



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 34 OF 2011**

**IN THE MATTER OF THE ESTATE OF MUSYOKI SILA MUSEI (DECEASED)**

**MUMBUA MUSYOKI ..... 1<sup>ST</sup> PLAINTIFF**

**MUIA MUSYOKI ..... 2<sup>ND</sup> PLAINTIFF**

**WAEMA MUSYOKI ..... 3<sup>RD</sup> PLAINTIFF**

**KIIO MUSYOKI ..... 4<sup>TH</sup> PLAINTIFF**

**KANINI MUSYOKI ..... 5<sup>TH</sup> PLAINTIFF**

**MUTHIKE MUSYOKI ..... 6<sup>TH</sup> PLAINTIFF**

**MUENI MUSYOKI ..... 7<sup>TH</sup> PLAINTIFF**

**VERSUS**

**MBENYA MUSYOKI ..... DEFENDANT**

**RULING**

The Petitioner herein filed an application by way of Chamber Summons dated 28<sup>th</sup> October 2014, seeking preservative orders against the administrator who is the Respondent herein, to restrain her from alienating, selling and leasing and or intermeddling with the assets of the late Musyoki Sila Musei pending the hearing and determination of this cause. The main ground for the application is that the administrator is selling assets of the estate even before distribution is undertaken and without justification, and thereby jeopardizing the interest of other beneficiaries. It is also alleged that there is a dispute as to whether this succession cause was filed using the proper procedure.

The 2<sup>nd</sup> Plaintiff in a supporting affidavit sworn on 28<sup>th</sup> October 2014 stated that he is one of the beneficiaries to the estate of the late Musyoki Sila Musei, and that the administrator did not involve him together with other beneficiaries in the application of Letters of Administration herein. Further, that the beneficiaries did not challenge the issue of the said grant as they thought that the administrator will follow the law and have the estate distribution fairly and equitably.

However, that the administrator has sold and /or alienated some of the assets and more particularly Machakos/Katheka-Kai block 4/105, and yet the grant has not been confirmed in order for the distribution to be undertaken. Further, that, it has emerged that there could be a will and therefore the process adopted

may be nullity.

The 4<sup>th</sup> Applicant also filed an affidavit in support of the application that he swore on 30<sup>th</sup> March 2014, wherein he stated that the deceased in 1996, in the presence of witnesses, showed him where he should put up his homestead and that he had lived on the said parcel of land since then to date, although he did not know the parcel number then. The deponent claimed that the deceased at the time of his death owned the following parcels of land;

- a. Machakos/Katheka Kai Block 4/105
- b. Machakos/Katheka Kai Block 5/323
- c. Machakos/Katheka Kai Block 6/unknown (it was alleged that the Respondent has denied the Applicants information on the parcel of land)
- d. Makueni /Muvau/480

According to the deponent, the Respondent has deliberately excluded property (b) and (c) above from the schedule of assets annexed to the application for grant, which therefore does not reflect the correct state of affairs in terms of the deceased assets, and that the only explanation for the omission is that the Respondent wanted to mislead, conceal and misappropriate the same to the detriment of other beneficiaries.

Further, that the Respondent has her matrimonial home at Machakos/Katheka Kai Block 4/105 , while the 4<sup>th</sup> Applicant has his home in Machakos/Katheka Kai Block 5/325. It was also alleged that the Respondent had sold part of the parcel at Machakos /Katheka Kai Block C after the death of the deceased, and had also sold a portion of the land the 4<sup>th</sup> Applicant occupies to one Francis Mutinda Ngaa who has carried out extensive acts of wastage on the said parcel. The 4<sup>th</sup> Applicant also stated that that the persons who has bought the parcel where his homestead is located has severally blocked his access road to his home.

The 4<sup>th</sup> Applicant reiterated that the beneficiaries never gave their consent to the Respondent to be administrator because they were not consulted nor notified of her intentions to apply for such letters. This is a clear manifestation of her desire to conceal the assets of the estate to the detriment of the beneficiaries.

The Applicants' Advocates, Kalwa & Company Advocates filed submissions dated 30<sup>th</sup> March 2015 and 20<sup>th</sup> May 2015, and set out the duties of the Respondent as an administrator to collect and preserve the estate of the deceased as provided in section 83 (b) of the Law of Succession Act, and her duty to act with due diligence in the administration of the estate and to preserve the estate. It was submitted that the Respondent has however allowed acts of wastage to be carried out on the deceased's estate and willfully refused to preserve the estate.

It was further submitted by the Applicants that they had shown a *prima facie* case by showing that the Respondent secretly applied for letters of administration, failed to include all the assets of the deceased, and that there is a will concerning the estate of the deceased and acts of wastage on the suit land. It was urged that the balance of convenience favours an order directing that no party should alienate, lease and/or intermeddle with the deceased's estate until distribution is done.

### **The Response**

The Respondent filed a replying affidavit sworn on 18<sup>th</sup> November 2014 in response to the application, wherein she averred that the Applicants are misleading the Court as the purported 1<sup>st</sup> and 7<sup>th</sup> Applicants are deceased person and they could not make an application before the court. The Respondent denied that she had sold Machakos/Katheka Kai Block 4/105 and she stated that she lived on the said property with her late husband before his demise, whereon he had constructed permanent houses where she still lives.

The Respondent contended that it is the Applicants who are intermeddling with the estate of the deceased

through the office of the County Commissioner, where they have severally attempted to have her arrested, and she attached summons from Assistant County commissioner and a letter from her advocates in response. Further, that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants live in Makeni/Muvau/480 which forms part of the estate of Musyoki Sila Musei and that if they allege that the Respondent is an intermeddler by virtue of residing in a property of the estate, then that they are also intermeddlers.

The Respondent also averred that she had taken care of the interests of the 2<sup>nd</sup> Applicant in a Supplementary Affidavit she swore on 11<sup>th</sup> June, 2013 and which was filed in court on 11<sup>th</sup> June 2013 which she annexed.

B.M Mung'ata & Co Advocates the counsel for the Respondent, filed submissions dated 7<sup>th</sup> May 2015. It was argued therein that the Applicants had not met the threshold for the grant of the preservative orders they seek, and reliance was placed on the decision in **Giella vs Cassman Brown Co. Ltd, (1973) E.A 358**. It was also submitted that the Applicants had not shown a *prima facie* case and have not shown any risk of damage or injury, as they had not tendered evidence of the alleged alienation, selling, leasing or intermeddling with the deceased's estate. Further, that the photographs furnished by the Applicants cannot be sufficient evidence to show ownership or existence of or wastage on the lands in question.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Applicants and Respondent. The issue to be decided is whether the orders for preservation of the estate sought herein are available to the Applicant. The sections of the law relied on by the Applicant are sections 45 and 47 of the Law of Succession Act.

I note in this regard that section 45 of the Law of Succession Act is the operative law when seeking to stop intermeddling with a deceased's estate and provides that other than instances expressly authorized by the Act, or by any other written law, or by a grant of representation under the Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

The law in addition provides that the duty of preservation of a deceased's estate can only be that of an administrator, in his or her capacity as the personal representative of the deceased and in whom the deceased's property vests. This position is pursuant to the powers and duties of an administrator as set out in sections 79 and 83 of the Law of Succession Act.

To this extent the Applicants are within the law in seeking that the Respondent acts to preserve the deceased's estate, and in seeking to stop any intermeddling with the same. The Respondent denies that there is any such intermeddling and disputes the evidence that has been brought by the Applicants of the same. The said evidence are photographs allegedly showing fencing of and buildings erected on the deceased land.

The Respondent however does not deny or confirm the averments by the Applicants that they did not consent to the administration of the estate or that there are properties of the deceased not included in the said administration. To this extent there is some doubt cast over the Respondent's intentions, and this Court is inclined to give the Applicants the benefit of doubt.

Section 47 of the Law of Succession Act gives this court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may meet the ends of justice. In the instant case, the overriding and common interest of all the parties is to protect the deceased's estate pending distribution. This Court in this regard orders as follows:

1. **The *status quo* that shall obtain as regards all the properties and assets belonging to the estate of the deceased and particularly Machakos/Katheka Kai Block 4/105, Machakos/Katheka Kai Block 5/325 and Makeni/Muvau/480 pending the confirmation of**

**grant issued herein shall be that the Administrator and Beneficiaries shall continue to be in possession and occupation of the properties and assets they currently occupy, and the said Administrator and Beneficiaries shall not sell, transfer, lease or in any manner dispose of or waste the said properties and assets, nor in any manner interfere with the current occupation and possession of the same by any beneficiary.**

2. Each party shall meet their respective costs of the Chamber Summons dated 28<sup>th</sup> October 2014.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 16<sup>th</sup> day of February 2016.

**P. NYAMWEYA**

**JUDGE**