



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

P&A CAUSE NO. 151 OF 2006

IN THE MATTER OF THE ESTATE OF JONATHAN MUIA MUMO (DECEASED)

PIUS KATEETI MUIA.....ADMINISTRATOR/RESPONDENT

VERSUS

1. DAVID MUTUKU MUIA

2. PAULINE WAMBUA.....OBJECTORS/APPLICANTS

RULING

1. This ruling relates to two (2) applications dated 10/03/2020 and 11/03/2021 filed by the Objectors and Administrator respectively. I will analyze them chronologically.

Application dated 10/03/2020:-

2. The Objector/Applicants seek for the two prayers namely:- *that the court do order the Administrator to hand over the original Titles to L.R. Machakos/Matuu/1103, Machakos/Matuu/472, Machakos/Matuu/ 491 and Machakos/Matuu/656 to the court so that the same could be handed over to the surveyor for purposes of sub-division of the parcels of land; that an order do issue to the effect that the Deputy Registrar do sign all the relevant documents to effect sub-division and transmission of the properties.*

3. The application is supported by grounds on the face thereof and by the affidavit of David Mutuku Muia the 1st Objector herein sworn on even date. The Applicant's case is that the administrator has become a law unto himself as he has refused to administer the estate by distributing the estate as per the confirmed grant. It is the Applicant's case that the administrator has refused to hand over the titles to the properties for purposes of subdivision by the Surveyor. The Applicants contend that the beneficiaries should not be held at ransom yet they are entitled to obtain their shares under the estate and to move on with their lives. Finally, it is the suggestion by the Applicants that this court directs the Deputy Registrar to sign the relevant documents so as to effect the sub-division, transfer and transmission of the properties.

4. The Administrator/Respondent opposed the application vide a replying affidavit sworn on 13/05/2021 and a further replying affidavit sworn on 3/6/2021 wherein he averred *inter alia: that despite the delay due to Covid-19 he has managed to singlehandedly secure a letter of consent to sub-division of L.R. Machakos/Matuu/1103 as per annexed copies of the said letter and mutation forms; that he has not managed to trace the titles to the other properties and hence the delay is not deliberate on his part; that as regards plot No.1103 it is the surveyor to visit the property and subdivide it in accordance with the orders of this court; that the Machakos County Surveyor should visit land parcel Machakos/Matuu/1103 and implement the court's orders on the ground; that the mutation forms being relied upon by the 1st Objector/Applicant are not authentic as they are not signed by the purported surveyor; that the Administrator has so far managed to effect transfer of parcel Machakos/Matuu/786 in favour of one Dorothy Ndinda Kyove; that the objector collected the original copy of the confirmed grant and only released it to him eight months later and hence the delay cannot be attributed to him; that he has since secured the necessary documents and is ready to take the County Surveyor to the site to complete the subdivision of the properties; that the Objectors application is made in bad faith and should be dismissed with costs.*

5. Vide submissions dated 12/04/2021 learned counsel for the Objector/Applicants submitted that the Administrator/Respondent has deliberately delayed the final distribution of the estate and is not ready to administer the estate as directed by the court and hence the need for the prayers sought.

6. Vide submissions dated 3/6/2021 learned counsel for the administrator/respondent submitted that the objectors are not candid in their

accusations against the administrator for delaying the subdivision of the estate as they are the ones who refused to hand over the original copy of the confirmed grant for a period of over eight months. It was submitted that the administrator has since secured the consent and booked for a special board over the matter of subdivision of the properties such as parcel number Machakos/ Matuu/1103 and that what is remaining is for the County Surveyor to visit the property and subdivide it. It was contended that the purported mutation forms presented by the objector do not conform with the sketch map on the basis of which this court confirmed the grant and further the same are not signed by the purported surveyor. Finally, it was submitted that the objector's application dated 10/3/2020 should be dismissed with costs.

7. After analyzing the rival affidavits and the submissions presented, I find that it is not in dispute that the grant herein has since been confirmed and issued and that what is remaining is the final distribution of the assets of the deceased. It is also not in dispute that the parties herein have no problem with the rest of the properties save on parcel No. Machakos/Matuu/1103. It is also not in dispute that this court during the hearing of summons for confirmation of grant and protest ruled that the proposed schedule by the protestors regarding parcel No. Machakos/Matuu/1103 was the proper one and ordered that the said parcel be shared equally between the beneficiaries each getting 1.73 Ha. It is also not in dispute that an attempt at sub-division of the said property was made by the Objectors herein as can be seen by the copies of mutation forms annexed to the administrator's affidavit which confirm that indeed a surveyor had visited the said land and carried out measurements according to what is actually on the ground. It is also not in dispute that the administrator has already secured a letter of consent to sub-division of parcel No. Machakos/Matuu/1103 into eight (8) portions. It is also not in dispute that the administrator has rendered a plausible explanation regarding the delay on distribution brought about by the loss of title to some of the properties and the Covid-19 pandemic and that he has undertaken to fast-track the process once the surveyor visits the land. It is also not in dispute that the objector's counsel had earlier collected the original copy of the confirmed grant and remained with it for some considerable period before being ordered to release it to the administrator's advocates. It is also not in dispute that the draft mutation form prepared by a surveyor brought by the objectors has captured the portions of each beneficiary on the ground and which tallies with the aggregate size for each individual beneficiary at 1.73 Ha with the exception of the portion being given to one of the local churches. That being the position, I find the singular issue for determination is whether the Objector's application has merit.

8. The Objectors seek to have the Administrator compelled to hand over titles to the appointed surveyor who is tasked with the subdivision. They also seek for an order that the Deputy Registrar of this court do execute the necessary documents so as to complete the process of ownership of the properties by the beneficiaries. The explanation offered by the administrator vide his replying affidavit and a further replying affidavit regarding the delay appears to be plausible. It is noted that he has already secured the letter of consent to sub-division and is in agreement that the said sub-division will be done in accordance with the court's ruling dated 6/11/2019 and consent entered on 23/01/2020 whereby each beneficiary is expected to get a share of 1.73 Ha. I have also noted that there is no love lost between the administrator and the 1st Objector herein regarding the distribution of the estate as can be established by the various applications that have been filed akin to checkmating each other. The only solution is for this court to put its foot down and call them to order that they should put aside their differences and close ranks by co-operating together so that this old matter could be brought to a closure. The administrator has explained that the titles to some of the properties are missing and that he has already lodged a report with the police and had been issued with a police abstract thereon. The Administrator has also explained that he has since finalized the transfer of one of the properties to a beneficiary. Under those circumstances, I am unable to fault the administrator for delays in distribution. It is agreed that the parties have no problem with the other properties except **L.R. Machakos/Matuu/1103**. This is the property which has generated a lot of heat in that the Objectors have worries that the administrator might seek to acquire more land than what he is entitled to under the grant while on the other hand the administrator feels that the objectors are unnecessarily harassing and pushing him around. The faster the exercise is finalized the better for each of them as by then each will be having their separate portions and free to carry on with their lives. The title to the property in dispute is in the possession of the administrator who has already been given the original copy of the confirmed grant and that he should now proceed to finalize the task of distribution within a timeline to be directed by the court. However, in the event of default and in order to ensure the faster conclusion of the matter, an order that the Deputy Registrar of this court do sign all the relevant documents to effect the sub-division, transfer and transmission of the properties to beneficiaries would be appropriate in the circumstances.

9. In light of the foregoing observations, the Objectors application succeeds in terms of prayers No.3.

Administrator's application dated 11/03/2021

10. The Administrator/Applicant herein seeks for an order that the County Surveyor Machakos County do undertake the mutation and sub-division of land **Parcel No. Machakos/Matuu/1103** in accordance with this court's ruling dated 6/11/2019 and the consent orders dated 23/01/2020 and certificate of confirmation of grant issued thereupon taking into account the developments of each beneficiary entitled to the land and that the said surveyor do file his report within 45 days of the Court's order.

11. The application is supported by the affidavit of the Administrator/Applicant sworn on even date where he averred inter alia; *that he has since made remarkable progress in the distribution of the estate and has obtained a consent from the relevant Land Control Board; that the protestor has purportedly secured a mutation form from a purported surveyor whose professional qualifications is unknown; that the County Surveyor should be engaged in the matter and to carry out the sub-division of the property and which should take into account the developments of each beneficiary entitled to the land.*

12. The application is opposed. The 1st objector herein filed a replying affidavit sworn on 24/03/2021 who deponed inter alia: *that the grant was confirmed on the basis of the sketch map presented to court by the Objectors; that the Administrator has been dragging his feet in the matter of distribution of the properties; that the administrators advocate on 15/12/2020 allowed the objector to obtain mutation forms at his cost which he did; that the administrator is the one who had earlier introduced the private surveyor to the Objector; that the administrator's sketch map had been rejected by this court during the hearing of the summons for confirmation of grant because it did not reflect equal distribution; that the request for a new surveyor to visit the ground and conduct fresh survey is unacceptable as it will amount to reopening the issue of distribution afresh thereby akin to an appeal through the back door; that the administrator has grabbed portions belonging to other beneficiaries and sold them off and hence his intention for fresh survey so as to enable him get the areas he had grabbed and sold.*

13. The application was agreed to be disposed of by way of written submissions. The Objector's submissions are dated 12/04/2021. Learned counsel submitted that the grant had been confirmed on the basis of the sketch map by the Objectors and that the administrator's sketch map was rejected by the court as it did not favour equal distribution. It was submitted that the request for the County Surveyor to visit the ground

and make a report will amount to reopening the issue of distribution afresh and hence akin to an appeal or review through the back door. Finally, it was submitted that the exercise of distribution has been finalized and that the court is already functus officio thereon. Counsel urged the court to dismiss the application.

14. The administrator's submissions are dated 3/6/2021. It was submitted that the objector had collected the original copy of the confirmed grant and remained with it without handing it over to the administrator until much later and hence the delay. It was submitted that the administrator is ready and willing to continue with the task of subdivision as the consent has been secured as well as a special board booked. It is the contention of the administrator that the purported mutation forms and map are not signed by the purported surveyor brought by the objectors and hence the documents lack professional legitimacy and thus the need for the County Surveyor to undertake the task of subdivision. It was also contended that the administrator could not be forced to sign documents prepared by a purported surveyor whose credentials are doubtful. It was finally submitted that during the County Surveyor's visit, the developments of each beneficiary entitled to the land should be taken into consideration. Counsel urged the court to allow the application dated 11/3/2021 as prayed.

15. Upon analyzing the rival affidavits and submissions, I find that this court has confirmed the grant and that the estate of the deceased is to be distributed as proposed by the Objectors. The sketch map presented by the Objectors provided for equal distribution of the estate particularly on **Parcel No. Machakos/Matuu/1103** where each beneficiary is to get an aggregate of **1.73 Ha** after taking into account the developments of each beneficiary entitled thereto. It is also not in dispute that the administrator has already obtained the letter of consent to sub-division and transmission of the properties. It is also not in dispute that the administrator through his advocates had authorized the objectors to proceed and come up with mutation forms as part of fast-tracking the matter and which have been duly secured and which are in tandem with the previous sketch map that had been adopted by this court. It is also not in dispute that the issue of distribution of the estate has since been determined by this court in its ruling dated 6/11/2019 and consent dated 23/01/2020 and hence this court is functus officio thereon. That being the position, the only issue for determination is whether the administrator's application has merit.

16. The administrator's gravamen is that he does not trust the authenticity of the mutation forms presented by the objectors since the purported surveyor is unknown. The Administrator wants a new surveyor in the name of the County Surveyor Machakos County to visit the land in question and carry out sub-division of the same and to file a report to court. The administrator also in the same breath wants the new surveyor to carry out the survey in accordance with the orders of this court. From the outset, this court confirmed the grant in accordance with the sketch map provided by the objectors since the proposed distribution was fair as it vouched for equal distribution of Parcel No. Machakos/Matuu/1103 among the beneficiaries. Indeed, all the beneficiaries except the administrator signed the consent to the distribution and confirmation of grant and which this court accepted as the fair proposal vide its ruling dated 6/11/2019. It is the same sketch map which has generated the mutation forms. If that is the position, I do not see any reason for another survey to be conducted afresh as that will burden the estate and beneficiaries with unnecessary costs and expenses. In any case, the said sketch map and mutation forms have captured and taken into account the developments and that each of the beneficiaries including the administrator have an aggregate of 1.73 Ha. The sketch map shows that none of the beneficiaries have been interfered with as the portions they currently occupy have been left intact. A majority of the beneficiaries are happy with the manner in which the sketch map and mutation forms have been prepared by the surveyor instructed by the Objectors as they find the distribution to be fair while the administrator seems to be the only lone ranger out to scuttle the process of distribution of the estate. The administrator in his affidavit says that he wants the survey conducted in accordance with the court orders. If that is his position, then why is he opposed to the sketch map and mutation forms that have been prepared in accordance with the order of the court? The only irresistible conclusion one reaches is that the administrator might be having something up his sleeve. It is instructive to note that it is the administrator who had recommended the surveyor to the objectors initially and in fact the administrators through his counsel at the time during the proceedings hinted that the objectors, if impatient, could as well proceed and secure the mutation forms and that the administrator would furnish them with the letter of consent. It would appear to me that the administrator seeks to rubbish the mode of distribution of L.R. Machakos/Matuu/1103 as proposed by the objectors and adopted by the court so as to get another chance to agitate on the matter yet the same had been concluded by the court. I am inclined to agree with the objectors claim that the administrator wants another survey which favours him so that he can allocate himself the areas that he is alleged to have earlier grabbed. The issue of distribution has already been determined by this court and it thus became functus officio. The administrator's grouse that the mutation forms and sketch maps are neither signed nor stamped by the surveyor could still be addressed by the concerned surveyor by signing and stamping the same and thereafter the same can be lodged with the Land Registrar for processing. In the premises, I find there is no need to require another surveyor to go and carry out a fresh survey of parcel No. Machakos/Matuu/1103 as the same had already been done and sketch maps drawn and which were duly approved by the court as presented by the Objectors. The request for a further survey as sought by the administrator must be declined since allowing the same will amount to an appeal or review by the administrator through the back door.

17. In the upshot, the administrator's application dated 11/03/2021 lacks merit and is dismissed.

18. As both applications have been determined, I proceed to make the following orders:-

(1) The Objectors are directed to regularize the sketch maps and mutation forms by having them signed and stamped by John Mutua c/o Landscape Land Surveyors & Consultants the surveyor who had been commissioned to carry out the survey and if not completed, to complete the same and thereafter the same be presented to the Land Registrar Machakos County for further action.

(2) The Administrator is ordered to co-operate with the said surveyor and thereafter hand over the relevant land documents for processing by the Land Registrar Machakos.

(3) In the event of failure by the Administrator to co-operate, then the Deputy Registrar of this court is authorized to sign all the relevant documents to effect the transfer and transmission of the properties of the estate to the beneficiaries.

(4) As parties are family members, each party shall bear their own costs.

It is so ordered.

Dated and delivered at **Machakos** this **10th** day of **June, 2021**.

D. K. Kemei

Judge