



**REPUBLIC OF KENYA**

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

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 372 OF 2012**

**IN THE MATTER OF THE ESTATE OF THE LATE EDWARD MUTUKU MWANDO alias MUTUKU MWANDO - (DECEASED)**

**PATRICK MUASYA MUTUKU**

**BONIFACE MUTALU MUTUKU.....ADMINISTRATORS/APPLICANTS**

**VERSUS**

**DAVID MUSEMBI MUTUA.....RESPONDENT/INTERMEDDLER**

**RULING**

1. By Summons dated 11<sup>th</sup> June, 2020, the Applicants herein seek the following orders:

1. **THAT** this Application be certified as urgent and the same be heard ex-parte in the first instance.
2. **THAT** the Respondent / intermeddler, David Musembi Mutua, be restrained from intermeddling and / or interfering with the land parcel MWALA / MYANYANI / 784, which is part of the deceased's estate hereof.
3. **THAT** the cost of this Application be borne by the Respondent / Intermeddler.

2. The application was supported by an affidavit sworn by **Patrick Muasya Mutuku**, the 1<sup>st</sup> Petitioner/Applicant herein one of the administrators to whom Letters of Administration Intestate and the Certificate of Confirmation thereon was issued.

3. According to the deponent, the deceased was the registered proprietor of Mwala/Myanyani/784 which forms part of his estate. However, the Respondent has unlawfully entered into and taken possession of part of the said property yet he is neither a son of the deceased nor a beneficiary of the estate hereof. The deponent averred that since he never sold to the Respondent the said parcel of land or any part thereof, he has no right whatsoever to intermeddle in the estate hereof.

4. The court was therefore urged to grant the orders sought herein in order to preserve the deceased's estate since the Respondent's actions are illegal and unjustifiable and are in violation of the spirit of **Law of Succession Act**, Cap 160 Laws of Kenya. The deponent lamented that the Administrators' desire to have a full control of the estate for purposes of administering it in terms of the Certificate of Confirmation of Grant issued on 6<sup>th</sup> February, 2019 has been hampered by the Respondent owing to his illegal presence in the said property.

5. According to the deponent, since the Respondent did not file any objections or protest in this cause to express his interest, if any, in any asset(s) forming part of the estate, his continued occupation and presence in the said property amounts to intermeddling in terms of Section 45 of **The Law of Succession Act**.

6. On behalf of the Applicants it was submitted that there is more than credible evidence to prove that the Respondent is intermeddling with parcel number **Mwala/Myanyani/784** based on the admission by the Respondent that he is in occupation of the land in question. Though the Respondent alleged to have purchased part of suit property from **Penina Keriko Mutuku**, the applicant submitted that the said **Penina Keriko Mutuku** was not the personal representative of the deceased as at 19<sup>th</sup> September, 2010 when the alleged transaction is alleged to have been entered into and had no legal capacity to sell the said land or any part thereof to the Respondent herein. Accordingly, the said **Penina** could not pass any good title or any title at all to the Respondent. According to the Applicants, the agreement, if any, between the Respondent and **Penina** was and continues to be null and void as the grant herein was issued to the Applicants on 4<sup>th</sup> July, 2013. Accordingly, on 19<sup>th</sup> September, 2010 **Penina** was divested of capacity to enter into a sale agreement in respect of the property in question

since it was still registered in the name of deceased **Edward Mutuku Mwando**.

7. According to the Applicants, the deceased's estate is protected by Section 45(1) of the **Law of Succession Act** and cited **Onyuka vs. Migwalla (2005) eKLR**, where the Court of Appeal held that the absence of a grant of Letters of Administration invalidates a sale agreement in respect of land registered in the name of a deceased person. The Applicant therefore submitted that the Respondent's continued occupation and use of title number **Mwala/Myanyani/784** is not only illegal and unjustifiable but also amounts to a criminal conduct which attracts penal consequences in terms of Section 45 of the **Law of Succession Act** and cited **Benson Mutuma Muriungi vs. C.E.O Kenya Police Sacco & Anor (2016) eKLR**.

8. The Court was therefore urged to find that the Applicants' summons dated 11<sup>th</sup> June, 2020 is merited and proceed to grant the orders sought.

9. In response to the application the Respondent averred that on 19<sup>th</sup> September, 2010, he purchased a portion of the said property measuring 1 and ¼ acres from the deceased's 2<sup>nd</sup> wife, **Penninah Keriko Mutuku**, now deceased, for a valuable consideration of Kshs 100,000/- and immediately took possession and occupation of the said property upon purchase of the said property and made extensive developments on the suit property, developments which the Applicants have been aware of as he has been in occupation thereon since 2010.

10. According to the Respondent, the administrators fraudulently obtained letters of administration through concealment of material facts without including the children of **Penninah Keriko Mutuku** from whom he purchased the suit property.

11. It was therefore his claim that in the interest of justice and fairness, the court should order that the portion he purchased be distinct from the assets that form part of the deceased's estate.

12. On behalf of the Respondent it was submitted, while reiterating the contents of the replying affidavit that the sale agreement between the Respondent and the said **Penninah** has not been disputed by the applicants, the administrators of the estate. It was submitted that as at the time of the said agreement the elders from the deceased's homestead were present hence the administrators were well aware of the said transaction.

13. According to the Respondent, the present application is brought in bad faith by the administrators who are out to benefit from the property of the Respondent by waiting for nine years for the Respondent to complete the construction of his residential home on the suit parcel. The Respondent lamented that in the event that the application is granted, the Respondent stands to suffer irreparable loss and injury as a result of the developments undertaken.

14. It was therefore sought that the application be dismissed.

#### **Determination**

15. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions filed.

16. Section 45 of the **Law of Succession Act** provide as follows:

*(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

*(2) Any person who contravenes the provisions of this section shall—*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.*

17. I associate myself with the opinion of **Musyoka, J** in **Veronica Njoki Wakagoto (Deceased) [2013] eKLR** that:

**“The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”**

18. I also agree with the position in **Benson Mutuma Muriungi vs. C.E.O Kenya Police Sacco & Anor (2016) eKLR** and **re Estate of M'Ngarithi M'Miriti [2017] eKLR** that:

**“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that**

intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

19. In this case, the Respondent contends that on 19<sup>th</sup> September, 2010, he purchased a portion of the said property measuring 1 and ¼ acres from the deceased’s 2<sup>nd</sup> wife, **Penninah Keriko Mutuku**, now deceased, for a valuable consideration of Kshs 100,000/-. From the affidavit sworn by the Applicant, it is clear that the said transaction took place before the grant of letters of administration. Even had the same been entered into after the grant but before confirmation, the effect would have been the same since the mere grant of letters of administration does not empower the administrator to dispose of the immovable properties of the deceased before the grant is confirmed. In the premises, the Respondent herein stands on a shaky ground and it may not make any difference that the transaction was blessed by the clan elders.

20. Since the applicants seek orders in the nature of prohibitory injunction, the general principles of injunction apply. In **Mrao vs. First American Bank of Kenya LTD & 2 Others (2003) KLR 125**, it was held that:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

21. However, in **Noormohamed Janmohamed vs. Kassamali Virji Madhani [1953] 20 (1) EACA 8** the then East African Court of Appeal (Sir Newham Worley, VP) held that the whole purpose of an injunction is that matters ought to be preserved *in status quo* until the question to be investigated in the suit can finally be disposed of. The Learned Vice President held that:

“Here the question was whether the appellant or the respondent was entitled to occupation of the suit premises and to carry on the hotel business. The appellant was admittedly in possession: the injunction, however, did not purport to maintain the *status quo* but actually ordered him to vacate the premises and cease doing business. An interlocutory injunction of this nature is unique in my experience and could only be justified if the appellant has admitted that he was a trespasser upon the premises.”

22. The same position was taken by the Court of Appeal in **Eso Kenya Limited. vs. Mark Makwata Okiya [1992] KLR 50**.

23. In this case the Respondent avers that he immediately took possession and occupation of the said property upon purchase of the said property and made extensive developments on the suit property, developments which the Applicants have been aware of as he has been in occupation thereon since 2010. This contention was not denied by the Applicants. The grant of an injunction is the exercise of equitable discretion and it is a doctrine of equity that he who comes to equity must come with clean hands. For the Applicants to be entitled to the injunction sought, they ought to show that they have nothing to do with the status quo prevailing as at the time they approach the court and that as soon as they came to realise that the Respondent was acting unlawfully, they invoked the court’s jurisdiction. In this case the Respondent contends that he has been in occupation of the suit property since 2010 and has carried out extensive developments thereon. Whereas such an averment may not change his legal status vis-à-vis the suit property if it is found that he ought not to have been on the property in the first place, at this stage where what is sought is a prohibitory injunction, this Court cannot under the guise of issuing the said orders effectively evict him from the suit property which would be the effect of granting the orders sought herein.

24. In the premises, while I decline to grant the orders sought herein, sections 47 of the ***Law of Succession Act*** provides that:

***The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.***

25. Accordingly, the order that commends itself to me and which I hereby grant is an order restraining the Respondent from taking any action geared towards the wastage or alienation of the suit property pending the confirmation of the grant or further orders of the court.

26. As none of the parties herein can be said to be without blemish, each party will bear own costs of this application.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF JANUARY, 2022.**

**G V ODUNGA**

JUDGE

**DELIVERED IN THE ABSENCE OF THE PARTIES.**

**CA SUSAN**