



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1128 OF 2009**

**IN THE MATTER OF THE ESTATE OF HIRAM NGAITHE GITHIRI A.K.A NGAITHE GITHIRI A.K.A HIRAM NGAITHE GITHIRE A.K.A HIRUM NGAITHE A.K.A HIRAM NGAITHE (DECEASED)**

**HIRAM NGAITHE KARIUKI.....APPLICANT**

**VERSUS**

**ANN NGAITHE.....RESPONDENT**

**RULING**

1. The deceased Hiram Ngaithe alias Ngaithe Gathiri died intestate on 12<sup>th</sup> October 2008. A grant of letters of administration intestate was made to Serah Wanjiku Kinuthia, Anne Ngaithe (the respondent) and Hiram Ngaithe Kariuki (the applicant) on 9<sup>th</sup> July 2010 and confirmed on 12<sup>th</sup> July 2011.
2. The applicant filed the present application dated the 3<sup>rd</sup> July 2015 seeking orders that:
  - a) the respondent, his servants and/or agents be restrained from interfering, wasting, developing and disposing that parcel of land known as Land Reference No. Kabete/Karura/25 including a portion irregularly excised from the said parcel and a bar from obtaining a title of the excised portion and or in any way dealing with the captioned land until further orders of the court;
  - b) the respondent whether by herself, her servants or agents be restrained from interfering, subdividing and or in any way dealing with Land Reference No. Kabete/ Karura/ 6, Land Reference No. Maela/Ndabibi Block 2/153 and Land Reference No. Maela/Ndabibi Block 2/16 pending the hearing and determination of this application inter parties and or further orders of the Court;
  - c) the respondent whether by herself, her servants or agents be restrained from carrying out any subdivision by way of survey or any other related activity affecting Land Reference No. Kabete/Karura/25 pending the hearing and or final determination of the application herein;
  - d) the court be pleased to appoint the land surveyor, Kiambu County or any other independent surveyor to carry out a fresh survey and subdivision of that parcel of land known as Land Reference No. Kabete/Karura/25 taking into consideration the interests of all beneficiaries of the said parcel of land; and
  - e) the respondent be compelled to pull down and remove the fence she has erected on a portion of Land Reference Number Kabete/Karura/25 failing which the said fence be demolished and removed at her own expense.
3. The application was based on the grounds that the respondent being one of the administrators caused Land Reference No. Kabete/ Karura/25 to be surveyed and subdivided into three; that the said survey and subdivision was carried out clandestinely, unfairly and without the involvement and consent of the applicant and the other administrators and beneficiaries of the estate; that as a result of the said survey and subdivision the applicant has been deprived of access to the main road, access to his portion of the property and has further denied the his tenants quiet enjoyment of the rental properties; and that the respondent has without the involvement and consent of the applicant and other beneficiaries of the estate caused to be partitioned Land Reference No. Kabete/ Karura/6 and unilaterally apportioned herself six big shops therein and started demanding rent from tenants.
4. The application was supported by the affidavit of the applicant dated 3<sup>rd</sup> June 2015, 2<sup>nd</sup> December 2016 and 13<sup>th</sup> January 2017. It was his

case that on the 25<sup>th</sup> June 2015, or thereabout, the respondent herein brought her own surveyors and caused Land Reference No. Kabete/Karura/25, a parcel that was devolved to the applicant and the administrators by virtue of a certificate of confirmation dated 12<sup>th</sup> July 2011, to be surveyed and apportioned into three portions; that the respondent then proceeded to fence off the identified parcel of land and is in the process of obtaining a title to the same; that he was never invited to the meeting held on the 12<sup>th</sup> June 2015 because the respondent wanted to carry out the subdivision of the Land Reference No. Kabete/ Karura/25 in a manner that is only beneficial to her but detrimental to the applicant and other beneficiaries; that as a result of the respondent's actions, the applicant was deprived of access to the main road and the tenants therein denied quiet enjoyment of rental properties; that in order for the applicant to gain access to his property, he will be required to demolish some of the rental houses meant for the deceased's grandchildren; that the respondent is in the process of subdividing the deceased's other properties that is Land Reference No. Maela/Ndabibi block 2/16 using the same *modus operandi* and it would therefore be in the interest of justice and fairness that the reliefs sought herein be granted to avoid unnecessary conflicts over the deceased's property; and that the survey and subdivision of the land had been done unfairly with the respondent being apportioned the top part of the land consisting 2.2 acres with wide access of the main road while the bottom part of the land consisting of 2.9 acres given to the applicant and the other beneficiaries thereby preventing them access from the main road.

5. The application was opposed through the affidavit of the respondent dated 4<sup>th</sup> February 2016. She stated that the applicant was all along aware of the process of survey and sub division having been invited to a meeting to that effect on the 12<sup>th</sup> day of June 2015 at the offices of Njenga Mbugua & Nyanjua Advocates; that the applicant deliberately failed and/or refused to attend that meeting and had intentions of delaying and frustrating the process of subdivision of the property as he has been benefitting from the *status quo* by collecting rent from the tenants; that long after the certificate of confirmation of grant the applicant had refused to sign the transfer forms to facilitate distribution of the estate and only agreed to do so upon the respondent filing an application to that effect; that the applicant had also refused to pay his portion of the surveyors fees in order to defeat and delay the process thus forcing the respondent to shoulder the fees alone; that the sub division was properly done according to the existing survey regulations and strictly in accordance with the certificate of confirmation of grant in regard to the portion sizes decreed.

6. Parties filed their submissions which I have considered.

7. It was the applicant's contention that the respondent did not seek his consent or involve him in the survey process; nor did she invite him to the alleged meeting of 12<sup>th</sup> June 2015 at the office of M/s Njenga Mbugua & Nyanjui Advocates to discuss the modalities of appointment of a surveyor and to work out and agree on the process of subdivision among the beneficiaries. His case was that there was no evidence confirming that he had been consulted in any way or invited to the alleged meeting.

8. The respondent contended that the applicant had not shown he would in any way be prejudiced by the said subdivision as a road of access has been provided to their land connecting to the main service road, and that she intends to develop her property commercially which would be affected if the property is subdivided according to the applicant's proposal. She further stated that the other two administrators of the property being Charles Karau Kariuki and Josephine Wanjiku Kariuki have not objected to her proposed mode of sub-division.

9. It is unfortunate that since 12<sup>th</sup> July 2011 when the grant was confirmed the administrators have not distributed the estate of the deceased to each respective beneficiary. The subdivision of LR No. Kabete/Karura/25 followed a meeting held at the offices of M/s Njenga Mbugua & Nyanjua Advocates on 12<sup>th</sup> June 2015 at which the survey was agreed to be undertaken. The respondent caused the meeting. She stated that she invited the applicant to the meeting. The applicant denied that he was invited. His case was that he was not aware of that meeting at which the survey was agreed to be undertaken, and which survey has led to the subdivision which he is challenging. The respondent did not indicate how the applicant was invited to the meeting. Was it by letter, or phone call? He was represented. Was his advocate contacted? I find that there was insufficient evidence to show that the applicant was invited to the meeting. This is the meeting at which the parcel was discussed and survey agreed upon. The resultant subdivision has aggrieved the applicant. I find that the entire process of survey and subdivision of LR No. Kabete/Kerwa/25, or any other land in the estate of the deceased was, to that extent, unfair and illegal. It is hereby set aside. Whatever boundary marks and fences erected to demarcate the portions are of no value and shall be removed by the respondent forthwith.

10. I hope I have said enough to show that the application has merits. It is hereby allowed with costs in terms of prayers (a), (b), (c) and (e).

11. So that this dispute does not linger on forever, I direct the County Surveyor Kiambu to go to LR No. Kabete/Karura/25 and survey and distribute it to the beneficiaries in accordance with the certificate of confirmation herein. This should be done in the presence of the respective beneficiaries and/or their representatives. The sharing should take into consideration access to the road and river and the topography of the area. The survey should be undertaken within 60 days from today and a report filed into court. The administrators will pay the costs of the survey and report, or the applicant should pay and seek reimbursement from them.

12. This matter shall be mentioned on 4<sup>th</sup> February 2019 for further directions.

**DATED and DELIVERED at NAIROBI this 19<sup>TH</sup> NOVEMBER 2018**

**A.O. MUCHELULE**

**JUDGE**