



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO 161 OF 2003**

**IN THE MATTER OF**  
**THE ESTATE OF IMANYARA M'TURUCHIU (DECEASED)**  
**MUNYANGE M'IMANYARA .....PETITIONER**

**Versus**

**M'RARAMA M'TUARUCHIU .....OBJECTOR**

**RULING**

**Unending litigation**

[1] The application I am considering is dated 5<sup>th</sup> October 2012. The application is seeking for three significant orders;

- (1) That the District Surveyor, Meru to subdivide the estate property, namely ABOTHUGUCHI/KATHERI/690 as per the judgment of the court delivered on 13<sup>th</sup> March 2008;**
- (2) That the fence which the Objector erected on the land be removed; and**
- (3) That the surveyor be provided with enough security to enable him carry out the subdivision.**

**Little important background**

[2] But before I finally determine this application a little background of this case matter is necessary. After a protracted hearing of the case, Anyara Emukule J eventually delivered judgment on 13<sup>th</sup> March 2008 and directed "*...that the widow Munyange the petitioner herein and the objector herein share the land in the proportion each currently occupies.*" But subsequently, this matter seems to be unending; it has been protracted by the parties; there have been reported acts of violence by either party at some point or other. The parties have also made a number of applications in court, for instance the ones dated 18<sup>th</sup> May 2010 and 27<sup>th</sup> May 2010 which Kasango J dealt with in the Ruling she delivered on 31/3/2011. In the said ruling the judge ordered that OCS Meru Police Station to provide security to the District Surveyor, Meru in order to enable him subdivide the estate property namely LR. No. ABOTHUGUCHI/GITHONGO/815 in accordance with the judgment of the court dated 13<sup>th</sup> March 2008.

## **Impugned Subdivision**

[3] The district Surveyor, Meru Central District, Mwitikari K. Njue visited the said parcel of land on 8<sup>th</sup> June 2011 and subdivided the land into two portions; one for the objector measuring approximately 0.35 HA (0.864 acres), and the other for the petitioner measuring approximately 0.36 Ha (0.889 Acres). The surveyor filed his report together with the Sketch Map showing the exact measurements and demarcations of each piece of land. Except the report forwarding the Sketch Map has an error in respect of the portion for the petitioner- it indicates the portion to be approximately 0.3 (0.889 acres). That is a simple error that does not go to the substance of the report and it does not affect the actual measurements of the portions as shown in the Sketch Map. But, the petitioner seems to be placing too much emphasis on such simple error to found an objection to the sub-division that was done by the Surveyor herein. The Petitioner has really inflated this matter in the hope that it will rout the report. The Sketch Map is clear and measurements are stated clearly. I will not discredit the survey report and sketch map on this basis. But, perhaps the other points raised are substantial; let me determine their merits first.

## **Petitioner's gravamen**

[4] The bone of contention is that the subdivision that was done of the estate property does not reflect occupation of each party as at 13<sup>th</sup> of March 2008 as per the judgment of the court herein. The Petitioner submitted that the surveyor subdivided the estate property before ascertaining the area each party occupied as at 13<sup>th</sup> March 2008. Further, she submitted that the surveyor simply used the fence which was wrongly and unlawfully erected in July 2010 by the Objector after he had chased away the same surveyor and the Petitioner on 21.04.2009. In these circumstances, the Petitioner argued that it is only fair that the Court sends the Deputy Registrar to accompany the District Surveyor to supervise the subdivision of the land as per the court order.

[5] The Petitioner accused the Objector of again chasing away the Petitioner and the Surveyor on 21.04.2010 after he lost an application to review the judgment of the Court. The Petitioner says that the fact that the Objector had applied to review the judgment of the court to allow the land to be subdivided into two equal portions show that he occupied the smaller portion of land and he should get a smaller portion now. She stated that the fencing the Objector carried out of the estate property was an attempt to defeat the judgment of this court and should be removed. She did not stop there; she imputed that the surveyor herein may have been influenced by the Administrative Officers especially the Chief Kirimi Mbiyiwe. She was of the view that the said subdivision should be discarded and another one done under the supervision of the Court.

## **The objector says otherwise**

[6] The Objector on the other hand submitted that the Petitioner has never intended the Objector to receive his share of the estate property, and that is why she has protracted this litigation. He also accused the Petitioner of frustrating the judgment of this court by placing the land in her name. He takes the view that the land is now surveyed and therefore, this matter should be brought to an end. In any case, he contended that the orders being sought in the current application were sought and granted in the application dated 18<sup>th</sup> May 2010. Therefore, the objector argued that this application is *res judicata*. He also submitted on the fence which he erected. He stated that the officers from lands visited the property and found that parties were cultivating the land in a haphazard manner without caring about straight lines. And the Petitioner was doing this in order to get as much land as possible. The District surveyor had to use straight lines in the subdivision as is required hence the survey in court now. He said that the Petitioner's house that they say was affected was deserted over 30 years ago. He asked the court to stop these machinations by the Petitioner by adopting the survey that was done herein.

## **DETERMINATION**

[7] I have considered all the affidavits filed in court as well as the submissions of the parties. I

have also considered all factors surrounding the case. I take the following view of the matter. As I said earlier, this case seems to be unending. It has seen applications after applications. Doubtless, during these circumlocutions by parties, much time has passed by since 13<sup>th</sup> March 2008. The materials before the court show that each party has over the years been trying to outdo the other. There are also accusations and counter accusations by the Parties. The Petitioner accused the Objector of chasing away the surveyor on two occasions and also erecting a fence in order to gain much of the land. She stated that her old house and plantation had even been affected and hived off to the portion allocated to the Objector by the survey in question. The Objector on the other hand accuses the Petitioner of never intending him to get his rightful share of the estate by taking him through protracted litigation, and then registering the land in her sole name. The latter issue on registration of the estate into the Petitioner's name was dealt with and is perfectly in order for it was a registration by transmission of the administrator. I will not revisit the issue. The Objector also accused the Petitioner of cultivating the land in a haphazard manner in order to gain as much ground as possible.

[8] The argument by the Petitioner that part of her old house has been affected seems to be quite attractive. But it could as well be one of the ways the parties have employed to obtain most possession of the land. I say this because, no evidence that shows that the house is occupied by the Petitioner. It may be true that the house is a deserted old house as it has been submitted by the Objector and I do not find any evidence to the contrary.

[9] Given all that has happened in this case, I come to point where, as Kasango J stated in her ruling dated 3<sup>rd</sup> May, 2011, that it is about time the administration of this estate was brought to a close. These parties have completely acted in a manner that is inconsistent to justice, yet each party claims to defend justice. The parties have deliberately distorted the positions that obtained as at the 13<sup>th</sup> March 2008 when the judgment was delivered. Their actions described above were deliberate and designed to enable a party to claim as much land as possible- a negation of the judgment of the court herein. It is also a reasonable inference from the conduct of parties that none intends this litigation to end; each is attempting to re-open the case and re-litigate it through the various applications I have seen. In all four, this is purely a case of *inparidelicto* where both parties are to blame. And as each is entitled to the estate, I believe the court should not ordinarily involve itself in resolving one side's claim over the other's; and I should be guided by the practice of law of leaving the parties where I find them, in accordance with the maxims; *in pari delicto melior est conditio possidentis* and *in pari delicto potior est conditio defendentis et possidentis*. And I should simply take the view that whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim. Accordingly, and I have stated this earlier, both are entitled to the estate; therefore, in the interest of justice, I should adopt the surveyor's report and leave each party to take what the surveyor has demarcated for them. I have considered the fact that each party engaged in acts that would enable them scoop as much land as possible or that would increase a large "sphere of influence" or occupation under the judgment of the court herein. Regrettably, this case is a classic example of acts of impunity and abuse of the process of the court by parties. I, therefore, leave these parties where I find them and order the following:

- (a) That the subdivision filed herein is adopted by the court and is the basis of distribution of the estate property herein namely LR. No. ABOTHUGUCHI/GITHONGO/815;**
- (b) Accordingly the distribution of the above estate property shall be as follows:-**
  - i. The petitioner shall get 0.36 Ha (0.889 acres), and**
  - (ii) The Objector shall get 0.35 Ha (0.864 acres).**

I note that the portions are not equal as was claimed by the Petitioner. The portion for the petitioner is bigger as per the sketch map. It is so ordered.

**Dated, Signed and Delivered in open court at Meru this 5<sup>th</sup> day of November, 2015**

**F. GIKONYO**

**JUDGE**

**In the presence of:-**

**Kaumbe for Mburugu for Petitioner/Applicant**

**Rimita for Objector/Respondent**

**F. GIKONYO**

**JUDGE**