



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**SUCCESSION CAUSE NO. 673 OF 1990**

**IN THE MATTER OF THE ESTATE OF JOSEPH GITAU RICHO (DECEASED)**

SAMUEL KINYANJUI.....1<sup>ST</sup> APPLICANT

EDWARD NDUNGU.....2<sup>ND</sup> APPLICANT

PETER KIAMBUTHI.....3<sup>RD</sup> APPLICANT

**VERSUS**

GEOFFREY RICHU.....RESPONDENT

**RULING**

**PLEADINGS**

The matter presented before this Court is by the Court Ruling of Hon. Justice L. Kimaru of 9<sup>th</sup> October, 2014 which orders in a nutshell were as follows;

“the parties herein are ordered to provide each two (2) names of surveyors whom they desire to prepare a draft subdivision plan which shall be approved by the Court. Out of the names of surveyor provided, the Court shall nominate two (2) surveyors who shall jointly prepare subdivision plan. During the preparation of the draft subdivision draft all the parties will be required to be on site. If there shall be any disagreement, the same shall be noted by the surveyors who shall present such complaint in Court for determination. The names of the surveyors shall exclude the surveyors who previously surveyed the said parcel of land.”

Pursuant to the orders, the Applicants, Samuel Kinyanjui, Edward Ndungu, Peter Kiambuthi their respective lists of surveyor and on 13<sup>th</sup> December, 2014 the Court appointed **GEOMEASURE SURVEYORS LIMITED** from the list presented by the Applicants and instructed them to implement the orders of the Court as shown in the Ruling of 9<sup>th</sup> October, 2014.

On 16<sup>th</sup> February, 2015, Mr. Mbichire Advocate for the Administrator/Respondent Geoffrey Richu informed the Court that the appointed surveyor went on site and erected beacons according to the Applicant’s proposal and failed to take into account the two (2) proposals. Although the administrator and all relevant parties were present, they were aggrieved and therefore filed the Notice of Objection on 27<sup>th</sup> January, 2015.

The Applicant also filed reply to the Respondent's Notice of Objection on 2<sup>nd</sup> February, 2015. Upon hearing both parties the Court ordered the Respondent/ Administrator to file within two (2) weeks their surveyor's proposal in Court with Objection and proposal from the Court to consider.

On 10<sup>th</sup> March, 2015 the Court issued witness summons to the two (2) respective surveyors to inform the Court of the proposals filed.

### **HEARING**

On 6<sup>th</sup> May, 2015 the Court heard from the surveyors **Mr. Nahashon Mburu of Geomeasure Surveyors Limited** informed the Court he visited the "suit property" **Dagoretti/Kinoo/600** on 29<sup>th</sup> December, 2014. He found the land was largely flat but with a gentle slope on the lower side. The upper part is fully developed with commercial and residential buildings and road access on all sides of the land.

Geoffrey Richu and Peter Kiambuthi settled on the upper side and Edward Ndungu and Samuel Kinyanjui have settled on the lower side. The lower side has a gully which is on the road and not on the land.

In cross examination by the Respondent's Advocate, the Surveyor admitted that from his proposed subdivision plan Land Parcel 'A' 'B' 'C' 'D' on the plan filed and produced in Court on 5<sup>th</sup> January, 2015 are developed, there is enough land for a road to be constructed and this is the most prime land.

The proposed subdivision of the plan is as follows;

1. 'A' - 0.1470Ha - G. Richu
2. 'B' - 0.1470Ha - P. Kiambuthi
3. 'C' - 0.1470Ha - E. Ndungu
4. 'D' - 0.1470Ha - S. Kinyanjui
5. 'E' - 0.3240Ha - G. Richu
6. 'F' - 0.3240Ha - S. Kinyanjui
7. 'G' - 0.3240Ha - E. Ndungu
8. 'H' - 0.3240Ha - P. Kiambuthi
9. ACC. RD=0.1000Ha

The Applicant Peter Kiambuthi informed the Court that the proposal by Geomeasure Surveyors Limited did not take into account that each of the beneficiaries will need to access the river at the end of the slope so as to pump water and irrigate crops. The surveyor informed the Court that there was no river at the bottom of the gentle slope.

The Respondent's surveyor **Mr. Wilson N. Kamau of Geodata Land Surveyors and Consultants** filed their report on the proposed subdivision plan on 9<sup>th</sup> March, 2015.

During the hearing, the surveyor stated as follows;

The suit property is accessible from four (4) roads there are ten (10) residential houses both permanent and semi-permanent houses and a family cemetery. The land is not flat but part of it slopes towards the west and there is a gully. In the proposed plan, he listed the parcels as follows;

1. Parcel 'A' there are structures that belong to Mr. G. Richu
2. Parcel 'B' homestead of Mr. P. Kiambuthi
3. Parcel 'C' homestead of Mr. G. Richu
4. Parcel 'D' homestead of Mr. S. Kinyanjui
5. Parcel 'E' homestead of Mr. E. Ndungu
6. Parcel 'Z' Family burial site

7. Parcels 'F' 'G' 'H' 'I' 'J' 'K' and 'L' are all agricultural land.

The proposed Partition Scheme is as follows;

1. Beneficiary proposal formula

- i. Richu - A+C+L= 0.44Ha
- ii. Kinyanjui - H+D+K=0.44Ha
- iii. Ndungu - G+E+J=0.44Ha
- iv. Kiambuthi - F+B+I=0.44Ha

- 2. i) A=0.20      ii) B=0.10      iii) C=0.10      iv) D=0.10
- v) E=0.10      vi) F=0.20      vii) G=0.20      viii) H=0.20
- ix) I=0.14      X) J=0.14      xi) K=0.14      xii) L=0.14
- xiii) Z=0.045 – Cemetery      xiv) RD AREA=0.185

3. There are permanent structures within plots 'A' 'B' 'C' 'D' 'E'. Plots 'F' 'G' 'H' are relatively well conditioned in terms of usability. Plots 'I' 'J' 'K' 'L' are equally disadvantaged in that there exists a dip gully as a result of storm water from the upper side of the parcel marked blue on the diagram.

The Surveyor Mr. Kamau, mapped out a road as is required by the Physical Planning Act about 9 meters would be excised and each beneficiary would access the road from their respective plots. He confirmed Land Parcel 'A' had some part that could be hived off but it cannot amount to a piece of land is too small to warrant a separate title deed to be issued.

After the hearing, the Court also considered the pleadings filed. Of importance is the confirmed grant of 15<sup>th</sup> November, 1991 in the application filed on 2<sup>nd</sup> August, 1991.

**Paragraph 2** listed the beneficiaries of the estate of the deceased as follows;

- 1. Peninah Kanini Gitau - Widow
- 2. Geoffrey Richu Gitau - Son - Applicant
- 3. Samuel Kinyanjui Gitau - Son
- 4. Edward Ndungu Gitau - Son
- 5. Peter Kiambuthi Gitau - Son
- 6. Racheal Njeri Gitau -
- 7. Gladwell Wanjiku Gitau -
- 8. Hannah Wanjiku Gitau - Daughters
- 9. Elizabeth Wambui Gitau -
- 10) Catherine Murugi Gitayu -
- 11. Alice Wanjiru Gitau -

**Paragraph 5** the listed assets are outlined and the proposed mode of distribution as follows;

(5) (i) Land Title No. Dagoretti/Kinoo/600 to be divided into four (4) equal shares between;

- a. Geoffrey Richu
- b. Samuel Kinyanjui
- c. Edward Ndungu
- d. Peter Kiambuthi

(2) Land Title No. Dagoretti/Kinoo/634 be divided into plots inn equal shares between;

- (a) Peninah Kanini
- (b) Gladwell Wanjiku
- (c) Hannah Wanjiku
- (d) Eizabeth Wambui
- (e) Catherine Murugi
- (f) Alice Wanjiru

(3) All that Title of Plot No. T. 408 to Peter Kiambuthi and Geoffrey Richu Gitau.

(4) All that Title of Plot No. T.403 to Rachel Njeri, Peter Kiambuthi (Rectification of grant).

Certificate of confirmation of grant of 15<sup>th</sup> November, 1991 outlines as follows;

<u>Name</u>	<u>Description of Property</u>	<u>Share of Heirs</u>
Geoffrey Richu Gitau		
Samuel Kinyanjui	Dagoretti/Kinoo/600	Equal shares
Edward Ndungu		
Peter Kiambathi		
Penina Kanini		
Gladwell Wanjiku		
Hannah Wanjiku	Dagoretti/Kinoo/634	Equal shares
Elizabeth Wambui		
Catherine Murugi		
Alice Wanjiru		
Peter Kiambathi		
Geoffrey Richu Gitau		
Samuel Kinyanjui	Dagoretti/Kinoo/T.408	Equal shares
Edward Ndungu		
Rachel Njeri	Dagoretti/Kinoo/T.403	Whole

The written consents of all beneficiaries are attached and signed before the Chief of Kinoo Location. The confirmed grant of 15<sup>th</sup> November, 1991 reflects the proposed mode of distribution as in the affidavit in support of the application for confirmation of grant.

If that is the case then the Court has to determine whether the distribution of the deceased's estate has been in accordance with the confirmed grant. A cursory glance at the confirmed grant; Dagoretti/Kinoo T.408 was to be subdivided into four (4) equal shares of the sons of the deceased. Yet in the Respondent's Replying affidavit filed on 24<sup>th</sup> December, 2012 to the Applicant's application filed on 12<sup>th</sup> November, 2012 seeking to have new administrator appointed and the Respondent removed, the Respondent stated in **paragraph 5 of the Replying Affidavit** as follows;

“With regard to asset Dagoretti/Kinoo T. 408 it was discussed and agreed at family meeting that Samuel Kinyanjui and Edward Ndungu 1<sup>st</sup> and 2<sup>nd</sup> Applicants were to occupy the land/T.408 wholly and later compensate the 3<sup>rd</sup> Applicant Peter Kiambuthi and the Respondent Geoffrey Richu with part of their portion in Dagoretti/Kinoo/600 the suit property herein.”

**In paragraph 6**, the Respondent deponed that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants occupied Dagoretti/Kinoo/T.408 and later sold it to 3<sup>rd</sup> parties and did not share sale proceeds with the beneficiaries.

They later protested as to the distribution of Dagoretti/Kinoo/600 that it should be four (4) equal shares as agreed and as in the confirmed grant and ignored the earlier agreement and arrangement that the 3<sup>rd</sup> Applicant and Respondent share in Dagoretti/Kinoo/T.408 was to be hived off from the respective shares in Dagoretti/Kinoo/600 to compensate them their interest in Dagoretti/Kinoo/T.408.

This has been the bone of contention and the dispute has prolonged the distribution of the deceased's estate for 24 years. It has also made the family engage in protracted litigation from the Chief, District Office, and Land Tribunal, Lands Appeal Tribunal and finally in this Court.

This Court will abide by the confirmed grant of 15<sup>th</sup> November, 1991 as it has not been set aside, amended or appealed against. The parties to confirm to the Court if, when and how the distribution of Land Parcel Dagoretti/Kinoo/T.408 was done. If it did not include all the beneficiaries' share as stipulated in the confirmed grant then the 3<sup>rd</sup> Applicant and Respondent shall be compensated in the proposed distribution of Land Parcel Dagoretti/Kinoo/600.

With regard to the two (2) surveyors' reports of the proposed subdivision plan of the suit property, the Court wishes to address the matter as follows;

- a. Parcel 'A' 'F' 'G' and 'H' are not equal and cannot possibly measure 0.20 hectares as shown in the Geodata Surveyor Plan. Parcel 'A' is much bigger than all the rest. Parcel 'F' has the grave site hived off and is therefore less in acreage than the other portion.
- b. Parcel 'B' and 'E' there is provision for road between them and still more land for the major road so that 'B' and 'E' will end up smaller than 'A' 'C' and 'D'.
- c. 'F' 'G' 'H' 'I' 'J' 'K' 'L' are vertically divided and the 3<sup>rd</sup> Applicant is of the view that there is a river at the bottom of the slope while each beneficiary would like to access and tap water for crops and therefore favours the horizontal subdivision into four (4) parts and no more. The others feel the horizontal will disadvantage those who are in the middle and they will not access the road.

The proposed subdivision plan by Geomeasure is of four (4) equal share of land on the upper part and four (4) equal share of land on the lower part. The proposal would be more appropriate if the issue of land parcel Dagoretti/Kinoo/T.408 is resolved.

Therefore in light of the confirmed grant, the proposals on the suit property subdivision plan, the evidence by both surveyors the Court orders the following;

- a. **Land Parcel Dagoretti/Kinoo/T.408 ought to have been divided as per the confirmed grant of 15<sup>th</sup> September, 1991.**
- b. **If any of the beneficiaries did not get their rightful portion or share of the sale proceeds of Dagoretti/Kinoo/T.408 they shall be compensated in the subdivision of Dagoretti/Kinoo/600.**

- c. **The Applicants and Respondent to furnish the Court with supporting affidavits on the distribution of Dagoretti/Kinoo/T.408 within 30days.**
- d. **If the distribution of Dagoretti/Kinoo/T.408 was as stipulated in the confirmed grant of 15<sup>th</sup> September, 1991 then the Court will allow distribution as per the proposed subdivision filed by Geomeasure Surveyors Limited filed on 5<sup>th</sup> January, 2015 four (4) equal portions at the developed/higher level of land and four (4) equal portions at the lower level of land.**
- e. **If the distribution of Dagoretti/Kinoo/T.408 left out the 3<sup>rd</sup> Applicant and the Respondent then the distribution of Dagoretti/Kinoo/600 shall be in terms of Geodata Land Surveyors and Consultants on the 1<sup>st</sup> part of the land the upper level and the 2<sup>nd</sup> part the gentle slope as per the Geomeasure Surveyors Limited.**
- f. **The matter to be mentioned in 30 days for the Court to be furnished with the relevant information.**
- g. **No orders as to costs.**

**READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF JULY, 2015**

**M. MUIGAI**

**JUDGE**

***In the presence of;***

***Mr. Analo holding brief for Mr. Mbichire for the Respondent***

***Mr. Peter Kiambuthi present***