



In re Estate of James Mwendia Njogu (Deceased) (Succession Cause 341 of 2012) [2025] KEHC 12399 (KLR) (3 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 341 OF 2012
EM MURIITHI, J
SEPTEMBER 3, 2025**

IN THE MATTER OF THE ESTATE OF JAMES MWENDIA NJOGU (DECEASED)

BETWEEN

PIUS GACHOKI MWENDIA APPLICANT

AND

PERMINUS GITHINJI MWENDIA RESPONDENT

RULING

1. By Summons dated 24/2/2025 pursuant to section 47 of the [Law of Succession Act](#) and Rule 73 of the Probate and Administration Rules, the Applicant seeks that:
 1. This Honourable Court do issue an order for the resurveying of land parcels No. Ngariama/ Ngiriambu/6129 and 6130 by the County Surveyor.
 2. The parties be at liberty to avail surveyors of their choice during the resurveying exercise.
 3. An order do issue for the Respondent to remove any part of the fence constructed on L.R NO. Ngariama/Ngiriambu/6129 and 6130.
 4. Costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Pius Gachoki Mwendia, the Applicant herein sworn on even date. He avers that both parties herein attended a mediation session where it was agreed inter alia that L.R No. Ngariama/Ngiriambu/6130 be resurveyed. The mediation settlement agreement was subsequently adopted as an order of the court and the exercise of resurvey undertaken, in his absence without notice. The family house, kitchen and metal gate were not curved out in a rectangular manner in order to give access road to the Respondent's portion, in blatant breach to the parties' consent.



3. The Applicant swore a supplementary affidavit on 22/4/2025 in support of his application.
4. The Respondent swore a replying affidavit on 14/4/2025 in opposition to the application. He avers that the Applicant was duly served with the date of resurvey, but he refused to attend. The Applicant, who is bent on delaying the finalization of this matter by raising issues that do not hold water, has not refunded him the resurvey fees as per the court order issued on 30/4/2024. In his view, the application lacks merit and it should be dismissed with costs.

Submissions

5. The Applicant urges that the resurvey exercise was undertaken in his absence and contrary to the orders of the Court. He urges that the exercise did not, therefore, yield the expected results, and cites *R v Sussex ex parte McCarthy* [1924] 1 KB 256 [1923] All ER Rep 233), that justice must be seen to be done.
6. The Respondent faults the Applicant for failing to prove that he was not served with the date of the scheduled survey visit, and prays for the dismissal of the application with costs.

Analysis and Determination

7. The issue for determination is whether the application is merited.
8. Whereas the Applicant disputes being notified or served with the date of the resurvey exercise, there is evidence on record to the contrary.
9. In his letter dated 2/3/2025, the assistant chief of Mbiri Sub-location emphatically maintained that he had taken the liberty to personally call the Applicant on the phone and inform him of the date for the scheduled resurvey exercise, but he deliberately failed to turn up.
10. The court thus finds that the Applicant is thus the author of his misfortune and he is precluded from attributing blame to the Respondent.
11. The court further finds that the Applicant is undeserving of the orders sought because his hands are unclean, since he neglected to meet his proportionate share of the survey fees as ordered by the court on 25/4/2024.
12. Where parties obtain orders for the survey of land or such task to be performed by professional surveyors and other technical persons as appropriate, the Court cannot encourage that the outcome of the exercise is only valid if it goes the way of a particular party. And where a party deliberately, with due notice, absents himself for participating or witnessing such activity, he cannot be heard to impugn the report emanating from such exercise merely on the ground that he was not present.
13. The Court has not heard any cogent reasons, other than the applicant's deliberate absention, for the Court to make the order for resurvey sought.

Orders

14. Accordingly, for the reasons set out above, this court finds that the Applicant's application dated 24/2/2025 is an abuse of the court process, and it is dismissed.
15. There shall be no order as to costs in this family succession cause.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF SEPTEMBER 2025.



EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Nyangati for the Applicant.

Ms. Ndirangu for the Respondent.

