



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 362 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE BETH KATHIKWA MAKAU-DECEASED

DAVID MBINDYO MAKAU.....1ST ADMINISTRATOR

FERDINAD NZIOKA MAKAU.....2ND ADMINISTRATOR/APPLICANT

JAMES AARON MAKAU.....4TH ADMINISTRATOR

-VERSUS-

MARTHA GIDEON MAKAU.....3RD ADMINSTRATOR/RESPONDENT

RULING

1. By Summons dated 23rd January, 2019, the 2nd Administrator/Applicant herein, **Ferdinand Nzioka Makau**, seeks the following orders:

1. **THAT** the Summons herein be deemed as urgent and service thereof be dispensed with in the first instance.
2. **THAT** this Honourable Court be pleased to issue an order compelling the 3rd Administrator/Respondent to grant the 2nd Administrator/Applicant access to the parcel of land allocated to him by removing the gate, chains and locks blocking the known road pending the hearing and determination of the Summons herein.
3. **THAT** this Honourable court be pleased to make an order directing the 3rd Administrator/Respondent to forthwith execute mutation, transfer forms and all other relevant documents in execution of the certificate of confirmation of grant issued by this Honourable court on 9/11/2012 who has refused to do so.
4. **THAT** in the alternative and/or default of prayer 3 herein above, this Honourable court be pleased to make an order that the signature of the 3rd Administrator/Respondent be dispensed with and that the Hon. Deputy Registrar of this Court do execute mutation, transfer forms and all other relevant documents in execution of the certificate of confirmation of grant issued by this Honourable court on 9/11/2012 in place of Martha Gideon Makau, the 3rd administrator/respondent herein who has refused to do so.
5. **THAT** the costs of this application be paid by the 3rd administrator/respondent.

2. According to the Applicant, the deceased, **Kathikwa Makau**, left behind parcel of land number Wamunyu/Kambiti/95 as the sole property to be shared among the parties herein as per the certificate of confirmation of grant. It was his averment that they obtained a letter of consent to subdivide the said parcel of land into four portions as per the grant and that they have diligently administered the estate as required by the law. However, the 3rd administrator/respondent is not cooperative and is hindering the conclusion thereof by refusing to execute mutation, transfer forms and all other relevant documents in execution of the certificate of confirmation of grant issued by this court on 9th November, 2012.

3. The applicant therefore lamented that he cannot access his allocated parcel of land since the access road thereto has been blocked by the 3rd administrator/respondent without any justifiable cause rendering his allocated parcel landlocked notwithstanding the fact that the access thereto was defined and has been in use since 1971.

4. According to the applicant, they all have been harmoniously utilising their respective allocated parcels of land as granted during the lifetime of the deceased since time immemorial and on the part of the 1st and 4th administrators they have granted access road even to the 3rd administrator/respondent herself, who however wants to selfishly enjoy the access granted by the others yet declining to grant the applicant access despite many efforts made by the family towards settlement.

5. It was averred that the 3rd administrator has vowed to stay put and have the access road closed and has subjected him to loss and damage including profiting from his allocated parcel of land where he has been grazing his cattle for 4 decades and may continue to do so unless compelled by an order of this court.

6. The applicant's position was supported by the 4th administrator.

7. In response to the application, the 3rd administrator/respondent, a daughter in law to the deceased, averred that during her lifetime the deceased shared the said parcel of land amongst her four sons who thereafter occupied and developed the same on their respective portions. However, the said subdivisions were never registered and no access road were created. According to her, her late husband created a footpath next to their compound to access the other part of the portion of their land in 1980's and since the said portion borders the applicant's the applicant also begun using the same footpath to access his portion with the permission of her late husband. After the death of her husband in 2006, she approached the applicant and informed him that due to security reasons caused by a footpath near her compound, the same should be shifted to the other side of the portion allocated to her husband, a proposal which the applicant agreed with and she proceeded to block the said footpath and created another. It was her averment that the said footpath has been in use from the year 2006 to date and the same has never been blocked as alleged and the applicant has been using the same to access his portion.

8. According to the respondent, following the confirmation of grant, a consent to subdivide the land was obtained, but when the surveyor went to ascertain the acreage occupied by each beneficiary, the applicant insisted on having the blocked footpath created as an access road. The surveyor however advised that the size of the said footpath was not sufficient for an access road and proposed to have a broader access road whose effect would be to have her gate wall, pit latrine and an electricity pole demolished. When the respondent raised the objection with the County Surveyor on the proposed access road, he advised that the access road may be created on any other part of her portion as long as her buildings and developments are not demolished.

9. The respondent averred that she declined to execute the mutation forms simply because the proposed access road once created, will amount to destruction of her developments thereon. She was however willing and ready to provide an access road through the other side of her portion of land to safeguard her developments. She therefore urged the court to direct that an access road be created as long as none of her developments are demolished.

Determination

10. I have considered the issues raised in this application. With due respect to the parties herein, they are simply fighting over egos. There is no doubt that there is a need to subdivide the suit parcel of land amongst the beneficiaries as per the certificate of confirmation of grant. The only point of contention are the access roads. It is trite that whenever subdivision of parcels of lands are done, there ought to be access roads thereto. My position is also based on the decision of **Mwera, J** (as he then was) in **Bernard Onyango Okoth vs. Dorina Nyadewo Mosi & Another Kisumu HCCC NO. 133 of 2005** where he held that:

“In law no party should own a property he cannot access. He cannot enjoy it and it loses value. Or if one party does not accord the other a right of way when the two properties are adjacent then it is proper that orders issue that the two create an access road. Such roads not only facilitate plot owners to enjoy their properties but also provide the public with recognised passages the members have to use without trespassing on other *shambas*.”

11. The only issue here is where such access roads ought to be created. That decision is purely that of the surveyor. Of course in so doing the surveyor must take caution to ensure that the creation of the access roads does not unduly inconvenienced the parties or lead to loss and damage to their properties. I am not totally convinced that in this case the access roads cannot be created without damaging the 3rd administrator's developments. It can be done by the parties indulging each other and accommodating each other since the said access road is for their mutual benefits as the land was the deceased's land who magnanimously bequeathed it to them. The practice of beneficiaries treating their bequests as God given rights is a product of sheer raw greed which should be discouraged.

12. I therefore direct the County Surveyor to proceed to the ground and subdivide the suit parcel of land and demarcate their boundaries while creating access roads to each of them without unnecessary damage to properties or developments and in a manner that is convenient to the parties as much as possible. The costs of the survey shall be borne by all the parties equally.

13. There will be no order as to the costs of this application. It is so ordered.

Read, signed and delivered in open Court at Machakos this 3rd day of June, 2019.

G V ODUNGA

JUDGE

In the absence of the parties.

CA Geoffrey