



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 83 OF 2013

IN THE MATTER OF THE ESATE OF MUATHE NZYIMI MULOI (DECEASED)

TITUS MAINGI MUATHE.....1ST APPLICANT

GIDEON NZYIMI MUATHE.....2ND APPLICANT

VERSUS

BENSON MULWA KILONZO.....1ST RESPONDENT

ANN KAVEMBA KAULA.....2ND RESPONDENT

ONESMUS KITENYE KAULA.....3RD RESPONDENT

RULING

1. The Ruling relates to the application dated 27.10.2020 pursuant to section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.
2. The Applicant sought the following orders
 - a) *Spent.*
 - b) ***THAT*** the respondents Benson Mulwa Kilonzo, Ann Kavembe Kaula and Onesmus Kitenye Kaula do attend court to show cause why they should not be imprisoned for contempt for flagrantly disobeying the order given by the honourable court on 23.4.2020 and issued on 7.5.2020.
 - c) ***THAT*** the costs of the application be provided for.
3. The grounds of the application were set forth in the affidavit deponed by Titus Maingi Muathe where he averred that the respondents were served with the order issued on 7.5.2020 and in disobedience of the said order, they jointly and severally trespassed on parcel number **OKIA/NZUUNI/ 1391** and are actively cultivating on the same. Photos of the cultivation were annexed to the affidavit and marked TMM5 and TMM6.
4. In response to the application was an affidavit deponed by Benson Mwonga Kilonzo where he admitted being served with the ruling but denied the acts complained of by the applicant. He invited the court to visit the locus in quo so that it may be proven whether or not the portion belonged to the applicants.
5. The application was canvassed vide oral submissions. It was submitted by counsel for the administrators that the respondents had prepared the land for planting and they ought to show cause why they should not be sent to jail. The respondents denied the same and urged the court to visit the locus in quo.
6. The issues for determination are whether the court ought to grant an order for locus in quo visit and whether the applicant has established grounds for this court to issue the Notice to Show Cause prayed for.

7. The purpose of visiting a locus in quo was observed in the case of **Badiru Kabalega v Sipiriano Mugangu Kampala HCCS No. 7 of 1987 [1992] II KALR 110** that was cited in the case of **Republic v National Environmental Tribunal & 4 others Ex parte China Road And Bridge Corporation**, Nairobi Miscellaneous Application 82 of 2016:-

“.....When the court deems it necessary to visit the locus-in-quo then both parties, their witnesses must be told to be there. When they are at the locus-in-quo, it is my view not a public meeting where public opinion is sought as it was in this case. It is a court sitting at the locus-in-quo. In fact the purpose of the locus-in-quo is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he/she must do so on oath. The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. Any observation by the trial magistrate must form part of the proceedings.”

8. Sir Udo Udoma CJ. (R.I.P) in **Mukasa v Uganda (1964) EA 698** at page 700 stated that:

“A view of a locus in-quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a Judge or Magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be substituted for evidence.”

9. In **re Estate of Daniel Kiboi Ndiang’ui (Deceased) [2016] eKLR** Justice Muriithi in allowing an application to visit the locus in quo stated that *“Moreover, a visit to locus in quo is consistent with the rule of evidence that allows the production of the thing itself as the best evidence thereof rather than the oral evidence of a thing. See section 63 (3) of the Evidence Act which provides as follows:*

“63 (3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.”

10. I have seen the photographs on record and considered the respondent’s affidavit and find that the respondent’s invitation for a visit to the suit land is merited and the same is granted. It is appropriate for this court to give the respondents the benefit of doubt and to allow the request for as the bible says *“the truth shall set you free”* and hence the need to pursue the said truth by visiting the locus in quo. The court shall visit the subject land, and conduct proceedings on a date to be fixed in consultation with the parties so as to see where the cultivation on the suit land had been done as alleged by the applicant.

11. In view of the above finding, I stay the resolution of the 2nd issue that was framed for resolution until the court has made a finding after its visit to the locus in quo. Parties are now directed to schedule a suitable date for the aforesaid purpose.

It is so ordered.

Dated and delivered at **Machakos** this 17th day of **December, 2020**.

D. K. Kemei

Judge