them?**

33. I perused both files in search of an answer, first is to find out the manner in which the title deed was issued. I did not find the title deed on the record. However, I came across sworn evidence from both sides of the dispute, from Willy Gitau in an affidavit sworn on 7th November 2009 where he swore;

1. THAT I am the objector herein and therefore competent to swear this affidavit.
2. THAT I attended court on 22nd September 2008 and was ordered that each party to file affidavit of how he would like to have the matter resolved.
- 3...
- 4...
- 5...
- 6...
7. THAT our late father's estate is a portion of land parcel Number LR 5630.
8. **THAT the portion that actually belonged to our late father is 729 acres as the 271 acres belonged to the family of KARIUKI MUCHIRI (Deceased).**
- 9...
10. THAT I would like the said parcel of land forming the estate of my father to be shared out equally according to the two households.
11. THAT to be specific, the said 729 Acres should be shared out as follows:-
 - a) My family to get 364.5 Acres
 - b) The petitioner's family to get 364.5 Acres"

34. Elvis Macharia on 6th June 2014 testified that their father's share of the land was 271 acres, 250 acres plus 21 acres that were compensation for the movable and immovable parts of the share of the land that went to Gitau.

35. This position also emerges in the minutes of meetings held by the representatives of the families of original owners of the land, i.e. Naboth, Fredrick, Gitau and Kariuki. This committee was elected on 5th March 2010 to represent the families of the 4 original partners Willy Gitau and the Protesters were office bearers. In the meeting of 15th May 2010 by these representatives of the original owners of the land, it was acknowledged that the partners had originally shared the land among themselves and specifically that Gitau Karuma was to get 729 acres, Kariuki Muchiri 271 acres. It was also evident from the record of the meeting of 15th May 2010, that the 2nd family Gitau Karuma was the one dilly dallying about the 21 acres owed to Kariuki Muchiri by Gitau Karuma.

36. It emerged from the record that in the early years of this matter, there was no dispute, and the facts were laid down, truthfully and that is why Willy Gitau, could, in 2009, make oath and state that his father's share of L.R. 5630 was 729 acres, and that of Kariuki Muchiri was 271 acres. That is why the committee of the family members of the original owners, where Willy and the protesters were officials could record, in minutes of their meeting, that the estate of Gitau Karuma owed the estate of Kariuki Muchiri 21 acres.

37. There is nothing on record to show that this position ever changed except that the administrator of the estate in cause 336 of 2007 became devious and ran away from the truth, and from the record, for no other reason than personal gain. They had the truth all those years ago, and with the passage of time have tried to bury it, but the truth has this uncanny character of rearing its head unexpectedly.

38. I am persuaded by the totality of the evidence on record that the 2 partners agreed that Gitau would give Kariuki 21 acres out of his share of the LR 5630. That explains the voluntary meeting between the members of the two families before the chief, together with the administrators in both causes, and the agreement by the administrators of Kamau Muchiri's estate to accept 16 acres instead of 21 acres. Willy has not stated that he was summoned by the Chief or that they never said that they were coerced or tricked to go there. The record just shows that they were all present before the Chief, on two separate occasions to draw the agreements. It is the turn around and the throwing of aspersions as the Chief who is not a party to these proceedings that paints Willy the one who cannot be believed. He cannot be heard to turn around and begin to say that the chief had jurisdiction to conduct parallel proceedings yet there is no evidence that that is what happened. The fact that the matter was pending before court did not stop the parties from pursuing out of court settlement and if they chose to go before the chief, it was within their rights. It is common knowledge that many people who have family disputes, they go to the chief to deal with the same. They could as well have drawn the consent in their home or under a tree, it does not matter, what matters is that there is no claim of fraud, coercion or mistake and it was voluntary. These consents were further evidence that they were alive to the fact that their father owed Kariuki Muchiri. The claim that some of the family members were absent is no consequence because the Administrators were present and in any event those mentioned have not complained.

39. Hence, from the record, I am satisfied that the LR 5630 had been shared between the owners at 729 acres and 271 acres. To that extent

the protest succeeds.

40. I find and hold that there is no dispute on the ownership the LR 5630 between Gitau Karuma and Kariuki Muchiri. That they shared it at 729 acres and 271 acres respectively.

41. The administrators of the Estate of Gitau Karuma to proceed to confirm the grant at 729 acres, and those of the estate of Kariuki Muchiri at 271 acres.

42. The two (2) estates to avail a surveyor to draw the boundary.

43. Costs to the protesters.

DATED AND DELIVERED BY EMAIL BY CONSENT OF COUNSEL THIS 11TH DAY OF MARCH 2021.

MUMBUA T. MATHEKA

Judge

Court Assistant: Edna

Counsel for Petitioner: Mirugi Kariuki & Co. Advocates

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Counsel for the Objector: M/S H & K Law Advocates

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