



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
SUCCESSION CAUSE NO. 210 OF 2015
IN THE MATTER OF THE ESTATE OF LAZARO MULLEI KYAI (DECEASED)
MARIA KAVINDU LAZARO.....PETITIONER
VERSUS
MUTUNGA KIILU.....RESPONDENT
RULING

The Petitioner herein is the 2nd wife and a beneficiary of the estate of the deceased Lazaro Mullei Kyai who died on 21/06/2001. The Respondent is the son of Kiilu Lazaro, who is a son of the deceased and one of the beneficiaries of the estate of the deceased. The Petitioner has filed an application by way of summons dated 6th November 2015, seeking the following orders:

1. That preservation and protection orders to issue with regard to the estate of the deceased herein particularly Plot No. 4236 Mutitu Adjudication Section against Mutunga Kiilu (the Respondent herein) together with his servants, agents or any other person whomsoever prohibiting interference and intermeddling with the assets of the estate of the deceased whether by subdivision, alienation and/or disposing off pending interpartes hearing of this application.
2. That this Court be pleased to grant any other orders that is may deem just and expedient to meet the ends of justice including punishment of Mutunga Kiilu and any other person whomsoever interfering with the estate of the deceased herein.

The Petitioner in a supporting affidavit sworn on 28th October 2014 stated that she has already petitioned for letters of administration with respect to the estate of the deceased, and that Plot No. 4236 Mutitu Adjudication Section (hereinafter referred to as the suit property) is and has always been owned by the deceased , the Petitioner, and the deceased's 3rd wife, Muthina Lazaro as tenants in common.

However, that the Respondent herein is currently intermeddling with the suit property by allowing people to trespass thereon, and by disposing of the suit property without the consent or knowledge of any of the other beneficiaries of the deceased. Further, that the Respondent and his agents are in the process of illegally subdividing and alienating the assets of the estate of the deceased herein unilaterally and without full grant, and before the distribution of the estate of the deceased is done.

The Response

The Respondent filed a replying affidavit sworn on 23rd November 2015 in response to the application, wherein he averred that the suit property was subdivided by the deceased who was his grandfather, among his 3 wives namely Maria Kavindu, Muthina Lazaro and Kiasyo Lazaro his grandmother. The Respondent attached a copy of the subdivision scheme. The Respondent contended that he is in the suit property as a lawful beneficiary to the estate of the deceased, and denied that he had allowed people to trespass therein or that he had disposed of any part of the suit property. Further, that he is not in the process of subdividing and alienating the assets of the estate of the deceased, and averred that the Petitioner wants to chase him from the suit property.

The Respondent also explained that he was charged with the offence of trespass to the suit property in Criminal Case No. 95 of 2013 at Tawa wherein the Petitioner was the complainant, and that the court in its judgment held that he had a valid and reasonable excuse for entering the suit property. He attached a copy of the said judgment delivered on 6th March 2014.

The Issues and Determination

The Petitioner's application was canvassed by way of written submissions. P.M Mutuku & Company Advocates, the Advocates for the Petitioner and the Respondent filed submissions dated 9th and 14th December 2015 respectively, in which they reiterated the averments made in their pleadings. I have read and carefully considered the pleadings and submissions made by the Petitioner and Respondent. The issue to be decided is whether the orders for preservation of the estate sought herein are available to the Petitioner. The sections of the law relied on by the Applicant are sections 45 and 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules Section 45 of the Law of Succession Act addresses 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.

Section 47 of the Law of Succession Act on the other hand 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. The Applicant also relied on Rule 49 of the Probate and Administration Rules which states that a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules shall file a summons supported if necessary by affidavit.

This Court is mindful of the position that the property of a deceased person vests in administrators in their capacity as the personal representatives of the deceased, and it is indeed the duty of administrators to preserve a deceased's estate in this capacity pursuant to the powers and duties of an administrator as set out in sections 79 and 83 of the Law of Succession Act. However, after perusal of the record of the Court proceedings in the present application, I note that the Petitioner has not yet been appointed as the Administrator of the estate of the deceased and a grant of letters of administration has not been issued to her. The Petitioner in addition did not brought any evidence of such a grant.

I am in this regard guided by the provisions of sections 45 and 80 of the Law of Succession Act, and the decision in **Troustik Union International & Another vs Mrs Alice Mbeyu & Another, Nairobi Civil Appeal Number 145 of 1990**, that nobody has capacity to act with regard to a deceased's estate including getting any substantive orders in relation to the property of a deceased person or enforcing a cause of action arising out of a deceased's death, without a grant of representation.

Arising from the foregoing, the prayers sought by the Petitioner are denied, and I order as follows pursuant to the provisions of section 47 of the Law of Succession Act:

1. **The *status quo* that shall obtain pending the pending the hearing and determination of the petition for letters of administration herein shall be as follows:**
 - (a) **The Petitioner and beneficiaries shall continue with the occupation and possession of the**

deceased's property and assets that they occupy as at the date of this ruling.

(b) There shall be no transfer of the deceased's assets and properties by the Petitioner and/or beneficiaries.

2. Each party shall meet their respective costs of the summons dated 6th November 2015.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 23rd day of March 2016.

P. NYAMWEYA

JUDGE