



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**SUCC CAUSE NO. 215 OF 2017**

**(FORMERLY MACHAKOS HC SUCC. No. 105 of 1996)**

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

**DAVID MBITHI NGUNZE.....PETITIONER**

**VERSUS**

**BENJAMIN NGUNZE.....1<sup>ST</sup> OBJECTOR**

**JACKSON KITAVI NGUNZE.....2<sup>ND</sup> OBJECTOR**

**MONICAH NGII NGUNZE (deceased).....3<sup>RD</sup> OBJECTOR**

**AND**

**ANDROCLES KIILU MBITHI.....1<sup>ST</sup> INTERESTED PARTY**

**JOSEPHINE MWIKALI NGUNZE.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The application for determination is dated 30/08/2001 and was brought under Rule 49 of the Probate & Administration Rules and section 82 & 83 of the Law of Succession Act (LSA) Cap 160). It seeks;

a) That the estate of the deceased be distributed according to the following scheme;

- Kiteta/Kiambwa/382 measuring 3.4 HA be subdivided and distributed as follows;

i. Androcles Kiilu Mbithi and Jeremiah Kitone Mbithi- 1.7 HA jointly being the purchasers of the share of Daniel Peter Ngunze.

ii. David Mbithi Ngunze-1.7 HA to hold pending further sub-divisions into 5 portions of 0.33 HA to hold pending further sub-division into 5 portions of 0.33 HA each for himself and Benjamin Nzuki Ngunze, Jackson Kivuitu Ngunze, Monicah Ngii Kieti and David Mbithi Ngunze in trust for MKN (minor).

- Kiteta/Kiambwa/477 measuring 4.0HA be sub-divided and distributed as follows;

i. Josephine Mwikali Ngunze1.69HA absolutely.

ii. David Ngunze Mbithi –0.22 HA absolutely

iii. David Mbithi Ngunze – 2.09 HAto hold for further sub-division and transfer as follows;

?0.45 HA-Androcles Kiilu Mbithi and Jeremiah Kitone Mbithi- being the purchasers of the share of Daniel Peter Ngunze.

?0.45 HA- Josephine Mwikali Ngunze absolutely.

0.70 HA-Kawasya Mbuvi-absolutely as purchaser from deceased.

0.45 HA- David Mbithi Ngunze in trust for himself and Benjamin Nzuki Ngunze, Jackson Kivuitu Ngunze, Monicah Ngui Kieti and MKN (minor to hold through David Mbithi Ngunze)

N.B; remainder of 0.04 HA is an existing road reserve passing through the plot.

b) That the sub-division and transfers of the deceased's two plots aforesaid; Kiteta/Kiambwa/382 and Kiteta/Kiambwa/477 already carried out in the cause of the execution of the applicant's powers and duties as administrator and as set out in more detail in the supporting affidavit hereto annexed be approved and carried into effect to complete the administration of the deceased's estate.

c) That costs of the administration of the deceased's estate be provided for by the estate.

2. The application is supported by the grounds on the face of it and the petitioner's supporting affidavit sworn on the same day. The principal ground is that the certificate of confirmation of grant issued on 06/06/1997 lacked a schedule of distribution due to an oversight by the petitioner. It was deposed that due to the oversight, the administrator was bound to meet difficulties in effecting sub-divisions, transfers and registrations of the various portions to respective beneficiaries. He exhibited a grant and certificate of confirmation as **DMN-1a & b** respectively.

3. Further, he deposed that the deceased had distributed his land amongst his 3 wives vide a written document dated 05/12/1981 and subsequently sold a portion measuring 0.70 HA out of plot No. 477 to one Kawasya Mbuvi. He exhibited **DMN-2a & b** to support his deposition. Further, he deposed that Daniel Peter Ngunze, representing the 2<sup>nd</sup> household, sold his share to Androcles Kiilu Mbithi and Jeremiah Kitone Mbithi. He exhibited an agreement dated 19/10/1997 as **DMN-3a & b**.

4. Further, he exhibited title deeds marked **DMN-4a, b,c & d** to show the resultant sub-divisions and transfers.

5. The application was supported by the 3<sup>rd</sup> wife, Josephine Mwikali Ngunze, through an affidavit sworn on 08/04/2002. She deposed that the sub-divisions done by the petitioner were in accordance with the way the deceased had shared out his land in his lifetime on 05/12/1981.

6. She deposed that the petitioner had been made the family head by the deceased. According to her, the objectors are just disgruntled elements within the 1<sup>st</sup> household seemingly out of disrespect, jealousy or petty hatred because the petitioner's sons bought the share of the 2<sup>nd</sup> household, secondly, because the petitioner was the trustee of minor M's share and thirdly, because the deceased gifted the petitioner a portion of land.

7. Further, she deposed that the objectors have no justification to oppose what the holder of a confirmed grant has done and what the other two households have agreed as being in conformity with the deceased's wishes.

8. The application was also supported by Daniel Peter Ngunze through his affidavit sworn on 08/04/2002. He deposed that the sub-divisions carried out confirmed the wishes of the deceased who had shared out his lands at a family meeting held on 05/12/1981. He deposed that he authored exhibit **DMN-2** under the directions of the deceased who signed and countersigned all alterations.

9. The application was opposed through the joint affidavit of the objectors sworn on 08/02/2002. They deposed that the petitioner had filed the cause without the consent of the other family members. They also depose that the estate should have been administered by the 3<sup>rd</sup> wife who was still alive. They deposed that after obtaining the grant, the petitioner proceeded to sub-divide the estate properties according to his wishes and being dissatisfied with the manner of sub-division, they lodged a complaint at the District land office in Machakos on 24/11/1997. The letter of complaint is exhibited and marked **BNN-1**.

10. They deposed that on 14/03/2000, they filed a land dispute case at the Makueni lands office as well as a caution to stop further dealings in the land. The family members were summoned to appear at the Makueni lands office in September 2000 and on 21/11/2000, the District land registrar and District surveyor visited the site to confirm the disputed estate. After finalization of the case, the Government surveyor rectified the sub-divisions which had been made by the petitioner's private surveyor. The new mode of distribution as per the proposal of the Government surveyor is indicated in their affidavit. They exhibited a ruling of the Makueni Lands Office as **BNN-2**.

11. Further, they deposed that the sons of Mumbua Ngunze (1<sup>st</sup> wife) had agreed on how her share would be divided vide a letter dated 08/11/2000 which they exhibited as **BNN-3**.

12. Directions had been given for the application to be canvassed by way of viva voce evidence but when it came up for hearing on 07/10/2019, Mr. Mbithi for the petitioner informed court that he was not in a position to proceed owing to some stomach upset. He submitted that the affidavits, documents, witness statements and submissions would be sufficient to dispose off the matter. The proposal was accepted by Ms. Kyalo for the objector and as such, the application was canvassed by way of written submissions.

#### **The Applicant's & Interested parties' submissions**

13. They submit that the Applicant is the duly appointed administrator of the deceased's estate. That all he has done in distributing the estate is in line with the wishes of the deceased and within the Applicant's powers as an administrator. They contend that the grant was confirmed by consent of the chosen representatives of the three households. Further that the said grant has never been challenged.

14. It is their submission that the confirmed grant has never been challenged. They ask the court to approve the proposed distribution to take

care of the interests of the beneficiaries and the purchasers to whom the properties have been transferred.

They argue that the objector's complaints only relate to parcels Nos. Kiteta/Kiambwa/1157 and 1158 which were given to the 1<sup>st</sup> and 2<sup>nd</sup> households. The latter was sold to 3<sup>rd</sup> parties who have titles that are protected. It's their contention that the two parcels are of equal size and they were ready to have measurements taken.

15. On property No. Kiteta/Kiambwa/398 they contend that the same does not form part of the deceased's estate. On the issue of lack of access roads, they have submitted that the same have been provided for. That in the event of more space being required the beneficiaries can individually do that, otherwise the subdivision plans and maps are very clear.

16. They also submit that there is no contestation about the *gift inter vivos* to the Applicant which is plot No.1154 (0.22HA). They finally submit that the grant is legally valid and virtually uncontested and as such there is no illegality or irregularity whatsoever about the administrators' actions and all that the Applicant requires is the court's approval to complete the exercise. They urge the court to disregard all the proceedings, directions and orders of the District land registrar and surveyor exhibited herein are illegal, irregular, unprocedural and without legal basis and should be struck out, expunged, rejected and ignored for being of no legal effect.

### **Objectors' submissions**

17. They have denied the existence of the agreements alleged to have been made by the deceased. They submit that there was no *gift inter vivos* to the Applicant.

18. It is their contention that the Applicant's mandate as an administrator was not sanctioned by all the beneficiaries and that the consent to act as such was only signed by three people-one from each household. They submit that section 76 of the Law of Succession Act LSA guides the court when deciding on whether or not to revoke a grant. They cite the case of **Anil Bahari Ghosh –vs- SMT. Latika Bla Dassi & Others [1955] AIR 566 (1955) SCR (2) 270** where the Supreme Court of India interpreted their equivalent of our section 76 and held;

*“The expression ‘defective in substance’ ...means that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings”*

19. With regard to the alleged distribution according to the deceased's wishes, they wonder whether the Applicant distributed the estate as an administrator or as an executor of the deceased's Will. They however acknowledge that the deceased sold a piece of land to Kawasya Mbuvi who later sold it to Margaret Mutuse, wife of Paul Mutuse.

20. On the mode of distribution, they submit that the deceased was polygamous and as such, this court should be guided by section 40 of the LSA. They submit that the properties should first be divided equally among the three houses and thereafter, divide the shares among the units in each house.

21. Having considered the application, the replying affidavit, the rival submissions and the entire record, I find the only issue falling for determination to be whether the application is competently before this court.

### **Competence of the application**

22. It is clear from the record and indeed there is no dispute that a grant of letters of administration was issued to the Applicant on 24/09/1996 and confirmed on 06/06/1997. Whereas form P & A 5 indicated 12 beneficiaries, the consent for confirmation of grant dated 23/05/1997 was signed by four beneficiaries and was worded as follows;

*“We, the undersigned do hereby give consent that Mr. David Mbithi Ngunze ID No. [...] be issued with letters of Administration for the above two pieces of land comprising 4.0 HA and 3.4 acres respectively. He will thereafter sub divide the land in accordance with the wishes of our father late Mr. Ngunze Kimende who died on 13<sup>th</sup> May 1994.*

*Daniel P. Ngunze ID No. [...] signed*

*Richard Maingi Ngunze ID No. [...] signed*

*Bernard Kioko Ngunze ID No. [...] signed*

*Johnny Kieti Ngunze ID No. [...] signed”*

23. The schedule in the certificate of confirmation of grant dated 23<sup>rd</sup> May, 1997 shows that the only two assets of the estate *to wit* Kiteta/Kiambwa/382 and 477 were to be registered in the name of David Mbithi Ngunze, the Applicant herein. There is no mention of him holding the same in trust for anybody.

24. Section **71(1)** of the LSA provides as follows;

*(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*

(2) .....

*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.*

25. The grant in possession of the Applicant was issued and confirmed by a court of competent and concurrent jurisdiction as this one and its import in light of the above *proviso* is that the court was satisfied as to the identities and shares of all persons beneficially entitled. Whatever the Applicant is seeking to do now is what he should have done before the confirmation of the grant. He cannot come here and pretend that the certificate of confirmation of grant issued on 6<sup>th</sup> June 1997 lacked a schedule of distribution due to an oversight on the Applicant's part. The court could not have confirmed the grant without being satisfied with the mode of distribution. This mode has been clearly set out in the said certificate of confirmation of grant.

26. As for the dissatisfaction and resistance by the objectors the law did not leave them without a remedy after the alleged unilateral decision of the Applicant and four others. Contrary to the Applicant's submissions, there is an application for revocation dated 08/10/2007 and filed on the same day, after which counsel for the parties kept on telling the court endless times that a settlement had been reached and/or was about to be reached but none was ever recorded. Be it as it may, the current position is that the confirmed grant is valid and is not under any challenge. The objectors' submissions about revocation of grant are therefore misplaced as that is not the application before this court. To put the record straight the application before me is neither an application for revocation or rectification of grant.

27. The Applicant has been chest thumping that there is nothing illegal or irregular about his actions as he has the backing of sections 82 and 83 of the LSA. Indeed, nothing was illegal or irregular upto the point where he transferred the two assets to himself. The further sub divisions however are contrary to the confirmed grant and it is a pity that all the dealings in the estate have happened under the watch of the parties' legal representatives who are advocates of the High Court of Kenya. Nothing in sections 82 and 83 of the LSA empowers an administrator to embark on any distribution that is not indicated in the schedule at the time of confirmation of grant.

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 30<sup>th</sup> August, 2001. In other words, he is asking this court to rubber stamp his said actions. I find that to be an abuse of the court process and I decline to do so by disallowing the application dated 30<sup>th</sup> 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.

29. I therefore dismiss the application dated 30<sup>th</sup> August 2001 with costs.

Orders accordingly.

**Delivered, signed & dated this 3<sup>rd</sup> day of April, 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**