



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 959 OF 2015

IN THE MATTER OF THE ESTATE OF JACKSON NICHOLAS KYENGO

MULWA (Also known as KASANGA JOEL MULWA) (DECEASED)

MARY AGATHA MULWA.....APPLICANT/1ST RESPONDENT

-VERSUS-

MARTHA KASANGA MULWA.....1ST RESPONDENT/APPLICANT

JOSEPH KONZOLLO MUNYAO.....2ND RESPONDENT

SAMMY MWENDWA MUTAVI MUELAH.....3RD RESPONDENT

DR. ANDREW KAVULYA MULEEL.....4TH RESPONDENT

RULING

1. In her Summons dated 4th March, 2016 brought under **Section 45 and 47** of the **Law of Succession Act, Cap 160**, and **Rule 49** of the Probate & Administration Rules, 1980, the 1st Respondent/Applicant Martha Kasanga Mulwa seeks the following orders; First, that the Court do grant the Applicant leave to build a guard house, put up a gate and fences and dig trenches on designated areas on the property known as L.R. No. 8857/72, Mavoko Municipality Machakos County; secondly, that the costs of the works above in the sum of Kshs.11,824,560.00 be paid from the Deceased's Account Number ***** held at Co-operative Bank of Kenya Limited in the name of Kasanga Mulwa.

2. The grounds of the Application as contained on the face of the application are that the property L.R. No. 8857/72 (suit property) situate in Mavoko Municipality Machakos County is part of the estate of the late Jackson Nicholas Kyengo Mulwa also known as Kasanga Joel Mulwa (deceased). That on diverse dates in January and February 2016, unknown persons trespassed on the suit property with trucks and harvested sand thereon without authority. That armed poachers have also been intruding on the premises and targeting animals in the conservancy; and lastly that the intruders have been accessing the property through the porous borders/entry points.

3. The Applicant argued that the property being approximately 1401 hectares, the security officers on site are unable to man all areas of the suit property all the time. That the continued harvesting of sand and illegal poaching has not only diminished the value of the suit property but it poses an environmental threat particularly because there is a conservancy located on the property. That the said activities are also a security threat to the family and the workers on the property.

4. Further that the said unauthorized harvesting of sand on the suit property and poaching amounts to intermeddling with the estate of the deceased contrary to Section 45 of the Law of Succession Act. That it is therefore necessary that the porous areas/entry points on the suit property be secured to prevent easy access by the said intruders, and it is in the interest of justice that the said property be preserved for the benefit of the estate.

5. The application is supported by the affidavit of the Applicant Martha Kasanga Mulwa, herein sworn on 4th March, 2016. She reiterates the content of the application.

6. The 1st Respondent Mary Agatha Mulwa opposed the application by her replying affidavit sworn on 6th June 2016 in which she deposed that she is the first widow of the deceased and that she has not in any way intermeddled with the estate of the deceased. That there has not been any intrusion into the deceased's estate as alluded to by the Applicant and that it is her son, Erick Nzioka Mulwa who was harvesting sand which he intended for his personal use and not for sale.

7. The Respondent avers that the incidents of poaching alluded to by the Applicant are not a novel phenomenon and that in any event if they did occur, the Kenya Wildlife Service was well equipped to deal with the menace, to ensure the nature and character of the suit property is not altered in any manner as to interfere with the estate.

8. The Respondent asserts that the alleged digging of trenches; posting of guard houses; valuation of the works to be conducted or the withdrawal of any monies from the bank account of the deceased at Co-operative Bank, are not activities that should vest solely in one party but rather on all beneficiaries for the benefit of the estate.

Applicant's Submissions:

9. The Applicant supported her arguments by way of submissions filed on 11th July, 2016 by Learned Counsel, Mr. Kamau who contends that sometime in January 2016, the Applicant received information from security guards that a group of unknown people had been spotted on the suit property harvesting sand and loading it on to a truck. That on 4th, February a group of intruders invaded the suit property and harvested sand and the incident was reported at Daystar Administration Police Camp vide OB No. 04/02/2016.

10. Mr. Kamau submitted that on other occasions, being 14th February 2016 and 16th February 2016 respectively, trucks were reported to have been seen on the suit property with a large group of sand harvesters. The incident was also reported at Lukenya Administration Police Post and the report was recorded as OB No. 02/15/02/2016 and 02/16/02/2016. Mr. Kamau argued that unless porous borders/entry points on the property are sealed by fencing the entire property, the said intruders will continue gaining access to the suit property and thus interfering with the character of the property. That given the vast acreage of the suit property which is approximately 1401 hectares, it is impossible for the guards to man it.

11. Mr. Kamau argued that it is in the interest of all the beneficiaries to have the suit property preserved in order to avoid intrusion by third parties and also to preserve the resources on the property from wastage by intruders. That the preservation of the property is crucial for security reasons as the property acts as home to various beneficiaries, school children as well as various animals in the conservancy. That there is a school which hosts over 1000 students as well as staff and this creates the need to guarantee security to the human life residing on the property. He contended that part of the property is used as a conservancy and is the home to various animals whose security is crucial to avoid incidents of poaching which have been reported in the recent past.

12. Mr. Kamau contended that the continued harvesting of sand on the undeveloped portion of the property containing a reservoir of sand which is used for various structural developments on the deceased's properties and storage of water in the underground aquifer, as well as by domestic livestock degrades the water system and adversely affects the animals. That guards and the officers from Kenya Wildlife service who from time to time have been requested to guard the Conservancy are unable to be at all places at the same time and as such various entry points remain exposed to intrusion by third parties.

13. Mr. Kamau submitted that the continued intrusion on the property amounts to intermeddling with the deceased's Estate contrary to Section 45 of the Law of Succession Act. He pointed out that despite a court order issued by Muigai J on 4th March, 2016 prohibiting the harvesting of sand and intermeddling with the suit property, pending the hearing and determination of this application, the intruders continue to invade the property. He urged the court to allow the fencing of the entire property as sought in the application and referred the court to the case of **Re: Estate of Muthama (Deceased)[2004]eKLR** where Kubo J faced with the same issue found that:

“While the issue of confirmation of the grant remains unresolved, the subject property, i.e. L.R. DAGORETTI/WAITHAKA T648 should be protected and preserved.”

14. Counsel also referred the court to the case of **Moraa Gisemba v David Nyakoi Ongori [2015] eKLR** in which the attention of the court was drawn by the applicant, to information that clearly showed that the estate of the deceased had been intermeddled with and had changed hands even before the confirmation of the grant by the court. The court in the foregoing case held thus:

I find that Rule 73 of the Probate and Administration Rules grants this court the wide discretion to make appropriate orders as may be necessary in the interest of justice or to prevent abuse of the process of the court. For the foregoing reasons, an order for the maintenance of status quo obtaining as at today is here issued in order to safeguard and preserve the deceased's Estate as it awaits confirmation of the grant already issued”.

15. Mr. Kamau also referred to the decision in the case of **Winfred Nyambura Karugu & another v Magdalene Nyokabi Guandai [2015] eKLR** in which on an application the court held that:

“The deceased's estate is to be protected preserved and maintained until distribution of the estate.”

16. Mr. Kamau submitted that the deceased died testate leaving a Will dated 24th September, 2014 and appointed Joseph Konzollo Munyao (2nd Respondent) and Dr. Andrew Kavulya Mullei (4th Respondent) respectively as Executors. The said Will has been challenged by 1st Respondent, Mary Agatha Mulwa and her children on grounds that the deceased lacked testamentary capacity to make the Will and that while the issue of the validity of the Will is pending determination, no Administrator has been appointed to manage the affairs of the deceased's estate.

17. Mr. Kamau contended that the Applicant, being a lawful beneficiary to the deceased's estate with legitimate interest in the suit property, has capacity to seek orders to protect the deceased's estate under **Section 46(2) of the law of Succession Act.**

18. Mr. Kamau submitted that the Applicant had obtained a valuation on the cost of the intended works from Shapa Consulting Limited, who

gave the total estimate as 11,824,560.00. That the said valuation has not been challenged by way of a different quotation, and the Applicant is willing to provide a statement of account of all expenses incurred in carrying out the works to Court.

19. Mr. Ahmednasir learned counsel for the 1st Respondent /Applicant Mary Agatha Mulwa opposed the application. He argued that the Applicant purportedly obtained ex-parte orders which she has been using to restrain the 1st Respondent from accessing the sand on the vast property yet the said orders have never been served on the Respondent to date.

20. Counsel asserted that the incidents the Applicant referred to in her application are all false, because the Respondent could have seen the alleged harvesters, since they would have to pass where her homestead is to access the sand. Counsel stated that it was the Respondent's son, Erick Nzioka Mulwa who went to harvest sand to build his house, and he is the one whom the Applicant referred to as "strangers".

21. Mr. Ahmednasir submitted that jurisdiction is everything and without it, the court cannot do anything. He referred the court to the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1988] KLR**, where Nyarangi, JA stated inter-alia that

"jurisdiction is everything. Without it, a Court has no power to make one more step."

22. Mr. Ahmednasir pointed out that the instant application invokes the provisions of **sections 45 and 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules**. He argued that Section 45 prevents intermeddling in the deceased's property and the intermeddler is accountable to the rightful executor or administrator. Section 47 on its part gives power to the court to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders that may be expedient.

23. Mr. Ahmednasir contended that the law of succession Act does not have a provision whereby a named beneficiary can move in and seek to protect the estate property especially in the absence of a grant of representation. He asserted that the Executors of the deceased's Will petitioned for a grant of probate on 22nd April 2015, and on 3rd July, 2015 the 1st Respondent herein filed an objection in opposition thereto.

24. Counsel stated that the said objection is still pending and has not been determined by this court, meaning that there is no person in law that represents the estate of the deceased, or can be held accountable for it. He referred to the provisions of paragraph 10 of the Fifth Schedule of the law of Succession Act under which the court has the authority to appoint an administrator of the estate of the deceased, where the validity of the will of the deceased has not been resolved.

25. Counsel also referred the court to the case of **Marianna Murri Basirico vs K Boat Service Ltd and 2 others, Nairobi Civil Appeal No. 276 of 1998**. He asserted that the Applicant should have sought to invoke the provisions of the paragraph 10 of the Fifth Schedule of the Law of Succession Act, Cap 160 so as to acquire a status to file such application.

26. Counsel argued that while the 1st Respondent/Applicant appreciates that there may be a need for the protection of the deceased's estate, it is without a doubt that the Applicant cannot arrogate herself the sole authority to make such decisions without any consultations whatsoever with the 1st Respondent. That it is worth noting that the Applicant and the 1st Respondent are both beneficiaries of the estate and there should be a consultative process between the beneficiaries as no one beneficiary has a superior right to the other. He urged the court to dismiss the application since the Applicant has not petitioned for grant of representation for the deceased's estate.

27. I have considered the pleadings and the submissions of the counsels on record and find that the main issue for determination in this matter is whether the Applicant has the locus standi to bring this application before the court.

28. There is no question that the estate of the deceased must be protected and preserved for distribution to the rightful beneficiaries. **Section 46 of the law of Succession Act** referred to by Mr. Kamau however, refers to the duties of officers such as those in the police or in administration in relation to protection of the deceased person's property.

29. The proper procedure for the situation that obtains in the cause before me is as set out in paragraph 10 of Fifth Schedule of the Law of Succession Act adverted to by Mr. Ahmednasir. The said Paragraph 10 of the Fifth Schedule of the law of Succession Act provides thus:

"Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of the deceased person who shall have all the rights and powers of a general administrator other than the right of distributing the estate and the administration shall be subject to the immediate control of the court and shall act under its discretion."

30. From the facts deponed by the Applicant, it is not evident that she has the locus standi to bring this application, for reasons that she has not established that she is an executor or an administrator of the estate of the deceased. **Section 45 of the Law of Succession Act** requires inter alia that a person who intermeddles with the property of a deceased person be answerable to the rightful executor or administrator.

31. The only person authorized to deal with the affairs of the deceased's estate is therefore, the executor appointed under a will or an administrator appointed by the court. The Applicant is neither of the two. There is an objection pending in which the validity of the Will has been questioned. This means that as of now there is no representative of the estate of the deceased.

32. This case can be distinguished from the one referred to by Mr. Kamau in Re: **Estate of Muthama (Deceased) [2004] eKLR** in which Kubo J rendered himself thus:

"There is disagreement in the family on the mode of distributing land parcel L.R. DAGORETTI/WAITHAKA T 648.

Various unhelpful accusations and counteraccusations have been traded between the parties and no mutual agreement seems to be in sight. The Court is forced to step in to stop the deceased's property L.R. DAGORETTI/WAITHAKA T648 from going to waste, pending confirmation of the grant of 01.07.03.

In the foregoing case a grant had been made and there was therefore, an administrator to administer the estate, and to whom the court could issue orders concerning the intermeddlers.

33. A person seeking to restrain an intermeddler must first obtain representation to the estate, in order to acquire capacity to sue or to stop intermeddlers. Filing a suit against perceived intermeddlers before first obtaining a grant puts such an applicant at the risk of being considered an intermeddler herself.

34. The sum of money sought by the Applicant in her application is considerable. It should only be accessed by the rightful executor or administrator once the petition and the objection are heard and determined, to ensure that the estate of the deceased does not waste away.

35. From the foregoing I find that the intermeddling has not been established and the Applicant herself lacks locus standi to bring this application. In the premise I dismiss the application dated 4th March 2016 for want of merit. Costs to the 1st Respondent.

SIGNED DATED and DELIVERED in open court this 13th day of March, 2018.

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the 1st Respondent