



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT SUCCESSION NO. 215 OF 2017

IN THE MATTER OF THE ESTATE OF NGUNZE KIMENDE (DECEASED)

DAVID MBITHI NGUNZE.....PETITIONER/RESPONDENT

-VERSUS-

BENJAMIN NGUNZE.....1ST OBJECTOR

JACKSON KITAVI NGUNZE.....2ND OBJECTOR

MONICA NGII NGUNZE..... 3RD OBJECTOR

RULING

1. Before me is a Summons dated 05/10/2020 filed by the three objectors through counsel M/s O.N Makau & Company advocates.

2. The application was filed under section 47 of the Law of Succession Act (Cap. 160), and seeks the following orders –

1) That an access road to where the objectors have constructed their residences on KITETA/KIAMBWA/1157 be provided by the petitioner.

2) That the County Surveyor do move into the land and provide an access road for all proposed sub-divisions before confirming the grant.

3) That costs of this application be paid out from the estate.

3. The application has grounds on the face of the summons. The grounds are that the petitioner had purported to provide an access passage that passes through a swampy area which is impassable by either bicycle or vehicle, especially when it rains, while the applicants have a right of access through the deceased's estate as the same was yet to be fully administered.

4. The application was filed with a supporting affidavit sworn on 5th October 2020 by Benjamin Ngunze, one of the objectors/applicants, in which it was deposed that in 1996 the respondent/petitioner obtained letters of administration in which he assigned to himself the entire portion of the deceased's estate in exclusion to the deceased's 3rd wife and the objectors; that the applicants raised an objection claiming that the respondent had failed to make a full disclosure of material facts in obtaining the grant; and that the court on 7th November 2018 made orders and the court's Executive Officer visited the scene in dispute and compiled a report which highlighted the applicant's/objector's predicament, which report had been filed with the application as annex to the affidavit. The affidavit also annexed a copy of Surveyor's report dated 3rd October 2003 prepared by the District Surveyor – Makueni County.

5. In response to the application, the petitioner/respondent David Mbithi Ngunze filed a replying affidavit he swore on 15th October 2020, in which it was deposed that valid letters of administration had been confirmed vesting the estate in him and had been duly administered and all resultant parcels provided with sufficient and reasonable access roads, including

plots Nos. Kiteta/Kiambwa/1157 and 1158, and that on the basis of the court's ruling dated 03/04/2020, there was no valid basis for the current application as there were no pending proceedings herein after confirmation of grant.

6. It was deposed further, that in accordance with the court order dated 3/6/2010, all that was required was for the applicants to engage in good faith, the 3rd party owner of plot No. Kiteta/Kiambwa/390 on agreeable terms, for creation of an access road, as an alternative to the existing ones, the applicants had refused to develop as expected.

7. The administrator/petitioner also filed a further affidavit he swore on 24/3/2021 in which he annexed the ruling of this court delivered on 3rd April 2020, and averred that the estate herein had been wholly administered and that there were no further proceedings pending before this court.

8. The petitioner's counsel M/s Mwanja Mbithi filed written submissions, while the objector's counsel elected to rely on affidavits filed.

9. Having perused and considered the application of the objectors, and the response of the petitioner, as well as the written submissions of the petitioner's counsel, I find that the petitioner is just bent on creating unnecessary problems in this matter.

10. Indeed, even his counsel seems to be misleading the court when he filed written submissions contending that Ong'udi J. closed this matter in the ruling dated 03/04/2020. From the contents of paragraph 28 of the ruling, the Judge clearly stated that the administrator (petitioner) was abusing the court process. The court stated as follows –

“28. This is a case where the administrator has after confirmation of a grant created his own schedule of distribution which he wants the court to approve vide the application dated 30th August 2001. In other words he is asking this court to rubber stamp his said action. I find that to be an abuse of the court process and I decline to do so by disallowing the application dated 30th August 2001. Any party dissatisfied with the mode of distribution in the confirmed grant has a right to challenge it, as provided for under the Law of Succession Act”.

11. It appears that the administrator is still bent on abusing the court process by misleading the court. I want to state clearly that the petitioner/respondent should know that under the Law of Succession Act, even after confirmation of grant he can be removed as administrator at any time by this court, and that a confirmed grant can be revoked at any time.

12. The objectors herein being beneficiaries to the estate, I allow the application dated 5th October 2020 and grant prayers 1, and 2. The petitioner/respondent will ensure that the County Surveyor moves to the land to provide access to all proposed

subdivisions and report to this court within 90 days from today. In this regard, I will hereafter fix a mention date to confirm compliance.

13. The costs of the Surveyor will be paid from the estate. Parties will bear their costs of this application.

It is so ordered.

DATED SIGNED & DELIVERED, THIS 29TH DAY OF SEPTEMBER 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE