



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 561 OF 2012

IN THE MATTER OF THE ESATE OF UKONGO KAINGA THATHI

PHILIP KATOO MUMO

MBATHA UKONGO.....PETITIONERS/APPLICANTS

VERSUS

MICHAEL MUTUA MWIKYA alias

MICHAEL MUTUA UKONGO.....OBJECTOR/RESPONDENT

RULING

1. By Summons dated 18th June, 2020, the Petitioners/Applicants herein seek the following orders:

- 1) **THAT the Summons filed herein be and is hereby be certified as urgent and service thereof be dispensed with and it be heard *ex-parte* in the first instance.**
- 2) **THAT this Honourable Court be pleased to issue Orders restraining the objector/respondent by himself, agent, servant or any such person act under his authority or instructions from disposing, selling, wasting, interfering or in any manner whatsoever dealing with the assets of the estate particularly Land Reference Number Kathiani/Kombu 2997 pending the inter-parties hearing and determination of this application.**
- 3) **THAT this Honourable Court be pleased to issue Orders restraining the objector/respondent by himself, agent, servant or any such person act under his authority or instructions from disposing, selling, wasting, interfering or in any manner whatsoever dealing with the assets of the estate particularly Land Reference Number Kathiani/Kombu 2997 pending hearing and determination of the main succession cause.**
- 4) **THAT this Honourable Court be pleased to make any other conservatory orders for the preservation of the deceased estate as it may deem fit and just to grant.**
- 5) **THAT The costs of this Application be awarded to the Petitioners/Applicants.**

2. According to the Applicants, though the Estate of the deceased herein is yet to be distributed, the Respondent has been engaging in wasteful acts of intermeddling with the said Estate property known as Land Reference Number Kathiani/Kombu/2997 (the Suit Property). It was averred that the Respondent herein has without colour of right or authority whatsoever invaded the Suit Land and started cutting down trees, digging trenches and encroaching on the portion of the said land, conduct which was reported to Nzaikoni Police Post. Apart from the report, the Applicants' advocates have written letters to the Deputy County Commissioner, Kathiani Subcounty to intervene and to ensure that the deceased's estate is protected and the said Deputy Commissioner ordered the status quo to be maintained.

3. It was therefore the Applicants' apprehension that unless restrained by this Court from the said action, the purpose of these proceedings will be defeated as there will be nothing left to distribute despite the fact that directions had been taken in this, matter for the hearing but the said hearing was obstructed by the intervention of the COVID 19 pandemic. The deponent, the 2nd Applicant herein lamented that she is 102 years old and it has taken 8 years for the distribution of the Estate of her deceased husband due to the delaying tactics of the Respondent. She averred that it is in the interest of justice and fairness to all the beneficiaries that the orders sought herein be granted.

4. On his part the Respondent denied that he was engaged in any wasteful acts by intermeddling with the estate of the deceased as alleged or

at all and averred that he was unaware of the allegations made by the applicants.

5. According to the Respondent, though on 6th July, 2020 the Court ordered **Mutinda Muli** to vacate the suit property, the same has not happened because the widow of the said **Mutinda Muli**, one **Felista Wanza Mutinda** is still in occupation of the said parcel based on her claim that she purchased the same from the 2nd Applicant and one **William Mumo Ukongo**. The Respondent insisted that the said **Felista** is not a beneficiary of the estate of the deceased hence her occupation of the suit property is not only wrong but is also illegal.

6. It was the Respondent's position that the allegations made herein are only meant to forestall the determination of this cause by distribution of the assets of the estate of the deceased. He asserted that it has never been his intention to dispose of the parcel in issue as alleged but disclosed that the Applicant has since received consideration in respect thereof from the said **Felista Wanza Mutinda** and/or her husband with a view to selling and/or granting her consent to unlawfully possess and occupy the said parcel.

7. The Respondent averred that he was born and raised on the suit parcel and therefore any orders depriving him access thereto would be grossly prejudicial.

Determination

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

9. The law regarding intermeddling with the estate of a deceased person is well codified in the *Law of Succession Act*. Section 45 of the said Act provides 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.

10. According to Musyoka, J in Veronica Njoki Wakagoto (Deceased) [2013] eKLR:

“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.”

11. In re Estate of M'Ngarithi M'Miriti [2017] eKLR it was held 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.”

12. In this case, the Applicants have exhibited photographs showing that some action is taking place on the suit land. The Respondent's response to this is just a bare denial without specifically dealing with the said allegations. Instead of specifically traversing the same, the Respondent has instead introduced an issue regarding the alleged sale of part of the suit land to a third party by the 2nd Applicant. With due respect, the Respondent's response to the application was nothing but a feeble attempt to divert the attention of the Court from the real issue in controversy in his application.

13. Section 47 of the *Law of Succession Act* provides as follows:

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.

14. It is therefore clear to my mind that the deceased's estate ought to be protected and this court has the power to do so.

15. Consequently, I find merit in this application and I hereby issue an order of injunction restraining the objector/respondent by himself, agent, servant or any such person acting under his authority or instructions from disposing of, selling, wasting, interfering or in any manner whatsoever dealing with the assets of the estate particularly Land Reference Number Kathiani/Kombu/ 2997 in a manner geared towards the wastage of the said property pending hearing and determination of this cause.

16. Though the parties were directed to furnish the Court with soft copies in word format, the Respondent failed to do so. Consequently, the costs of this application shall be borne by the Respondent.

17. It is so ordered.

Read, signed and delivered in open Court at Machakos this 19th day of October, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mutua Makau for Miss Makundi for the Applicant

Mr Mutinda for Mr Mutinda Kimeu for the Respondent

CA Geoffrey