



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE AND ADMINISTRATION NO. 21 OF 2006

IN THE MATTER OF THE ESTATE OF WANZALA MUCHONGO.....DECEASED

HENRY NEKESA WANZALA.....RESPONDENT/PETITIONER

VERSUS

RODGERS OMBALE MAGINA.....APPLICANT/PROTESTOR

CHURCH COMMISSIONERS OF KENYA....INTERESTED PARTY

RULING

(Chamber Summons application dated 3rd February, 2016)

1. The Applicant/Protestor Rodgers Ombale Magina has brought the application dated 3rd February, 2016 under Section 76 of the Law of Succession Act, Chapter 160 and prays for orders as follows:

“(a) THAT the County Land Surveyor do move to land parcel number BUKHAYO/EBUSIBWABO/290 and carry out a proper land survey to ascertain the following:-

(i) The size of the shares of land for each of the 4 sons of the deceased comprising land on the lower side normally used for agricultural purposes and as already demarcated on ground.

(ii) The size of share of land meant to be given to the Polytechnic.

(iii) The size of the share of land meant to be given to the ACK Church as a whole.

(iv) In respect of the share of land meant for the ACK Church, the Surveyor to measure and specify the size of land that was originally given to the Church by the deceased himself and then measure the size of land that the ACK Church bought from HENRY EGESA.

(v) The size of the remaining portion of land that is disputed.

(vi) The County Surveyor shall draw the relevant mutation form and make provision for proper planning and access to the undisputed shares of land comprising the agricultural portions, the Polytechnic’s plot and the ACK Church plot.

(viii) THAT the Surveyor do file his report with an annexed proposed Mutation Form in Court within 60 days.

(viii) THAT the costs of the County Land Surveyor shall be paid by the protestor who may accept any contribution offered by any other willing beneficiary.

(b) THAT each beneficiary be at liberty to appoint a private surveyor of his choice at his cost to oversee the exercise.

(c) THAT costs of this application be in the cause.”

2. The application is supported by grounds on its face as follows:

“1. THAT the initial application for confirmation was not based on accurate distribution records and not all those entitled to shares were accommodated.

2. THAT the orders sought are necessary to enable the matter to move forward and narrow down the disputed area.

3. THAT there shall be no prejudice to the respondents if the application is allowed.”

3. The application is also supported by an affidavit sworn on 2nd February, 2016 by the Applicant.

4. The Petitioner, Henry Egesa Wanzala is the 1st Respondent and Interested Party, the Church Commissioners of Kenya ACK Nasira is the 2nd Respondent.

5. The Applicant’s case is that his application is meant to narrow down the issues and facilitate the process of confirmation that is based on accurate records of measurement of shares in respect of L.R. No. BUKHAYO/EBUSIBWABO/290 an asset in the estate of the deceased Wanzala Muchongo.

6. In an affidavit sworn on 4th April, 2016, Patrick Wabwire Kasiba, the Chairman of Nasira A.C.K. Church averred that the Church was entitled to one acre and one plot measuring 50ft by 100ft from the estate of the deceased. However, when the application came up for hearing on 31st January, 2017 Mr. Balongo who represents the Church indicated that the Church was willing to take $\frac{3}{4}$ of an acre. He also indicated that the Church was not opposed to the Applicant’s application.

7. The Petitioner opposed the application through grounds of opposition dated 2nd November, 2016. His case is that the deceased had demarcated and distributed the land in question prior to his demise and the Applicant’s application is only meant to delay the process of confirmation of the grant of letters of administration.

8. It is his case that the land which measures 26.25 acres has been distributed as follows:-

- (a) Henry Nekesa Wanzala - 6 acres
- (b) Gilbert Wanzala - 6 acres
- (c) Morris Wanzala - 6 acres
- (d) Rodgers Magina - 6 acres
- (e) ACK Church - $\frac{3}{4}$ acres
- (f) Primary School - $1\frac{1}{2}$ acres
- (g) Fredrick Were - $\frac{1}{2}$ acre

9. It is the petitioner’s position that the application is brought in bad faith and the same should be dismissed.

10. Looking at the shares as indicated by the Petitioner, it shows that the same (26.75) exceeds the available acreage (26.25) by half an acre. This alone shows that the Applicant is right that the actual acreage on the ground of each beneficiary be ascertained before the matter can proceed for confirmation.

11. It has not been demonstrated by the Petitioner that the orders the Applicant seeks will prejudice any of the beneficiaries. From the face of it these are orders that are meant to clearly indicate what each beneficiary owns on the ground.

12. In the circumstances of this case I allow the application in the following terms:

- (a) The County Land Surveyor, Busia to visit L.R. No. BUKHAYO/EBUSIBWABO/290 in the presence of all the beneficiaries or their representatives and take measurements of the portions of land occupied by each of the seven beneficiaries identified by the Petitioner in his grounds of opposition (see paragraph 8 of this ruling). The Surveyor will also note any roads of access on the land. The Surveyor to file his report within 60 days from the date of this order;
- (b) The Applicant Rodgers Ombale Magina will meet the costs of the Surveyor; and
- (c) Each party shall meet own costs of this application.

Dated, signed and delivered at Busia this 9th day of March, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT