

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 333 OF 2008

IN THE MATTER OF THE ESTATE OF JAMES FLAVIAN CHEGE MUNENE (DECEASED)

RULING

1. The matter for determination is a summons dated 15th February 2016 which seeks, in the main, orders that would facilitate access by the applicant to the main road from his residence. In his affidavit, the applicant avers that he had always accessed the main road through the property known as LR No. 8928 which belongs to the ACK Church. He states that that access has been blocked and he is therefore unable to access his premises. He states that the first respondent accesses the property, LR No. 4988/8083A and another portion referred to in Consent No. 6 in the letter dated 9th June 2015 and passes through the applicant's LR No. 4988/19. The first respondent is accused of fencing off more of LR No. 4988/19 than had been agreed to without consulting the applicant and without the benefit of survey work done thereon, which has had the effect of completely blocking his access to the main road. He states that he had agreed to settle the matter through the consent letter dated 9th June 2015 and he had anticipated that he would also access his residence through the road used by the first respondent. He has attached drawings which show the blocked pathway and correspondence relevant to the matter at hand.

2. The respondent executors swore two joint affidavits in reply to the application. They assert that the estate was distributed as per the will of the deceased, and the parties had entered into a consent to address certain aspects of the matter. They plead that the applicant's side of the property was always accessed through the church side, but the church had in its wisdom chosen to block that access for security reasons, and they opine that there could be a dispute between the two. Their position is that the matter is really a dispute which should be limited to the two, the applicant and the church.

3. The parties were directed to file written submissions to dispose of the application. The parties highlighted their submissions on 19th September 2016.

4. The gist of the application is access by the applicant to the main road. It is common ground that the access to his residence had always been through the church. The church has blocked the same, allegedly, for security grounds. I note that the grant herein was confirmed. So the scheme of distribution of the estate has been laid bare. Each party has its own portion as per the said distribution. It would appear that the applicant is moving the court for a revision of the distribution so as to align his need for access to the main road to the changed circumstances presented by the action of the church.

5. As the estate has already been distributed and each party taken possession, the court cannot impose its decision on them regarding creation of an access road. That is a private matter for the parties to agree on. Alternatively, the applicant has the option of acquiring access from the first respondent, or even the church, by way of purchase. Alternatively, should the first respondent and the church be recalcitrant, he may have to move the court by separate proceeds for orders to compel either of the two to make way for him. That is not a matter for the probate court; it is a matter that should be placed before the Environment and Land Court. The probate court is *functus officio* so far as matters touching on distribution are concerned, unless it is being asked by the executors to review its earlier orders thereon.

6. In view of what I have stated above, I will conclude that I do not find any merit in the application dated 15th February 2016. I shall accordingly dismiss the same with costs to the respondents.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF FEBRUARY, 2017 .

W. MUSYOKA

JUDGE