



REPUBLIC OF KENYA



**In re Estate of Nzuki Kilonzo Kiti (Deceased) (Succession Cause
182 of 2004) [2023] KEHC 20695 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 182 OF 2004**

**G MUTAI, J
JULY 14, 2023**

BETWEEN

HENRIETTE BENGER KILONZO PETITIONER

AND

CHRISTINE WANJIRU WOTHIRU OBJECTOR

AND

MITTERLEHNER HIRT ULRICH PROTESTOR

RULING

1. Vide Summons for Revocation of Grant dated November 10, 2022 the objectors/applicants sought the following orders: -
 1. That this application be certified urgent, service thereof be dispensed with and the court be pleased to grant orders 2, 3 and 4 ex-parte in the first instance;
 2. That pending the hearing and determination of this Application, an order be issued restraining the respondents from levying distress, attaching, breaking into, taking away and/or disposing of the applicant's goods, and also from evicting the applicant and/or interfering with the applicant's peaceful use and occupation of L.R No 3059/III/MN (org. Plot Kikambala – 1658);
 3. That in order to preserve the estate of the Deceased pending the hearing and determination of this Application, an order in rem be issued restraining any and all dealings or interference with the properties known as L.R No 3059/III/MN (Org. Plot Kikambala – 1658), Subdivision No. 2644 (Originating No. 1657/4) and Toyota KAG 846Y;



4. That pending the hearing and determination of this Application, the execution and/or operation of the grant of letters of administration intestate issued to Henriette Benger Kilonzo on March 31, 2022 and confirmed on October 18, 2022 be stayed;
 5. That pending the hearing and determination of the suit, an order be issued restraining the respondents from levying distress, attaching, breaking into, taking away or disposing of the applicant's goods, and also from evicting the applicant and/or interfering with the applicant's peaceful use and occupation of L.R No 3059/III/MN (Org. Plot Kikambala – 1658);
 6. That in order to preserve the estate of the Deceased pending the hearing and determination of the suit, an order in rem be issued restraining any and all dealings or interference with properties known as L.R No 3059/III/MN (Org. Plot Kikambala- 1658), Subdivision No. 2644 (Original No. 1657/4) and Toyota KAG 846Y;
 7. That the order made by this honourable court on March 31, 2022 and October 18, 2022 be set aside, and the grant of letters of administration intestate issued to Henriette Benger Kilonzo on 31 March 2022 as well as the certificate of confirmation of grant dated October 19, 2022 be revoked and/or annulled;
 8. That all transactions and entries made pursuant to the grant of letters of administration made on March 31, 2022 and the certificate of confirmation of grant dated 19 October 2022 be annulled and/or cancelled, and the properties known as L.R No 3059/III/MN (Org. Plot Kikambala – 1658), Subdivision No. 2644 (Original No. 1657/4) and Toyota KAG 846Y revert to the estate of the deceased;
 9. That a confirmed grant of letters of administration intestate be issued to the applicant herein;
 10. That the proposed interested parties/respondents be joined as interested parties to this suit;
 11. That this honourable court be pleased to give directions on filing of witness statements and documents within a limited time to pave way for the expeditious hearing and determination of this case; and
 12. That the costs of this application be provided for.
2. The objector/applicant filed an Objection and a Petition by way of Cross Application dated April 23, 2008. The said application was dismissed for wants of prosecution at the instance of the petitioner/respondent pursuant to the application dated 31 January 2022. Upon the dismissal of the objection application the Petitioner/Respondent was issued with the Grant of representation on March 31, 2022 which was confirmed on October 18, 2022 with the certificate of Confirmation of Grant being issued on October 19, 2022.
 3. The application is opposed. The petitioner/respondent filed a replying affidavit on November 23, 2022. In the said deposition she narrated the history of this matter. She blamed the objector/applicant for having failed to prosecute her previous objection. In the circumstances, she deposed, she was forced to instruct her advocates to apply to dismiss the objection application on January 28, 2022 in order to have the matter finalized after waiting “for over 14years and 8 months for the Objector to prosecute her claim”.



4. I have previously considered an application filed by the objector/applicant following the dismissal of this application for want of prosecution by Onyiego J. The said application was dated February 23, 2023. In paragraph 30 of my ruling I said that: -

“By allowing the application dated February 23, 2023 the objector/applicant now has a chance to prosecute her application dated November 10, 2022 on merits and to do so with diligence.”

5. In my said ruling I considered the history of this matter. In paragraph 26 thereof I stated that: -

“I would have dismissed the application as lacking merit. The delay in prosecution of the objection proceedings has been inordinate. I haven’t seen a reasonable explanation of the failure on the objector/applicant to prosecute her case. It might be that reasonable explanation exists. That has not been provided. Having said that I am persuaded to give the objector/applicant one more chance to ventilate her claim.”

The above remains my position in this matter.

6. In *Markson Karani Muchunku versus Joseph Ngari Gituku* [2021]eKLR Gitari J stated that: -

“The applicant seeks the exercise of discretion by this court to reinstate the appeal. It is trite that the court’s discretion must be exercised fairly and judiciously. It is a principle of natural justice that a party should be given an opportunity to be heard. Article 50 of the Constitution provides that, “every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body”

“It follows that every person ought not to be shut out from accessing the court or normally what is referred to as having his day in court. The right of a party to enjoy the fruits of judgment must be weighed against the right of a party to access court and to have his dispute heard and determined by a court or tribunal with competent jurisdiction. The emerging jurisprudence is that courts should lean on doing substantive justice by determining disputes on merits other than on procedural technicalities article 159(2) (d) of the Constitution provides that “Justice shall be administered without undue regard to procedural technicalities.”

This is buttressed by section 1A &1B of the Civil Procedure Act which provides for the overriding objectives of the Act which is to facilitate the just, expeditious proportionate and affordable resolution of civil disputes governed by the Act.”

I agree with her

7. The upshot of the foregoing is that this application will be allowed strictly in terms of prayer No 7 of the same. The rest of the prayers can be canvassed during the hearing of the objection dated April 23, 2008. The objector/applicant has been negligent and must be condemned to pay the Petitioner/ Respondent’s costs.

8. Article 159 of the *Constitution of Kenya* sets out the principles under which the Judiciary of Kenya exercises its authority. One of those principles is that justice must be done without undue delay. This court will therefore hear this matter on priority basis, given its age, so the same is concluded within the next court’s term.



Disposition

9. This Court issues the following orders: -

1. The orders made by this honourable Court on March 31, 2022 and October 18, 2022 are hereby set aside. Consequently, the letters of administration intestate issued to Henriette Bengler Kilonzo on March 31, 2022 as well as the certificate of Confirmation of grant dated October 19, 2022 are hereby revoked and or annulled;
2. The Petition by way of Cross Application dated April 23, 2008 is hereby reinstated;
3. I award the petitioner/respondent costs of the application;
4. Mention on July 26, 2023 for directions on how the Petition by way of Cross Application dated April 23, 2008 shall be heard and determined.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA THE 14TH DAY OF JULY 2023 VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Iddi hold brief for Mr. Odindiko for the Petitioner/Respondent;

Mr. Hamisi for the Objector/Applicant;

Ms. Mulongo holding brief for Mr. Gakuo for the 3rd Proposed Interested Party;

Mr. Arthur Ranyundo – Court Assistant.

