



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 4 OF 2015

IN THE MATTER OF THE ESTATE OF MWAURA MAKURO (DECEASED)

MICHAEL KINUTHIA MAKURO.....PETITIONER

-VERSUS-

FRANCIS MUIGAI.....RESPONDENT

RULING

[1] Before the Court for determination is the Summons dated **24 February 2020**. It was filed by **Michael Kinuthia Makuro**, the petitioner/applicant, pursuant to **Sections 45 and 47** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**, as well as **Rule 49** of the **Probate and Administration Rules**, for orders that:

[a] Spent

[b] The respondent, Francis Muigai Makuro, as well as Wangari Muigai (his wife), Kimani Kabata (nephew), Mwaura Kabata (nephew), Njeru Munene (nephew), Elizabeth Nyambura (niece), Mary Wahu (niece), Joseph Ngei (nephew) and Simon Mwaura (nephew) be restrained and or be prevented from interfering with the applicant's mandate of administering the estate of the deceased to wit Nzoia Scheme L.R. No. 113/116, and any other property listed in the grant.

[c] The Court do find that the actions of the persons listed above of harvesting 56 acres of maize crop in December 2019 and disposing of the same without the authority of the applicant amounted to intermeddling with the estate of the late Mwaura Makuro.

[d] The persons named in [b] above be compelled by orders of the Court to indemnify the applicant for the maize crop harvested from 56 acres totaling 2,240 bags, at 40 bags per acre.

[e] The persons named in [b] above, who have moved machinery and commenced cultivation of the sections of the farm comprised in the estate of the deceased, be restrained by means of injunction from planting, further ploughing or in any way interfering with the applicant's possession, utility and administration of Nzoia Scheme Plots 113/116, and any other asset listed in the grant pending distribution.

[f] The Court do impose such sanctions as against the intermeddlers including fines and or imprisonment for terms to be set by the Court.

[2] The application was premised on the grounds that the persons names in paragraph [b] herein above moved to the deceased's farm at Nzoia and harvested 56 acres of maize without the authority of the applicant. The applicant further complained that the said persons wantonly slaughtered sheep on the said farm and have since been readying themselves to commence cultivation of the estate property without any reference to the applicant. He further averred that, in addition they have been carrying out excavations and drilling of what are purported to be boreholes for water extraction without the authority of the administrator.

[3] According to the applicant, the respondents are intent on dispossessing him of the estate by force; granted that they have resorted to using vulgar language and threats of harm to himself and to those beneficiaries who appear sympathetic to him. He consequently averred that the orders he seeks are necessary for the orderly running of the estate of the deceased. The applicant also deposed that his complaint to the sub-chief of Nzoia Scheme and to the Police at **Nzoia Patrol Base** have elicited no response at a time when he was in the process of consolidating the estate so as to come up with a road map for distribution and accounts, as directed by the Court in its ruling dated **24 October 2019**.

[4] On behalf of the 1st respondent, **Francis Muigai**, Grounds of Opposition were filed by **Mr. Nyachiro** on **10 March 2021**. He thereby contended that:

- [a] **The application is not meritorious but an abuse of the court process;**
- [b] **The application is diversionary meant to delay the distribution of the estate;**
- [c] **The application is grounded on hearsay and not tenable;**
- [d] **The application is economical with the truth and conceals several material facts;**
- [e] **The applicant has not come to court with clean hands;**
- [f] **The application is meant to render the respondent destitute;**
- [g] **The applicant has not taken steps to comply with the court orders but keen on side shows.**

[5] A Replying Affidavit filed on behalf of the 2nd 5th and 10th beneficiaries, namely, **Kimani Kabata, Njeru Munene and Simon Mwaura Wanja**, respectively, was filed herein on **17 March 2020**, sworn by the 5th beneficiary. He, in particular, refuted the contents of paragraph 8 of the Supporting Affidavit and asserted that all beneficiaries are entitled to equal access to all the assets of the deceased until distribution; and specifically mentioned that **Eldoret Municipality Block 12/38 and 39**, on which stands a residential home, is a place where all the beneficiaries have for many years had unfettered access. The 5th beneficiary further averred that **Nzoia Scheme L.R. Nos. 113, 114, 115 and 116** have always been the agricultural property for the benefit of all the beneficiaries; and therefore that it would be an affront to the rights of the beneficiaries, with whom the administrator has disagreed, to deny them access.

[6] The 2nd 5th 10th beneficiaries further averred that the administrator has continuously used the 8th beneficiary to misappropriate the assets of the estate, either by design or acquiescence, and to sell and transfer properties belonging to the estate such as Motor Vehicle Registration No. KAB 548R as well as the sheep he now alleges were destroyed by the respondents. They asserted that the administrator has all along benefitted from the estate to the exclusion of all others; and without any accountability whatsoever. In particular, they averred that, in spite of several family meetings the applicant persists in his chauvinistic mindset to disinherit the married and unmarried female siblings and orphans, including the 10th beneficiary and 1st respondent. They accordingly prayed that the application be dismissed.

[7] The application was canvassed by way of written submissions. The submissions of **Mr. Ngigi Mbugua** for the applicant were filed on **12 May 2021**; and he therein proposed the following issues for determination:

- [a] **Have the persons named in the application intermeddled with the estate property?**
- [b] **Does the respondent's action of hiving off portions of the estate and cultivating them justified before distribution?**
- [c] **Has the estate suffered any loss?**
- [d] **What are the appropriate remedies in the circumstances?**

[8] Counsel relied on **Sections 82 and 83** of the **Law of Succession Act**, with regard to the powers and responsibilities of an administrator. He accordingly urged the Court to find that the respondents acted in breach of **Section 45** by invading the estate property and harvesting produce therefrom. He relied on **A Case Book on the Law of Succession by Musyoka, J.** and the cases of **Re Estate of the late James Akumu Nyamondo** and **Nairobi HCSC No. 2100 of 1987** [1989] eKLR in support of his submissions.

[9] **Mr. Kabata** for the 2nd 5th and 10th beneficiaries relied on his written submissions dated **26 January 2021**. He proposed the following issues for determination:

- [a] **Whether the 2nd 5th 7th and 10th respondents are intermeddlers and if so, what is the standard of proof?**
- [b] **Whether it would be just that an order issues restraining the 2nd 5th and 10th beneficiaries from accessing the estate;**
- [c] **Whether there exists a duty on the part of the administrator to account to the 2nd 5th and 10th beneficiaries;**
- [d] **Whether it is just that the estate be distributed under the supervision of the Court; and,**
- [e] **Are there any Covid-19 interventions that the Court may apply in the administration of the estate.**

[10] Counsel urged the Court to note that the applicant had been given 6 months to distribute the estate, but chose to wait until **10 March 2020**; a month short of the compliance period, to make the instant application. He urged the Court to find that this was done with the sole objective of further delaying compliance with the orders of the Court. As to whether intermeddling has been proved, counsel urged that the burden needed to be discharged beyond reasonable doubt, for the reason that **Section 45** of the **Law of Succession Act** is a penal provision. He relied on **Miller vs. Minister of Pensions** [1947] 2 ALLER at paragraphs 372-373; as well as the cases of **Machakos HCSC No. 81 of**

1995: Re Estate of Dr. John Muia Kalii (Deceased) and Re Estate of Demenico De Masi (Deceased) [2020] eKLR. Counsel also cited **Mombasa P&A No. 118 of 1989: Re Estate of Husseinbhai Karimbhai Anjarwalla** for the proposition that those with legal authorization, such as the respondents, cannot be accused of intermeddling.

[11] On the role of the administrator, it was the submission of **Mr. Kabata** that he is a trustee, for purposes of **Section 2** of the **Trustee Act, Chapter 167** of the **Laws of Kenya** and therefore must administer the estate for the benefit of all the beneficiaries, as well as creditors; and be prepared to account when called upon to do so. He pointed out that, although an order was made for the applicant to account for the estate, he is yet to do so satisfactorily. And because the applicant is yet to comply with the order on distribution, counsel urged that the proposal on distribution by the respondents be adopted and that the Deputy Registrar of the Court be authorized to effect the distribution; taking into account the need for expeditious disposal in the wake of the Covid-19 pandemic.

[12] On behalf of the 7th beneficiary/1st respondent, **Mr. Nyachiro** relied on his written submissions dated **19 February 2021** but which he filed on **12 July 2021**. His basic argument was that, since allegations of intermeddling are serious enough to attract criminal sanctions, it was expected that the credible proof be availed by the applicant to prove the same. In his submission, no evidence was availed to that end. He relied on **Re Estate of Dr. John Muia Kalii (Deceased)** (supra) to support his argument that mere uncorroborated allegations cannot do. Counsel further submitted that it is high time the estate was distributed to enable the beneficiaries move on with their lives. He emphasized the point that an administrator is a trustee and not a beneficial owner of the estate; and therefore must be prepared to give an account of the affairs of the estate to all the beneficiaries from time to time. Counsel otherwise made submissions along the same lines as did counsel for the 2nd, 5th and 10th beneficiaries and urged the Court to dismiss the application.

[13] I have carefully considered the application dated **24 February 2021**, the responses thereto as well as the written submissions filed by learned counsel. The key issue for determination is whether it has been sufficiently proved that the persons named in the application, at paragraph 2 of the prayers, intermeddled with the estate; and if so whether a case for restraining orders has been made against them. The court will also consider what loss, if any, has been suffered by the estate as a direct result of the alleged intermeddling; and what are the appropriate remedies therefor, granted the circumstances of this cause.

[14] There is no dispute that the Grant of Letters of Administration Intestate was made herein on **14 May 2015** to the applicant, **Michael Kinuthia Makuro**, with the consent of the other beneficiaries. It is now over 5 years since; and as pointed out in the Court's ruling dated **24 October 2019**, the estate is overdue for distribution. The applicant is yet to report back on distribution. Instead, he filed this application complaining that some of the beneficiaries invaded the estate property in Nzoia Scheme and harvested maize therefrom without his authority; in addition to slaughtering some sheep. He further complained that the respondents are minded to continue with their destructive acts unless restrained.

[15] The question to pose then is whether, in the circumstances, the respondents are intermeddlers properly so called. In this regard, **Section 45** of the **Law of Succession Act** provides that:

“(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 of, 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 or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.”

[16] It is settled then, that, being an offence punishable by a fine or imprisonment, intermeddling must be proved beyond a preponderance of evidence. In **Re Estate of Dr. John Muia Kalii (Deceased) Machakos HCC Succession Cause No. 81/1995** Hon. Mwera, J. held that;

“Since intermeddling is a criminal offence evidence to support an allegation of it must be very strong.”

[17] In this case, other than the averments by the administrator at paragraphs 3 and 4 of the Supporting Affidavit that the respondents harvested maize from the Nzoia Farm and sold the same to third parties, there, there is no proof that indeed that was the case. No documents were exhibited to demonstrate that the farm's acreage is 56 acres; or that he had planted maize on all 56 acres. There was, likewise, no proof that maize was harvested or shelled on the farm as alleged; or that the quantity involved was 2,240 bags as the applicant would want the Court to believe; or that the maize was sold to third parties. In effect the Court was asked to surmise that from 56 acres, the respondents must have harvested 40 bags per acre; hence prayer 4 in the Notice of Motion dated **24 February 2020**. That not only falls far below the standard of proof required for purposes of **Section 45** of the **Law of Succession Act** but also fails to demonstrate wrongdoing, granted that the beneficiaries have a right to live off the income earned from the estate assets pending distribution. It is noteworthy too that the averments of the 5th beneficiary to the effect that **Nzoia Scheme L.R. Nos. 113, 114, 115 and 116** have always been the agricultural property for the benefit of all the beneficiaries was not controverted.

[18] Indeed, a plain reading of **Section 83(f)** of the **Law of Succession Act** leaves no doubt that the beneficiaries have a beneficial interest to the income earned from the estate assets. It recognizes that one of the responsibilities of an administrator is:

“...to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;” (emphasis added)

[19] I am therefore not satisfied that sufficient evidence has been adduced to demonstrate that the respondents did anything that is not

authorized by the **Law of Succession Act** or the rules thereunder that would amount to intermeddling. Moreover, **Section 45 (2) (b)** of the **Law of Succession Act**, envisages that benefits received upfront, if any, be taken into account at the time of distribution. That being the case, it would be superfluous to consider whether restraining orders should issue against the respondents or what other appropriate remedies grant herein.

[20] Although counsel for the 2nd, 5th and 10th beneficiaries urged the Court to approve the proposal on distribution by the respondents for implementation by the Deputy Registrar of the Court, I note that no substantive application has been filed in that regard. Besides, the remedy for an administrator's indolence is in revocation of grant under **Section 76 (d)** of the **Law of Succession Act**. I find no basis therefore for approving the respondent's request for implementation of their proposal by the Deputy Registrar and decline the invitation to make orders in that regard.

[21] In the light of the foregoing, it is my finding that the application dated **24 February 2020** is completely devoid of merit. The same is hereby dismissed with an order that the costs thereof be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF JULY 2021

OLGA SEWE

JUDGE