



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE MATTER OF THE ESTATE OF NELLIE NJERI MWATHI (DECEASED)

SUCCESSION CAUSE 1314 OF 2001

(SUCCESSION CAUSE 103 OF 1988 KIAMBU LAW COURTS

SUCCESSION CAUSE 182 OF 1989 HIGH COURT NAIROBI)

JUDGMENT

INTRODUCTION

The deceased died on 23rd July 1987.

The petitioners filed petition for grant of letters of administration intestate in Succession Cause 103 of 2001 in Kiambu Law Courts.

The beneficiaries of the deceased's estate were;

- a) Beth Mbene Mwathi**
- b) Grace Wanjiru Mwathi**
- c) Julius Wainaina Mwathi**

The only son of the deceased objected to grant of letters of administration to all 3 children of the deceased on the basis that he was the heir to the estate as his sisters had only life interest of the property which was held by their late mother. On 14th July 1989, the Trial Court delivered Ruling that all 3 beneficiaries are joint administrators.

The Objector filed appeal against the Trial Court's decision in Succession Cause 182 of 1989 in the High Court. On 8th July 1998 Hon Justice M.A. Angawa upheld the Trial court's decision.

On 12th June 2001 the Objector filed in the present file summons for revocation or annulment of grant on grounds that the grant was obtained fraudulently and the Trial Court exceeded its pecuniary jurisdiction then of Ksh 100,000/=

On 17th October 2003 Hon. Justice M. Koome delivered Ruling and annulled the grant issued on 16th May 2000 by the Trial Court and issued a new grant in the joint names of all beneficiaries as administrators. The application filed on 12th June 2000 was granted.

The Objector filed summons for confirmation of grant on 5th May 2004 and proposed distribution as follows;

a) The Objector Julius Wanaina Mwathi to inherit Kabete/Kibichiku/754.

b) BethMbene Mwathi and Grace Wanjiru Mwathi to inherit Kabete /Kibichiku/675

The Respondents filed Protest on 27th July 2004 and contested mode of distribution. They proposed equal share in the suit property Kabete/Kibichiku/754 as Kabete /Kibichiku/675 was registered in the name of their late brother and was subject of dispute with a buyer.

Meanwhile, the Objector filed an appeal in Court of Appeal in Civil Appeal 123 of 1992 against the High Court decision on the beneficial interest of Kabete/Kibichiku/754.

The Court held that Ngugi Mwathi Ngige (deceased) son of the deceased herein and late brother to the beneficiaries was registered owner of Kabete/Kibichiku/754 and the same ought to be owned by the only brother, the Objector herein.

On 26th January 2007, Julius Wainaina Mwathi was substituted with Rahab Nyambura Wainaina his widow. The widow filed another summons for confirmation of grant on 13th August 2007, whose mode of distribution was similar to the one in the application of 5th May, 2004.

On 14th January 2011, Hon. Justice R. Nambuye delivered judgment and extensively dealt with the confirmation of grant and directed, Kabete/Kibichiku/754 by operation of Section 38 of Law of Succession Act Cap 160 was to be shared equally between the 3 children of the deceased. Kabete /Kibichiku/675 was registered in the name of their deceased brother Ngugi Mwathi who bequeathed the same to Julius Wainaina Mwathi. The Respondents challenged this position in C.A. 123 of 1992 which upheld that the suit property wholly belonged to Julius Wainaina Mwathi.

The widow of the Objector, Rahab Nyambura Wainaina filed summons for stay of execution on 2nd March 2011 and preferred an appeal by filing notice of appeal on 18th January 2011 against the said judgment. By a Ruling delivered on 20th December 2011, stay of execution of the judgment of 14th January 2011 was denied.

PLEADINGS

Certificate of confirmation of grant was issued on 17th September 2012. On 23rd November 2012, the Applicants Beth Mbene Mwathi and Grace Wanjiru Mwathi filed Summons under Section 73 of the Probate and Administration Rules that the 3rd beneficiary Rahab Nyambura Wainaina executes transmission and transfer forms to fully effect subdivision of Kabete/Kibichiko/754 into 3 equal shares. The grounds were that this matter was litigated for over 10 years, they are aged now at 80 years and would want to finalise this matter. The application was granted by Hon. Justice W. Musyoka that the Deputy Registrar in place of the Respondent executes the relevant documents. On 11th February 2014, Hon. Justice L. Kimaru ordered the restriction registered against the suit property be lifted old title cancelled and new titles issued by Land Registrar.

On 18th November 2014, the Applicant, Rahab Nyambura Wainaina filed an application titled Summons for annulment of Subdivision brought under Rule 49 of Probate and Administration Rules; inherent power of the Court and all enabling provisions of the law. The named Respondents are Beth Nyambene Mwathi, Grace Wanjiru Mwathi, District Surveyor and Land Registrar both of Kiambu County respectively. The main thrust of the application is the Court to prohibit registration of the mutation form of 9th October 2014 and further subdivision in light of the said mutation form.

On 24th November 2014, Hon. Justice L. Achode granted temporary injunction for 14 days and prohibited the 4th Respondent from presenting the mutation form and effecting the subdivision of the suit property, Kabete/Kibichiko/754. On 26th January, 2015, the 1st and 2nd Respondents filed a joint Replying Affidavit and opposed the application to annul the subdivision. On 20th February 2015 and 6th March 2015, the Applicant filed Further Affidavit and Supplementary Affidavit and she attached photographs of the developments and alternative proposed subdivision of the suit property. The

Respondents filed Further Replying Affidavit on 27th February 2015.

HEARING

On 21st September 2015, PW1 Ms. Jane Wanja Mburu, Estate Valuer testified that on instructions of her client Mrs Rahab Nyambura Wainaina she was shown the suit property Kabete/Kibichiko/754 at Wangige market in Kiambu County. She inspected a commercial block that consisted of 6 shops at the front and others in the rear. She measured and valued it at Ksh. 4.9 m which included the depreciated replaced value and not the market value and excluded value of the land.

The client showed another building block which belonged to the Applicant and she learnt it was the subject of dispute. She took photographs of the buildings and compiled her report which she produced as Exhibit 1. She informed the Court that the title document of the suit property confirmed Nelly Ndathi (deceased) the registered owner.

PW2 Rahab Nyambura Wainaina told the Court that she was married to Julius Wainaina Mwathi she lived with her husband and 8 children in the suit property Kabete/Kibichiko/754 from 1959 to date. Her husband, Julius Wainaina (deceased) had 4 siblings Beth Mbene Mwathi, Grace Wanjiru Mwathi, Andrew Ngugi Mwathi (deceased). She found all the siblings at the home; Beth was married in Kibichiku and Wanjiru in Kangemi and they came back home with their children in 1960s.

During her late husband's life they built their home and block of shops and his siblings did not contribute to the construction of the developments on the land. Instead the siblings were involved in court litigation with regard to the suit property Kabete/Kibichiko/754 for a long time until the judgment of Hon. Justice R. Nambuye was on 14th January 2011 and the grant was confirmed on 17th September 2014 that the suit property shall be divided equally amongst the Applicant and Respondents. PW2 was dissatisfied with the judgment but later on the advice of new her advocate she agreed to comply with it and abandoned the appeal.

However, the Respondents did not serve her with any Court documents and they proceeded with subdivision of the suit property without her knowledge, consultation, consent and presence. The mutation form distributed 6 shops to the Respondents and she was left with 3 shops, the beacons were placed at the doorstep of her house, the borehole is shared in joint portions and her late husband's grave is on their portions. The Applicant disputed the ownership and division of the shops. The Applicant reiterated, she and her late husband bought the stores in 1957 and later built them into shops from 1988 and the Respondents did not contribute to their development so they cannot have the shops. She produced copies of Tenancy agreements to prove this fact. That is why she objected to the mutation forms of the proposed subdivision. She also instructed a surveyor to subdivide the suit property so as to retain her home, shops, borehole and her late husband's grave. If the various developments are to be taken away then she should be compensated. In the Surveyor's Plan, there is the main road which she uses to access to her home. The Respondents have blocked the road so that the road used is the one that leads to the garage that belongs to the Respondents. The Applicant would want the road to her house retained.

PW 3, James Mwangi Mbogo; Land Surveyor was instructed by PW2 to carry out subdivision on the suit property Kabete/Kibichiko/754. He visited the site and found developments; rental houses, residential house and semi permanent houses. At the lower slope, he found there was a river. He produced subdivision proposal as RNWG. He proposed that the Applicant retains the developed structures which is marked A' where the rental houses are situated and Part marked B' where the Applicant resides. The proposed subdivision is as follows;

a) Part A' & B' for the Applicant totaling 0.523 ha

b) Part C' for 1st Respondent totaling 0.523 ha

c) Part D' for 2nd Respondent totaling 0.523 ha

d) 9 meters for access road

He proposed 4 portions for ease of understanding although the Court order was to divide into 3 equal parts.

The Respondents presented their evidence as follows;

DW 1 David Chege Kariuki Estate Valuer relied on the Valuation Report by Tuliflocks Limited. He was instructed by the Respondents and on 1st April 2014 he visited the suit property Kabete/Kibichiko/754. He was shown mutation forms. He valued as follows;

- a) Part A' combination of shops at the front and at the back is a garage measuring 3, 842sqft valued at Ksh 8,260,000/= (shops) and land valued at Ksh 22,500,000 for commercial purposes.
- b) Part B' no development.
- c) Part C' & D' are agricultural land valued at Ksh 9,630,000/=.

His conclusion was that the land in Part A' is the most valuable at Ksh 30, 760,000/=

DW2 Simon Kahiro Mwaura Land Surveyor and on 29th October 2014 visited the suit property Kabete/Kibichiko/754 on instructions of the Respondents to subdivide the land into 3 equal parts. The title deed confirmed the registered owner as Nelly Mwathi (deceased).

He proposed subdivision of the suit property into 6 equal portions and each party to have 2 portions and each Beneficiary to access the tarmac road and the river as follows;

- a) Part C' and D' - 3238 & 3239 for the Applicant Rahab**
- b) Part B' and E' - 3237 & 3240 for the 2nd Respondent Grace**
- c) Part A' and F' - 3236 & 3241 for the 1st Respondent Beth**

He did not interfere with the Applicant's matrimonial home except chicken rearing portion. He was not aware and was not informed of the ownership of the shops. He concentrated on equal subdivision of the suit property and not the structures on the land. He made provision for the access road and the rest of the land was divided in 3 equal parts.

In cross examination he stated that he is the Technical Assistant to the Land Surveyor one Mr. Obadiah Wainaina who could not come to Court and he assigned the witness to come and testify on the matter. He also admitted that all parties were not present and therefore he did not determine who owned what he only dealt with the land.

DW3 Beth Mbene Mwathi testified in Kikuyu through an Interpreter that she lives on the suit property with her 4 children and she was in Court to claim her portion as per their Surveyor's proposal. She admitted that at the road there are shops that belong to the Applicant Rahab Nyambura. She demanded that she removes her shops on her portion of land so that she also put up her shops. Rahab sold land and she built her shops on the land. She reiterated that they obtained orders from Hon. Justice Musyoka that the land be divided into 3 equal portions. She sought equal share in acreage and value as per the Surveyor's proposal. She informed Court that subdivision and transmission had taken place with orders from Court and when the Applicant filed the instant application, when matters came to a halt and seeks compensations for funds expended in the subdivision.

DW4 Grace Wanjiru Mwathe testified in Kikuyu through an Interpreter and supported DW3's testimony that she wants her equal share of the suit property and as proposed by the Surveyor DW2. She proposes that the structures shall be removed and each will use their own portion of land. She wanted Rahab to

remove her shops but was not willing to compensate her for the same.

At the close of the hearing on 24th November 2014, the Court implored the parties to seek Surveyors to subdivide the suit property without removal of structures and file updated/amended proposal on subdivision of the land.

On 2nd March 2016, the parties informed the Court that they could not agree on the Surveyor and asked the Court to visit the scene. The Court requested the Deputy Registrar to visit the scene and file the Report. The same was done and report filed on 5th April 2016.

SUBMISSIONS

The Respondents through their advocate filed Submissions on 20th September 2016 and stated in a nutshell that;

- a) The beneficiaries were not settled on the suit property by the deceased; the issue was resolved by judgment delivered by Hon.L. J .R. Nambuye that the suit property shall be equally divided by all beneficiaries.
- b) The Applicant intermeddled with the estate contrary to **Section 45(1) of Law of Succession Act** by developing the most valuable part of the land. The Applicant should not be rewarded for such acts as she did not have a grant but only a beneficiary and was therefore a licensee and therefore intermeddled with the estate. Reference was to the case of **RE ESTATE CHRISTOM WAINAINA [2014] eKLR** on this point.
- c) The Applicant was well aware of the subdivision and transmission. Despite being served she did not attend Court. She was summoned to the Chief she refused to sign the documents and Respondents moved to court and obtained orders to proceed. They did and incurred expenses only for the Applicant to halt the process through the present application. The Applicant ought to reimburse their expenses.
- d) The suit property Kabete/Kibichiko/754 was properly and fairly subdivided by the mutation form dated 6th October 2014 taking into account the number of parcels, value of the land, size and acreage and access to the river and main road.
- e) The Respondents are not laying claim to the Applicant's shops and buildings but they take issue with where they were constructed on the land adjacent to the road which is of higher value. Whereas the land towards the river is sloppy and not conducive for construction. To be fair equal distribution would entail that each of the beneficiaries has access to the main road and also the river. **In REESTATE OF JOHN MUSAMBAYI KATUMANGA (DECEASED) 2014 eKLR** where the court delved into the debate whether property that comprises of deceased's estate should be equally or equitably distributed to the beneficiaries.

The Applicant through her advocate filed submissions on 20th June 2016 and the salient points were;

- a) The Respondents obtained Court orders on subdivision of the suit property Kabete/Kibichiko/754 on 4th June 2013 and they did not consult or inform the Applicant.
- b) Contrary to Court orders to subdivide into 3 equal parts, the Surveyor divided land into 6 parts.
- c) The subdivision exhibited in the mutation form has affected the applicant's residential house (in Part D') the business premises and structures (in Part A' to C' on the mutation form) borehole and water tank (in Part E') the Applicant's late husband's grave (in Part F')
- d) The Respondents allocated themselves one of the Applicant's block of rental business structures (Kifka/Hammers Hardware Plot) without a proposal on compensation for the 6 shops and 4 rear

stores. She was left with Skinners Hardware Plot that has 3 shops and stalls.

- e) The Applicant claimed beacons were erected outside her home and borehole shared among 3 parties.
- f) The Applicant wants the main road that leads to her home to be maintained while the proposed access road be done away with as it is far from her home.

The Applicant relied on the **case of RE ESTATE OF SBS [2014]eKLR where the Hon. Justice Mabeya considered in distribution of the estate;**

.....the developments undertaken by individual beneficiaries. There are those who told the Court that they have already constructed permanent homes in certain areas. In this regard, the Court has tried to ensure that while trying to maintain equity, the lives of beneficiaries are to be disrupted at the minimum.

DETERMINATION

At the outset, the Court notes with concern that on 21st September 2016 after the hearing, the matter was slated for Ruling on 28th October 2016, the Court file either by design or default was removed from Court Chambers. In early March 2017 when the matter was brought to the Court's attention; efforts to trace the Court file were fruitful hence the inordinate delay of the judgment.

The issue for determination is the subdivision of Kabete/Kibichiko/754 between the 3 parties namely;

- a) **Rahab Nyambura Wainaina widow of Julius Wainaina (deceased) son of Nelly Njeri Mwathi (deceased)**
- b) **Beth Mbene Mwathi daughter of Nelly Njeri Mwathi (deceased)**
- c) **Grace Wanjiru Mwathi daughter of Nelly Njeri Mwathi (deceased)**

This Court outlined all relevant events leading upto the present issue so as to inform the way forward.

This Court considered the pleadings and evidence on record and confirms that the matter has been of long protracted litigation. The genesis is **Succession Cause 40 of 1987** with regard to Kabete/Kibichiko/200 which belonged to the deceased's husband Ngugi Mwathi and father of the beneficiaries herein. It was divided in equal shares between the Nelly Njeri and Njoki Mwathi 2 wives of their husband. Nelly Njeri got 1.57 hectares under L.R. Kabete/Kibichiko/754 and Njoki Mwathi got 1.57 hectares for her house. The Court applying Kikuyu customary law was of the view unmarried daughters would have life interest on the part they would cultivate.

In the judgment delivered by Hon Justice R. Nambuye of 14th January 2011 the Court applied the **Succession Act of 1981 which by virtue of Section 38 39 40 & 42 of the Act** determined that the children of the deceased would share the suit property Kabete/Kibichiko/754 equally.

What is at the centre of the dispute is what equal means and or amounts to. Equal is defined as something being the same in size, quality and value. According to the Respondents; they were marginalized by being given by their mother some small portion of land to cultivate while the larger portion was left to the sole surviving brother and son Julius Wainaina (deceased) husband to the Applicant. Therefore upon delivery of the judgment, the Respondents sought through Counsel services of a Valuer to inspect and value the suit property with a view to give a professional opinion on the open market value of the developments for probate purposes. Tuliflocks Limited conducted the valuation and found as follows;

Buildings on Plot A' & B' valued Ksh 1,560,000

Land 1,950 sqft on Plot A' & B'	Ksh 2,600,000
Total	Ksh 4,160,000
Buildings on Plot C' valued	Ksh 1,560,000
Land 1,892 sq ft valued	Ksh 2,600,000
Total	Ksh 4,160,000

General remarks are;

Plot A' it fronts the parcel and touches Wangige - Mwimuto Tarmac Road making it easily accessible thus affecting its value positively.

Plots B'C'&D' They are currently undeveloped or developed with semi permanent structures making them though bigger in size of lesser value than Plot A'

The Respondents proposed that they distribute the suit property equally amongst all beneficiaries.

On the other hand the Applicant through Valuer PW1 stated valuation of the shops and stores was at depreciating value and not at the market price at Ksh 4.9 m. The shops and stores were constructed by her husband and herself and therefore should not be subject to distribution.

The Court is of the following views;

It is conceded that the land by the road is of enhanced value and similarly the land by the river. The ideal situation is that all beneficiaries should have a share of the land at the main road and also by the river.

However, prevailing circumstances are as follows; there has been a simmering dispute over the years between the 2 sisters Beth and Grace and their late brother Julius. At the time the Applicant and their brother and her husband continued to develop their land, they resided on the said land from 1957 to date, they bought stores and developed them from 1988 when their mother the deceased passed on. It is not disputed that the shops, stores and buildings were developed not by their father, original owner of the suit property, or the deceased herein their mother; but the said brother and his wife the Applicant. Therefore these developments cannot be considered part of the equal share of the suit property between the 3 beneficiaries.

The Respondents conceded that although they did not contribute to these developments; they are on valuable land near the road which they are also entitled to a share. They proposed that the Applicant removes her shops and stores and then they can also develop their shops.

This Court can only enforce what is fair and just in the circumstances but it must also be legal, practical and reasonable.

The Applicant was not part of the tussle; as widow of the Respondents' brother, she was substituted with her late husband after his death in 2006. The Applicant did not deliberately and knowingly put up the said developments; they were done by her and her late husband for the benefit of their family. There is no evidence that the Applicant acted in this manner to deliberately deprive the Respondents. The developments were not contrary to any Court orders.

Secondly, from the chronology of events, the dispute spans almost 30 years and the Applicant and Respondents could not anticipate the outcome of their matter, hence the developments continued before the decision of the Court.

It is not contested that the developments on the land are by the Applicant and her husband Julius

Wainaina.

Their father and mother did not put up the said structures, shops and stores. Therefore these cannot be subject of being shared equally between the Applicant and Respondents.

In the circumstances, this Court shall not rely on either of the valuation reports as the value of the land and developments included property that is not part of the estate available or equal distribution.

The survey reports are not of significant assistance to the Court because each party conducted their separate survey over the same suit property in the absence of all beneficiaries presence. Secondly the said suit property and developments have been valued to each party's advantage; there is a huge margin and disparity of the 2 valuations.

The Respondents survey is not by a qualified surveyor as admitted in cross examination of DW2. The survey by the Applicant is claimed to be equal to all parties in size but it is not possible on the ground especially curving out the area where there are developments *vis a vis* the undeveloped part. The Respondents have encroached on the developed part where the buildings by the Applicant are situated and do not intend to compensate the Applicant for the developments; instead they demand that the Applicant removes the shops off the land so that they may erect their structures. This is not practical to demolish the Applicant's shops and she is not compensated. The Applicant contests the Respondents' survey as it takes up her matrimonial home, borehole, her late husband's grave and the shops and stores.

The totality of the evidence on record is that the proposed valuations and surveys do not assist the Court to fairly and practically implement the Court judgment of 14th January 2011.

DISPOSITION:

Therefore this Court orders;

- 1. The Applicant and Respondents shall conduct joint survey by the Kiambu County Surveyor within 30 days to implement judgment and orders of 14th January 2011 and pursuant to judgment of Hon. L.J. R. Nambuye.**
- 2. The parties shall indicate to the Surveyor their respective developments on the land which should not be interfered with unless any party is ready and willing to compensate the other party.**
- 3. As far as is practically possible each party to have a portion on the road and by the river without interference with personal developments.**
- 4. The surveyor may consider the existing valuations and surveys reports to inform the way forward.**
- 5. The surveyor to consider the possibility of one access road.**
- 6. All objections by parties shall be recorded and alternative proposals.**
- 7. The Surveyor may seek the protection by the nearest Police Station to carry out the exercise.**
- 8. The parties to share survey costs equally.**
- 9. The matter shall be mentioned on 6th June 2017 .**

DELIVERED SIGNED & DATED IN OPEN COURT ON 3RD APRIL 2017.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

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