



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 11 OF 2013**

**STEPHEN MURITHI M'MAGIRI.....APPLICANT**

**VERSUS**

**WILLIAM MWITI MAGIRI.....1<sup>ST</sup> ADMINISTRATOR/RESPONDENT**

**RUKARIA RAARIA GITONGA.....2<sup>ND</sup> ADMINISTRATOR/RESPONDENT**

**RULING**

***Introduction***

1. A Certificate of Confirmation of Grant was issued to the Respondents herein on 10<sup>th</sup> April 2019 with respect to the Estate of the Late Magiri Imanyara alias Magiri S/O Imanyara. As per the schedule of distribution, each of the 6 dependants of the deceased are to get one acre each out of the entire property namely L.R. No. Kibirichia/580 and the balance is to be shared equally amongst the 10 dependents listed thereunder.

2. Despite this agreed mode of distribution, the property is yet to be subdivided and the reason for this is what informs the instant application. The gravamen of the Applicant's claim in the application before this Court is that he is apprehensive that he is being sidelined in a subdivision exercise and that there is a ploy to subdivide and allocate the land in such manner as to ensure he gets a smaller portion on the hilly side of the land.

***The application***

3. The applicant brings his application under the provisions of Rule 73 of the Probate and Administration Rules and Section 71 and 76 (d) (ii) of the Law of Succession Act CAP 160 Laws of Kenya and he seeks the following orders: -

***i) Spent***

***ii) That this Honourable Court be pleased to issue an order of inhibition, inhibiting all dealings with respect to land parcel Registration Number Kibirichia/Kibirichia/580 pending the hearing and determination of this application.***

***iii) That this Honourable Court be pleased to order and/or direct that the subdivision of land parcel Registration Number Kibirichia/Kibirichia/580 be undertaken by a Government Surveyor and that the survey be undertaken on the ground as the parties are settled on the land.***

***iv) That this Honourable Court be pleased to order that the O.C.S Kiirua Police Station to provide security to the Applicant, other beneficiaries and the Surveyor to implement the distribution of the estate comprised of land Registration Number Kibirichia/Kibirichia/580.***

***v) That this Honourable Court be pleased to revoke the confirmed grant issued to William Mwiti Magiri and Rukaria Raaria Gitonga and issue a new grant in the name of Stephen Muriithi M'Magiri.***

***vi) That costs of the application be provided for.***

***The applicant's case***

4. His application is supported by his own supporting affidavit sworn on 28<sup>th</sup> September 2020. He avers that despite the certificate of confirmation of grant having been issued on 10<sup>th</sup> April 2019, the administrators have been silent on the issue of subdivision of the land

forming part of the estate herein being land parcel No. Kibirichia/Kibirichia/580; He avers that the administrators are being mischievous by declining to engage him on the subdivision of the land but are secretly engaging an unqualified person known as Geoffrey Gichuru to secretly subdivide the land to his detriment and he therefore prays that the Court directs that the subdivision of the land be undertaken by the Government Surveyor. He prays that the Court issues an order of inhibition, inhibiting all dealings with respect to the subject property either by way of subdivision, sale, lease, charge or otherwise pending *inter partes* hearing of this application to preserve the land and any mischievous dealings on the land to protect his interests. He avers that the Respondents have vowed to subdivide the land in a manner that disadvantages him so that he gets a bigger portion of the land on the hilly side but a smaller portion on the flat side thereby making his portion of the land unproductive while William Mwit Magiri and Lucy Kanyata Muriungi get a bigger share of the land in the flat portion of the land and a smaller portion on the hilly portion of the land. He avers that it is crucial for the OCS Kiirua Police Station to provide security during subdivision of the land since the Respondents have vowed that they will influence the subdivision process so that he is disadvantaged. He avers that it is now over one year since the grant was confirmed and yet the Respondents have not engaged a qualified surveyor which clearly shows that they are not diligently administering the estate and that if they are unwilling to administer the estate, then the grant issued to them should be revoked and a new grant issued to him or alternatively the courts do execute all the documents that the administrators execute to ensure the distribution of the estate to the beneficiaries. He avers that unless his application is allowed, the Respondents shall not distribute the estate herein fairly and he shall suffer prejudice of the Respondents proceed with subdivision of the land parcel No. Kibirichia/Kibirichia/580 using an unqualified person in the manner they have planned to unfairly give me the hilly portion of land that is not economical while they retain the flat and economical portion.

5. He filed a supplementary affidavit sworn on 26<sup>th</sup> March 2020. Therein, he avers that the allegation by the Respondents that he is a trouble maker in the family is bogus and is meant to tarnish his image before the Court. He avers that the Respondents have introduced in their replying affidavit non issues in response to his application and that they have avoided to mention the surveyor that they have engaged and if he is qualified to undertake the survey. He avers that the Court, in the certificate of confirmation of grant indicated the acreage of each beneficiary and what is left is for implementation of the said grant, which requires a surveyor but the 1<sup>st</sup> Administrator has declined to engage a qualified surveyor and that is the reason why he wants the subdivision to be undertaken by a government surveyor and that the Respondents, in saying that they are not opposed to him engaging a surveyor to survey on his portion clearly shows that the Respondents know that the alleged survey was not properly done and that is the reason he doesn't want the government surveyor to survey the entire land.

#### ***The respondent's case***

6. The application is opposed by the Respondents vide their replying affidavit sworn by the 1<sup>st</sup> Respondent on 26<sup>th</sup> November 2020. He avers that their father, during his lifetime subdivided his land, L.R NO. Kibirichia/Kibirichia/580 into 6 portions of one acre each and gave each to his 6 sons and remained with what was left, which remainder, is to be shared by all the deceased's 10 children pursuant to orders made in the succession case. He further avers that each of the 6 sons took possession, fenced their portions and have been occupying and developing their portions and that when they went to apply for the Lands Control Board consent to subdivide the land sometime last year, the Applicant reported to the area Assistant Commissioner that the Respondents were applying for a Land Control Board Consent to subdivide the land and give him less portion than his due. He avers that the Assistant County Commissioner summoned all the 10 children of the deceased to appear before him on 7<sup>th</sup> August 2020 and they explained to him that the land had been subdivided by the deceased and each of them had been occupied and they had each planted boundaries and after hearing them, the Assistant County Commissioner advised them to make an application before the Land Control Board for subdivision. He avers that they went to the Land Control Board on 8<sup>th</sup> August 2020, and the Applicant again complained to the Board that the land had been surveyed and his portion was less than one acre and that the Board gave the Applicant 14 days to get a surveyor and check the acreage of his portion, however, the Applicant failed to get one and on 8<sup>th</sup> September 2020, the Land Control Board gave consent for the subdivision. He avers that they are not opposed to the Applicant getting a surveyor of his own to check measurement of his portion at his own expense, but they are not ready to have him interfere with the shape of others' portion alleging that his portion is not even. He avers that the Applicant is a jealous person who is envious of others' developments on their portions as his is less developed. He further avers that none of the other 9 issues of the deceased is ready to accept the Applicant as administrator of the estate because he is the one who has been delaying distribution of his estate by ceaseless baseless complaints. However before the Respondents arranged to get a surveyor for subdivision, on 28<sup>th</sup> September 2020, the Applicant filed the application herein.

#### ***Submissions***

7. The application was canvassed by way of written submissions. The Applicant filed submissions on 14<sup>th</sup> December 2020. He restated the facts as per his supporting affidavit, his supplementary affidavit and the replying affidavit of the Respondents. He brought up 5 issues for determination. The first is on whether or not he would be prejudiced by the actions or lack thereof of the Respondents. He submits that there is risk that he will suffer serious prejudice as the Respondents intend to conflate the process of subdivision by engaging the services of an unqualified surveyor of their choice who will alter the subdivision according to the demands of the Respondents to his detriment. He argues that if at all the Respondents did not have ulterior motives, it would be upon them to show the intended subdivision plan and prove the qualifications of Geoffrey Gichuru. He relies on the case of *In re Estate of Maria Gebui Choguchu (2018) eKLR*, where the Court had issued directions to a government surveyor to implement the said grant taking careful consideration of the settled beneficiaries who had already received their portions from the deceased during his lifetime and that an application to challenge the same by way of review was also dismissed. He further submits that there has been inordinate delay in implementation of the confirmed grant as confirmed and he is apprehensive that the reason for this delay is that the Respondents are trying to maneuver around the law so that they can shortchange the Applicant of his inheritance. He submits that no reasonable justification has been given for this delay and the fact that the Respondents do not involve him in the plans and processes is indicative of their ulterior motives. He submits that he is worried that the Administrators may have failed or are unable or worse unwilling to give a just and faithful account of the administration as is required of them. He submits that this is prejudicial to him as he fears that the estate may incur losses or costs incurring liability and that further, he is not able to enjoy rights acquired by registration which is unfair because he loses the time which he would have charged the property and acquire financial assistance for various economic projects which may have already improved his economic status. The second issue he submitted on was on whether or not the Respondents should be allowed to continue in the administration of the Estate despite the fact that they have proved either to be unwilling, unable or unfaithful in the same. He submits that the Respondents should not be entrusted with such a sensitive responsibility after proving themselves unworthy as they have been biased, shrewd, dismissive, secretive, unreasonable and self-centered. He also submits that the Respondents have been slow and it is even possible that they have intentions of completing the succession proceedings even 20 years after the confirmation possibly at a time when other beneficiaries will have either died or relinquished their rights thereupon. Relying on the

provisions of Section 76 (D) (ii) of the Law of Succession Act, he submits that where Administrators refuse to faithfully administer the estate, the said grant can be revoked and a new one issued as the Respondents have failed and/or are unwilling to administer the estate of the deceased diligently. On the third issue, on whether or not the grant should be revoked, the Applicant, relied on the case of **In re Estate of Evans Ngugi Wanjau (Deceased) (2020) eKLR** where the Court satisfied that it could *suo moto* proceed to revoke a grant pursuant to Section 76 of the Law of Succession Act. On the fourth issue, on whether or not the order for inhibition should issue, the Applicant submits that the same should issue in order to protect and preserve the estate as the dispute is resolved and that proceeding without the inhibition will rendered the proceedings nugatory and at the very least, the Court should issue the order pending the ascertainment of the administration process so that no family member is prejudiced. He submits that Section 47 and 28 of the Law of Succession Act grants the Court jurisdiction to award such an order after careful consideration of the peculiar and particular circumstances of the case. On the final issue he submits that his application is merited and the orders sought therein should be granted.

8. The Respondents filed submissions on 18<sup>th</sup> January 2021. In their submissions, the Respondents restate the facts as pleaded in their replying affidavit and they thereafter they submit that the Applicant has admitted that the deceased during his lifetime had subdivided his land to his sons and each is settled on their respective portions; That the Applicant has not denied that earlier last year he had made objections to the Assistant County Commissioner and to the Board on the intended subdivision on the ground that there was an intention to allocate him a smaller portion that what is due but he failed to convince either of these two authorities and consent was issued but before the Respondents got a surveyor, the Applicant served them with the instant application. They submit that the Respondents have tried with all due diligence to distribute the estate, but all attempts have been hindered by the Appellant's unfounded, frivolous and vexatious complaints that the Respondents have secret plans to subdivide the land, giving him a hilly portion, whereas he confesses that each of them occupies a portion allocated to him by their father and that is how he would want them surveyed. They submit that they, the Respondents have not contracted Geoffrey Murithi who the Applicant refers to as an unqualified surveyor to subdivide the land and that this Geoffrey Murithi is a retired surveyor who worked with survey at Ministry of Lands and Settlement and who had subdivided the land for the deceased. They submit that they are apprehensive that the Respondents want revocation of grant to the Respondents and the same be granted to him so that he can do to the 1<sup>st</sup> Respondent and other beneficiaries what he falsely accuses the Respondents will do to him, once he is administrator and protected by Police and this is the reason as to why the Respondents said they are ready for the Applicant to have his surveyor watch for him as the Respondents have their own qualified surveyor do the subdivision. They pray that the application be dismissed and the Respondents be given the opportunity to discharge their responsibility as administrators of the estate.

#### ***Issues for determination***

9. From the pleadings and submissions on record, two main issues arise for determination.

***i) Whether or not to allow a Government surveyor to undertake the subdivision exercise.***

***ii) Whether or not to revoke the confirmed grant.***

#### **DETRMINATION**

##### ***Whether or not to allow a Government surveyor to undertake the subdivision exercise.***

10. The main prayer sought in this application is for a Government surveyor to undertake the subdivision exercise and that the same should be done with regard to the manner in which the parties are already settled on the ground. The Applicant argues that there is a scheme to subdivide the land in such a manner as to give him a portion on the hilly and unproductive side while the Respondents get the portions on the flat and more productive side. The Applicant however admits that the beneficiaries, including the Respondents have long settled on the land and have even developed on the same and it would therefore be necessary to ensure that the subdivision exercise does not interfere with the structures that have already been developed on the land. It goes without saying that none of the beneficiaries who have developed their portions would want to have the same interfered with. This has been submitted by the Respondents. Doing so would undoubtedly cause confusion amongst them. This Court finds that it cannot be that there could be a ploy to subdivide the land in a manner as to allocate the hilly sides to the Applicant whereas the Applicant himself confirms that the beneficiaries have been occupying the said premises for a long time and have even developed the same. There some sense of incoherency in the Applicant's argument in this respect.

11. The Applicant further contends that the Respondents have engaged an unqualified surveyor namely Geoffrey Murithi to subdivide the property. He contends that the Respondents ought to have proven the qualification of the said Geoffrey Murithi. The Respondents on the other hand have claimed that they have not engaged any such surveyor called Geoffrey Murithi and they in fact contend that the said Mr. Murithi is a retired surveyor who worked with the Ministry of Lands and Settlement and who had initially subdivided the land for their late father.

12. This Court observes that both the Applicants and the Respondents want to go ahead with the subdivision exercise and they both want to do it in a manner that maintains the status of what is already on the ground. Indeed, this is the correct manner to proceed with the subdivision. I have previously dealt with this matter in the case of **Meru Civil Appeal No. 157 of 2019 Elijah Matumbi M'Nkanata v David Mutuma M'Nkanata** where I held as follows: -

***“In the intestate distribution of estates, there is considerable merit in the proposition that regard should be had of the respective area or parcels or other property of the estate that various heirs may have over time with allocation by the deceased, been in possession although such possession is not perfected into title and where such heirs have developed such portions of the estate property during the period of their occupation, unless the size of the estate and scheme of sharing does not permit the heirs to retain all or part of such portion of the estate. In the absence of such or other compelling reason the portion held by the respective beneficiaries in the estate assets should be upheld so that there is minimal disruption of the long occupation of the beneficiaries.”***

13. What then is preventing the said parties from going ahead with the subdivision in the manner they both seem to be advocating for which will ensure that what is on the ground is not affected by the said exercise? It appears to be an issue of mistrust amongst family members. Going by the averments made by the Respondents, it appears that there have been attempts to undertake such subdivision but these attempts have been frustrated owing to the Applicant's apparent fears. This Court observes that whilst there are 10 beneficiaries in total, only one of them, the Applicant, is apprehensive that there will be injustice in the subdivision. Although, this Court finds that the basis of this apprehension has not been substantiated, this Court is alive to the sensitivity of succession matters, more so where land is involved. The Respondents have indicated that they are not opposed to the Court allowing the Applicant to contract with his own surveyor. In fact, it is claimed that the Applicant has previously been directed to get his own surveyor but he failed to do so.

14. Be that as it may, this Court therefore finds that the most efficacious way of resolving this matter is to allow parties to come with their own private surveyors and in addition, that the Applicant is at liberty to engage a government surveyor who will act as a neutral party. Parties who wish to engage their own private parties should be allowed to do so but the survey exercise ought to be done jointly with the government surveyor. This should dissuade any fears of irregularity in the subdivision as during the exercise there shall be both private and a government surveyor. As to the manner of subdivision, this should be done in such a manner as to preserve the beneficiaries' properties and developments on the portions they have been occupying. Concerning the prayer for police assistance, this Court does not see any reason to grant the same.

**Whether or not to revoke the confirmed grant.**

15. The law providing for revocation grants is Section 76 of the Law of Succession Act, Cap 160 of the Laws of Kenya. It provides as follows: -

**76. Revocation or annulment of grant**

***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—***

***(a) That the proceedings to obtain the grant were defective in substance;***

***(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the Court of something material to the case;***

***(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

***(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either—***

***i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the Court order or allow: or***

***ii) To proceed diligently with the administration of the estate; or***

***iii) To produce to the Court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

***(e) That the grant has become useless and inoperative through subsequent circumstances.***

16. The Applicant's reason for seeking this revocation is that there has been inordinate delay on the part of the Respondents in administering the estate. He submits that he has fears that the reason for this delay is rooted to the scheme by the Respondents to disenfranchise him of his fair deal in the deceased's property the subject of the grant.

17. This Court is alive to the serious ramifications of revocation of a grant. In this Court's view, this should be done only where there is good reason to do so. In the present case, there are no questions of fraud or defectiveness of the proceedings leading to confirmation of the grant. In this Court's view, fraud and defectiveness of the proceedings are the most serious matters which would invite an order for revocation. What is in issue herein however is the delay and purported mischief by the Respondents in the administration of the estate. The Applicant submits there has been no explanation for this delay and that he is worried that the Administrators may have failed or are unable or worse unwilling to give a just and faithful account of the administration as is required of them and that it is possible that the estate may incur losses and liability. He submits that owing to these delays, he has been unable to enjoy rights acquired by registration such as charging the property.

18. Turning to the delays in administration, this Court observes that from the Respondents' averments, it is the Applicant who has significantly contributed to the delays. It is on record that last year, particularly in the months of August and September, the Respondents took steps to get the consent for subdivision and representations were made before the Assistant County Commissioner and the Land Control Board. The Applicant has not denied these facts. He merely contends that he didn't raise any objections before these bodies as has been alleged by the Respondents. The instant application was filed on 28<sup>th</sup> September 2020. This Court therefore finds that the delay in administration has not been inordinate.

19. But even if there had been delay, this Court is mindful of the fact that the grant was confirmed in April 2019 and the following year, 2020 was marred with the COVID 19 pandemic and this may have contributed to delays in administration of the estate.

20. On the issue of the Applicant's apprehensions of mischief, this Court finds that the same are not well grounded and are based on mere speculations. As already held in issue i) above, the order for the subdivision to be undertaken by both private as well as a government surveyor should dissuade any fears of mischief. The order for a government surveyor would be the better option as opposed to revoking the grant which would result in further delays and bureaucracies. This Court therefore declines to issue an order for revocation of grant. However in order to ensure that the ends of justice and procedure are met, this Court shall require, in accordance with their duty under section 83 (g) of the Law of Succession Act, the Administrators of the Estate to furnish the Court with a full and accurate inventory and/or account detailing the manner in which the estate has been administered within 6 months from the date of issuance of the orders herein.

### **Orders**

21. In the end, for the reasons set out above, this Court makes the following orders: -

- 1. The subdivision of land parcel Registration Number Kibirichia/Kibirichia/580 shall be undertaken by parties' respective private surveyors at the parties' own costs.***
- 2. The Applicant is at liberty to engage a Government Surveyor at his own cost.***
- 3. As much as practicable, the survey shall be undertaken with regard to the manner in which parties are settled on the land. There shall be liberty to apply.***
- 4. Parties' private surveyors may join the government surveyor to conduct the survey on a date and time to be agreed between the parties, and in the presence of parties and/or their duly appointed representatives.***
- 5. The Respondents shall furnish the Court with a full and accurate account indicating how the estate has been administered within 6 months from the date of this order in accordance with their duty under section 83 of the Law of Succession Act.***
- 6. Each party shall bear their own costs of the application.***

*Order accordingly.*

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF MARCH 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

M/S Kaimenyi Kithinji & Co. Advocates for the Applicant

M/S Wilson P. Mburugu & Co. Advocates for the Respondents