



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.543 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE PHARIS MWANGI NGIGE [DECEASED]

GIBSON GACHERU MWANGIOBJECTOR/ APPLICANT

VERSUS

TABITHA WANGARI MWANGIPETITIONER/RESPONDENT

RULING

By an application dated 28/01/2013, the applicant prays that this court reviews and/or varies the orders contained on the judgment dated 18th May 2012 by ordering for a different mode of subdivision which will take into account the present occupational of the property. In the alternative, that the court reviews the specific order relating to the mode of subdivision of the land known as **Nyandarua/Kahuru/3343**, and consider adopting the mode proposed by the applicant.

The background to the matter as set out by the applicant is that, following the demise of PHARIS MWANGI NGIGE, letters of administration were taken by his two wives, PHYLLIS KABURA and TABITHA WANGARI who as the administrators of the estate, successfully oversaw the distribution of the deceased's estate. The parcel No.Nyahururu/Kahuru/ 104 measuring 64 acres was subdivided to create parcels Nyahururu/ Kahuru/ 3243 and 3244, each measuring 32 acres. Parcel No.3243 was allocated to the applicant's respondent's mother, while parcel 3244 was allocated to Tabitha Wangari Mwangi.

Phyllis Kabura subdivided parcels creating parcel 3345, 3346, 3347 and 3348. However applicant contends that the subdivision was undertaken by the late PHYLLIS KABURA and her three sons, excluding the applicant; and subsequently the parcels were registered in the names of Phyllis Kabura, Sam Karuga Mwangi, Wilson Macharia Mwangi, and Gathura Wa Mwangi respectively. The applicant was left out of the decision to subdivide and register the portions of land. His complaint is that, the subdivision would see the demolition of his house, which would occasion him great loss and damage - apparently the house straddles parcel No.3345 and 3346 and had been so even before the subdivision.

The judgment requires the applicant to transfer plot 3345 to his name, with that order, he states that, the court was misled, and made an error in concluding that he wants his brother's share of 8 acres in addition to his 8 acres.

Further that he should not have been condemned to pay the costs because this was a family matter.

The applicant states that there is another option, which would see the land divided equally, fairly, conveniently and would not occasion him to argue. The mode proposed by the applicant, it is argued, will minimize translocational costs and other related inconveniences and losses that would arise if the existing orders are executed.

In his supporting affidavit, the applicant does not dispute that the property was to be shared equally into four portions measuring 8 acres each. However the subdivision, which he says was carried out without involving him (despite being the eldest son in that house) did not consider that, he had built his house on his mother's land No.3345, and the house also occupied part of parcel 3346.

When his mother died, the family arrangement was that he takes over the portion registered in his mother's name -which he did, and he continued to occupy the house he'd build and cultivate the portion of land he'd always cultivated.

He proposes that the land be subdivided horizontally and not through the middle, which will enable all of them to use an adjacent road, instead of creating another road in the middle of the farm. He has engaged a surveyor who has prepared a proposal for the subdivision which would minimize the loss and damage.

In opposing the proposal and application for review, Gatura Wa Mwangi (3rd Respondent) on behalf of himself and the other two respondents deposes in the replying affidavit that the sub-division of parcel 3243 was carried out by his mother, with the knowledge of the entire family and applicant's allegations about exclusion are contested on grounds that he never filed any suit against his mother during her lifetime, to stop her from subdividing the parcel.

Whereas it is acknowledged that the applicant built his house on parcel 3345, which house straddles part of 3346, the respondents insist that this was deliberately done to enable him occupy and lay claim to the arable land or portion, leaving the respondents to occupy the lower portion which is marshy and uninhabitable. He explains that the subdivisions that led to the four parcels is such that each of the four brothers occupy a portion of the arable and a portion of the marshy land. This, they say is untenable, and unreasonable, and detrimental to the other beneficiaries.

The respondents deny that the applicant has been living in the house based on an earlier agreement with the family. The respondents further contend, that whatever loss the applicant will suffer as a result of the demolition of the house, is mitigated by the fact that since 1974, he has single handedly been using what initially formed parcel No.3343 to the exclusion of the other beneficiaries of the deceased's estate.

The application was disposed of by way of written submissions, while his counsel states that the applicant had no idea that his already established home would straddle part of parcel No.3346; and his action was not intended to disinherit his brothers of their portion of land -so the court's finding that he wanted the entire 8 acres belonging to his brother was erroneous.

The advantage of the applicant's mode of subdivision is reiterated, and is described as being fair and just.

The respondent's counsel submissions reiterates what the respondents have deposed to. Counsel points out that by a letter dated 26/06/2012, the applicant through his previous advocate indicated that he was ready and willing to abide by the agreement of up to 31st December 2012 to harvest his crops and his is simply a delaying tactic.

The loss that he laments about can be compensated by the fact of applicant previous exclusive use of the entire property 3343 since 1974.

I have read through the findings by this court dated

18/05/2012; and the observation made that it appeared as though the applicant wanted 16 acres. That observation was erroneous in light of what the applicant states **BUT** it does not change the consideration made about the nature of the other portions of land, the marshy versus the arable area. The issue of the applicant's house straddling the two portions had been considered and a finding made in the judgment. I think this application simply confirms to me what the

I applicant demonstrated in court, and what the other family members said - that he wants things done his way, or no way at all. That kind of arm twisting has no legal space, and the observation about his desire to have 16 acres is corrected - that alone does not and would not affect the judgment delivered on 18/05/2012.

The upshot is that the application has no merit and is dismissed with costs to respondents.

Obiter: I am not aware of any provision in law which requires that when litigation is between family members, then the court should not condemn the losing party to costs. This is not a public interest litigation and costs follow the event - I find no reason to depart from the earlier orders.

Delivered and dated this 11th day July, of 2014 at Nakuru.

H.A. OMONDI

JUDGE