



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 1143 OF 2008**

**IN THE MATTER OF THE ESTATE OF MARIA GEBUI**

**CHOGUCHU alias MARIA GEBOI CHOGUCHU**

**WAIHERA GITAU KABIRU**

**GEORGE WAWERU KABIRU.....APPLICANTS**

**VS**

**SUSAN WANGUI KANENE & OTHERS.....RESPONDENTS**

**RULING**

**PLEADINGS**

By an application filed on the 24<sup>th</sup> of October 2013 brought under **Order 45 of the Civil Procedure Rules Cap 21, Rules 49, 59 & 73** of the **Probate and Administration Rules** and all the enabling provisions of the law brought by the Applicants' and the prayers sought are:

- a. That pending the hearing and determination of prayer 3 & 4 of the summons, a prohibiting order be issued prohibiting any subdivision, partition, transfer, sale or any dealings or interference with the physical occupation of parcel of land number NGONG/NGONG 4988*
- b. That the order of 13<sup>th</sup> June 2012 be reviewed and/or set aside*
- c. That the subdivision done by the District Land Surveyor on the 13<sup>th</sup> of June 2012 in furtherance of the order aforesaid be nullified/cancelled and that the suit property be partitioned in accordance with the mutation map drawn in the year 2001*
- d. That the cost of the application be borne by the respondents.*

The application was premised on the grounds that the apportionments captured in the certificate of confirmation of grant were determined by the deceased during her lifetime and the same was agreed during a meeting held on the 27<sup>th</sup> of August 1999 after the deceased's death. The beneficiaries then agreed on each of their portions which they subsequently developed. On the 13<sup>th</sup> of June 2012, Hon. Justice Njagi issued orders directing the Government Surveyor to visit the land with a view to subdividing it. The District Surveyor Kajiado District visited the land, resurveyed and subdivided the portions. The subdivision however altered the boundaries by providing a road on the suit property which thereafter reduced the Applicants' portion by over ¼ acres. It was their averment that the subdivision is illegal since their subdivision plan exposes them to crime as the road opens up the property for intruders, the subdivision was done without the consent of all the beneficiaries and that the district surveyor is bound by the order contained in the certificate of confirmation issued by the court.

**SUBMISSIONS**

Parties filed submissions in 2014 and this Court requested the Surveyor to adduce oral evidence which was adduced on 7<sup>th</sup> November 2017 when he outlined proposals of subdivision and explained why there were the various proposals.

The Applicants then filed written submissions on the 10<sup>th</sup> of March 2014, in support of their application. The Applicants stated that the application under consideration is one dated 24<sup>th</sup> October 2012. The substantive prayer is No 3 which seeks for cancellation or nullification

of the subdivision undertaken by District Land Surveyor pursuant to orders by Hon Njagi J on 13<sup>th</sup> June 2012 and the Applicants want the suit property be partitioned in accordance with the mutation map drawn in 2001.

The Respondent by her submissions of 24<sup>th</sup> June 2014, reiterated that the District Surveyor's Report of 2001, sketch map and mutation form confirm the actual acreage on the ground is less than what appears in the Certificate of Confirmation of grant. The Respondent stated that the Applicants and their children have always shown the Respondent herein hostility whenever they tried to access the suit property. The Applicants have taken advantage of the survey of 2001 as it favors them only and not all parties and continue to enjoy the status quo therein. The Respondent stated that the Consents of 13<sup>th</sup> June 2012 were in good faith to allow the District land Surveyor on the land to subdivide it. Therefore there is no basis for review of the Court's earlier orders. The Applicants herein have enjoyed occupation of the suit land and continue to do so to date and they have not come to Court with clean hands, the application of 24<sup>th</sup> October 2012 should be dismissed with costs.

The issue for consideration, according to the submissions, is whether a party can after confirmation of the grant distribute the estate contrary to the confirmed and without the confirmed grant being rectified or amended. It was their submission that the succession cause was filed to give effect to the wishes of the deceased and that if the respondents were dissatisfied with the acreage, they should have sought rectification and/or amendment of the grant.

On the 5<sup>th</sup> of May 2015, this Court issued orders that the ruling on the present application would be issued upon hearing the oral evidence of the surveyor.

### **HEARING**

The Government surveyor, Mwangi Wilson, testified before this Court on the 14<sup>th</sup> of December 2016. He stated that the land was 2.9 acres after conducting a search and not 3 acres as stated. He, alongside a team of surveyors, gave a proposal of how the subdivision was to be carried out. During cross-examination, he stated that he was not aware of an earlier subdivision and there was no evidence supporting the claim of the sub-division carried out in 2001. He stated that they used the confirmed grant in preparing their proposed plan and took into account the permanent development on the property.

On the same day, this Court issued orders directing the Government surveyor to revisit the suit property on a date agreeable to all parties and prepare a comprehensive survey on the possible subdivision of the land in line with the confirmed grant and to preserve the permanent structures. On the 3<sup>rd</sup> of February 2017, the surveyor alongside the beneficiaries visited the parcel in question and there was no agreement reached on the alternative ways to avoid the demolition of the building.

On the 17<sup>th</sup> of August 2017, the Government Surveyor was issued summons to appear before this Court. He testified on the 7<sup>th</sup> of November 2017. He stated that they had 2 proposals, the first one being that a kink be introduced shifting the road inwards away from the building and the same be compensated on the lower part. The second proposal was to shift the position of the proposed access road which means that a common boundary will be shared by two parties. During cross-examination he stated that the structures are semi-permanent and if the status quo is maintained, the structure will be affected. It was therefore his recommendation that the status quo remains.

On the 6<sup>th</sup> of December 2017, the Applicants' filed supplementary submissions opposing the report dated 5<sup>th</sup> February 2017. They stated that the existing structures should be maintained as it is the most equitable form of distribution considering the Applicants had settled on that land and have been developing it from 2001. The Respondents on the other hand do not reside on the property and will not be affected by the said adjustment as they will still retain their share of the property subject to the reduction on account of creation of an access road. It was their submission that the access road should run parallel to the live fence to ensure that the same is preserved.

### **ISSUES FOR DETERMINATION**

- a) Have the applicants satisfied the grounds for a review?
- b) Can a party/surveyor in this case alter the subdivision as provided for in the confirmed grant?

### **DETERMINATION**

The Applicants in this case sought, among others, that the order issued on the 13<sup>th</sup> of June 2012 by the Hon. Justice Njagi be reviewed/set aside. **Order 45 Rule 1 of the Civil Procedure Rules** restricts the grounds for review to the following grounds;

- a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;*
- b) on account of some mistake or error apparent on the face of the record, or*
- c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.*

The confirmed grant issued on the 28<sup>th</sup> of February 2011 had provided the total acreage of the property as 3 acres and each of the beneficiaries had been allocated a portion each. On the 13<sup>th</sup> of June 2012, the Court issued orders directing the government surveyor to visit the scene with a view to subdividing the land. The applicants presumed that the subdivision was to be as per the confirmed grant and the

mutation map. However, the surveyor subdivided the land and included an access road which would lead to the demolition of some structures erected on the land. This also led to the reduction of the acreage allocated to all the beneficiaries. To the Applicants, the access road is unnecessary as the existing road can be used by all parties. The Respondents on the other hand state that they cannot access their portions unless they use the Applicants' portion who have been hostile to them.

The order issued on the 13<sup>th</sup> June 2012 was to direct a surveyor to subdivide the property. In this case, it is my view that the issue is not with the order of the court but instead the outcome after the government surveyor subdivided the property. The Applicants have not given any/sufficient reasons in support of a review. They have not shown any error on the face of the record, any new evidence that has been discovered or any other reason that is legally required to grant a review of the Court orders. Further, the application was filed five months after the order was issued and the subdivision carried out. **Order 45 Rule 1(c) Civil Procedure Rules, 2010** provides that the application must be made without unreasonable delay. The Applicants have not given any sufficient explanation to justify the delay and five months in my opinion is unreasonable delay and therefore due to this, the applicants have not satisfied this Court that the order should be reviewed.

The other issue for determination is on whether the surveyor can alter the subdivision provided for in the Confirmed grant. In the surveyor's report, the Government surveyor has provided for an access road which was not indicated in the certificate of confirmation of grant. The surveyor submitted in his report stated that due to the shape of the plot there was need for creating a 9m access road. The Surveyor and the beneficiaries then met again on the 3<sup>rd</sup> of February 2017 with a view to identify the access road, the structures affected and a way to avoid or cause minimal destruction/demolition. 2 alternative proposals were suggested by the surveyor but no agreement was reached. The conclusion as provided by the survey report dated 31<sup>st</sup> March 2017 was that the ground position remains as is until the parties agree to the proposed adjustments or the Court determines the issue. A surveyor guides the parties in the subdivision of land. The surveyor found it fit that an access road is provided for due to the shape of the plot and further since some of the beneficiaries had limited access to the road as they were forced to go through other people's properties. The Court however has the discretion on whether to adopt the Surveyor's report in the case where the beneficiaries disagree as in this case. By virtue of the instant application this Court is precluded from deciding the issue at hand.

Upon perusing the Court file, it is noted that on the 26<sup>th</sup> of January 2018, Rhoda Wanjiku Gitau and Hannah Wamaitha Muriba filed summons for rectification of grant seeking orders, among others, rectification of the certificate of confirmation of the grant by providing that the estate of the deceased be shared equally among the deceased children and that George Waweru Kabiru, one of the co-administrators, be removed as a beneficiary of the estate since his mother is alive and a beneficiary of the estate as well. This application questions the acreage allocated to the beneficiaries as well as one of the beneficiaries not being a child to the deceased. This may therefore change the portions allocated to each of the beneficiaries once the application is heard and determined. This Court out the said application on hold pending the Ruling of the instant application.

The subdivision done by District land Surveyor on 13<sup>th</sup> June 2012 was proposal on subdivision of suit property Ngong/Ngong/4988 according to certificate of confirmation of grant, and if the parties did not agree that the Court would determine the same. Now, there is the pending application of 26<sup>th</sup> January 2018 challenging the certificate of confirmation of grant in terms of rectification and/or amendment. Clearly, since the confirmation of grant, the basis of which the proposed subdivision was conducted is now under scrutiny, it defeats the purpose of any subdivision that has been proposed to date. Therefore the application of 10<sup>th</sup> March 2014 in the following terms;

#### **DISPOSITION**

- a) A prohibitory order is hereby issued prohibiting any subdivision, partition, transfer, sale or any dealings or interference with the physical occupation of parcel land number NGONG/NGONG 4988 pending hearing and determination of the summons for rectification of grant of 26<sup>th</sup> January 2018.**
- b) The application for review or setting aside of the orders of 13<sup>th</sup> June 2012 is dismissed**
- c) The status quo be maintained; all beneficiaries to access and remain where settled, no eviction of any beneficiary or demolition of any permanent structures until hearing and determination of the pending application and proposed subdivisions by District land Surveyor(s).**
- d) All parties obtain hearing date from Registry on priority basis for hearing of the application.**
- e) Each party shall bear their own costs.**
- f) Any aggrieved party to lodge appeal**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 10<sup>TH</sup> DAY OF DECEMBER, 2018.**

**M.W.MUIGAI**

**JUDGE OF THE FAMILY DIVISION OF THE HIGH COURT**

**IN THE PRESENCE OF:**

**MRS KAYUNGIRA FOR THE APPLICANT**

**MR NYAKUNDI FOR THE RESPONDENT**