



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1430 OF 1997

IN THE MATTER OF THE ESTATE OF SAMUEL MWAURA KINGANG'I (DECEASED)

LUCY WANJIKU MWAURA.....APPLICANT

VERSUS

JAMES KUNGU KIBUE.....1ST RESPONDENT

JOHN MUNGAI MWAURA.....2ND RESPONDENT

RULING

1. Pursuant to a Court order delivered on 31st May, 2016 by this Court, the beneficiaries of the estate of Samuel Mwaura Kingang'i the deceased herein were directed to agree on a Surveyor. The said Surveyor was to conduct a survey of the estate of the deceased in the presence of all beneficiaries and subsequently present the proposed sub division in Court. It was also ordered that the development on the property was not to be interfered with.

2. On 23rd February, 2018 the District Surveyor Kiambu visited Parcel No. Kabete/L. Kabete/303 to conduct the proposed survey. Thereafter the surveyor prepared a sub-division proposal identifying all existing structures and did not interfere with the existing developments. The sub-division was plotted against the RIM (Map) and a copy of the proposed sub division was filed in Court.

3. When the matter came to court for adoption of the Report, the 2nd Respondent through learned Counsel Ms. Atuya opposed the surveyor's report. Counsel claimed that the survey was conducted in the absence of the 2nd Respondent and that the surveyor did not go to the property on 23rd February as alleged, but visited the site on 17th March, 2018 when the 2nd Respondent was away. Further, that the survey as proposed had created an obstruction and the 2nd Respondent did not have an access road. Counsel sought a fresh survey on the property.

4. The Applicant and the 1st Respondent through their respective Counsels Dr. Njaramba and Mr. Oyugi did not oppose the prayer for a fresh survey. By consent, the court ordered that the land be re-surveyed in the presence of all the parties. Title to the land would revert to the original title for distribution and the 2nd Respondent would meet the costs of the second survey.

5. On 29th March, 2019 when the matter came to court, Ms. Atuya learned Counsel for the 2nd Respondent informed the Court that the Surveyor was not able to do the sub division as James Kungu the 1st Respondent refused to grant the Surveyor access to the property. The 1st Respondent denied these allegations stating that all the parties were present during the survey and it was the Surveyor who chose to take measurements of only the boundaries but not the structures. By consent, the court ordered the Surveyor to return to the property on 13th May, 2019 and sub-divide the land according to the orders of Hon. Lady Justice Muigai dated 31st May, 2016. The Deputy Registrar family division was directed to be present during the process.

6. A second survey was carried out and a report filed by the surveyor on 21st May, 2019. In court, Learned counsel Ms. Morara for the Applicant rejected the whole Report. The grounds for opposition were that the Survey was conducted by a private surveyor availed by the 2nd Respondent. Secondly, that a portion of 2 acres curved out for the Applicant carries 7 graves and is the family graveyard. She prayed that the court adopts the Report by the District Surveyor dated 26th June 2018.

7. Learned Counsel for the 1st Respondent Mr. Oyugi also opposed the Report filed on 21st May, 2019. He submitted that in the Report, the 1st Respondent would have to demolish his house to make room for an access road for the 2nd Respondent. Further, that the 1st Respondent's land was diminished by 3.6 metres which if returned, he would compensate by relinquishing a similar acreage at the bottom of his portion to create the access road required. He reiterated the Applicant's sentiments that they should rely on the Report done by the District Surveyor, and not a private surveyor.

8. I have considered the two reports filed by the District Surveyor and the private Surveyor known as Gikonyo Surveyors on record. I have also considered the submissions made by the parties. The only issue for consideration is the manner of distribution of the parcel of land left to the beneficiaries.

9. The two survey Reports were challenged by the parties on either side. The first report was challenged by 2nd Respondent on the basis that he did not have an access road. This was not opposed. The court remedied this problem by directing the parties to conduct a fresh survey. Upon the filing of the second survey report, the Applicant and the 1st Respondent opposed the 2nd Report by Gikonyo Surveyors on grounds that the private surveyor had been procured by the 2nd Respondent and was likely to be biased. Secondly, that two acres of the Applicant's portion contained the family graveyard. Thirdly, that in the 2nd Report the 1st Respondent would have to demolish a portion of his house encroaching on the 2nd Respondent's proposed portion by 3.6 metres, which was impractical. The 2nd Respondent did not attend Court and did not refute any of the issues raised.

10. All parties have raised salient issues relevant to these proceedings. I have perused the survey reports prepared by the District Surveyor Kiambu and Gikonyo Surveyors. From the face of it, both Reports do not look fundamentally different. However the Report by the District Surveyor confirms the existence of structures owned by the parties, an exercise which was specifically ordered by the Court but which is fundamentally missing from the second report.

11. The issue raised by the 2nd Respondent was that the District Surveyor's Report denied him an access road. He was satisfied with the 2nd Report having been granted the access road, which is however not clearly outlined in the report. The Applicant and the 1st Respondent opposed the 2nd report claiming that 2 acres curved for the Applicant's parcel are a graveyard and that the 1st Respondent will be forced to demolish a portion of his property to cater for the access road. The 1st Respondent proposed to relinquish a similar acreage of 3.6 metres at the tail end of his property to provide the access road.

12. I am persuaded by the submissions made by the Applicant and the 1st Respondent regarding the inconveniences that they would undergo in the event that the 2nd Report is adopted. Although the allegations of bias are unsubstantiated, I am satisfied that the Applicant and the 1st Respondent have set out compelling reasons on why the 2nd Report is prejudicial to them. The 2nd Respondent's only complaints were that the initial surveyor had gone to the site in his absence and that his report did not provide an access road. The 1st Respondent's proposal on how to provide access has not been opposed.

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.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 16TH DAY OF SEPTEMBER, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of Advocate for the Applicant

In the presence of Advocate for the 1st Respondent

In the presence of Advocate for the 2nd Respondent