



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 167 OF 2008**

**IN THE MATTER OF THE ESTATE OF MBITHI MUU ENGOLI (DECEASED)**

**FRANCIS MUTHOKA MBITHI.....PETITIONER**

**VERSUS**

**BONIFACE MUU SAMUEL.....1<sup>ST</sup> OBJECTOR**

**PATRICK MULEE SAMUEL.....2<sup>ND</sup> OBJECTOR**

**MUTHAMA SAMUEL.....3<sup>RD</sup> OBJECTOR**

**RULING**

**The Summons**

The Applicant is the Petitioner in this succession cause, who was issued with a grant of letter of administration intestate on 20<sup>th</sup> August 2008 in respect of the estate of the Mbithi Muu Engoli (hereinafter referred to as “the deceased”). The Petitioner is a son of the deceased, while the Objectors are the sons of the Petitioner’s deceased brother Samuel Mbithi, and are grandsons of the deceased.

The Petitioner has filed an application by way of Chamber Summons dated 12<sup>th</sup> August 2015 pursuant to the provisions of sections 45(1) and 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, and is seeking the following outstanding substantive orders therein:

- a. That orders do issue restraining the Objectors, either by themselves, their agents and/or contractors from selling, interfering and intermeddling with the deceased’s estate in any manner whatsoever and from interfering with the Petitioner’s quiet occupation and use of the deceased’s land parcel No. Machakos /Kiandani/1750 and from putting up structures on the aforesaid parcel of land.
- b. That the land parcel No. Machakos /Kiandani/1750 be formally sub-divided and registered into three (3) portions as per the confirmed grant.

The Petitioner in his supporting affidavit sworn on 12<sup>th</sup> August 2015 and a further affidavit sworn on 10<sup>th</sup> December 2015 averred that prior to the confirmation of grant issued to him, it had been agreed by his mother, his living siblings and the Objectors’ mother that land parcel no. Machakos/ Kiandani/1750 be registered in his name to hold in trust. Further, that he would cause the same to be sub-divided into three(3) portions amongst: Samuel Mbithi’s family (made up of the Objectors’ mother, the Objectors and their siblings); Titus Kasema Mbithi’s family; and himself. The grant was confirmed on 6<sup>th</sup> April 2009 and the aforesaid parcel of land was subsequently registered in his name.

He further stated that his efforts to subdivide the said land has been frustrated by the Objectors' application for revocation of grant dated 29<sup>th</sup> June 2009. Further, that on or about 21<sup>st</sup> July 2015 the Objectors invaded the portion earmarked for him, and hurriedly put up permanent structures thereon, and also excised a sizeable portion therefrom and sold to a third party who has fenced off the portion with a barbed wire. He stated that the Objectors were in breach of the law and should be restrained as he stood to suffer irreparable loss unless the orders are granted.

According to the Petitioner, he is a beneficiary of the deceased's estate as a matter of right, whilst the Objectors and their mother are only entitled to their late father's share of the deceased estate. He also contended that the Objectors were misleading court by alluding that the aforesaid land did not form part of the deceased's estate, and he claimed that the parcel of land at Makueni County referred to by the Objectors was his personal property which he purchased in 1979, and which was transferred to him by the seller. The Petitioner attached several annexures to his pleadings as evidence.

Nzei & Company Advocates, the learned counsel for the Petitioner, filed submissions dated 20<sup>th</sup> January 2016, wherein it was urged that the parcel of land in dispute was still part of the deceased's estate, since the administration process through sub-division has not been completed. It was submitted that the Objectors had not denied being in occupation of their late father's share of the said land. Further, that the Objectors had not demonstrated the existence of another parcel of land owned by the deceased, and occupied by the Petitioner to the exclusion of the Objectors and/or other beneficiaries. Lastly, it was pointed out that the Objectors despite filing the application for revocation of grant, had not prosecuted it for seven (7) years.

### **The Response**

The Objectors in response filed a replying affidavit sworn by the 1<sup>st</sup> Objector on 15<sup>th</sup> August 2015. They denied selling part of Machakos/Kiandani/1750 and intermeddling with the deceased estate, since the said land had already been registered in the Petitioner's name. It was averred that the Petitioner had never taken steps to sub-divide or transfer the said land. Further, that there was land in Makueni where the Petitioner was residing that belonged to the deceased. They denied constructing on the said land.

R.M. Matata & Co Advocates, the Objectors' learned counsel, filed submissions dated 8<sup>th</sup> February 2016. It was argued therein that the only asset of the deceased, being Iveti/Kiandani/1750 was by way of transmission duly registered in the name of the Petitioner, and a title deed duly issued to him on 17<sup>th</sup> June 2009. Therefore, that by the time the Objectors lodged the objection seeking revocation of the grant issued to the Petitioner, there was no asset registered in the name of the deceased and therefore there was no issue of intermeddling as per section 45(1) of the Law of Succession Act.

It was further submitted that there was no evidence that all the interested parties including the Objectors' mother had appeared in court during the confirmation hearing, or gave their consent before the grant was confirmed. In addition, that the orders sought were not tenable since the prayer for sub-division would have the effect of rendering the Objectors' objection useless and nugatory if they were successful. Finally, the Objectors submitted that they did not object to the *status quo* being maintained pending the hearing and determination of the objection lodged.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided are firstly, whether the land parcel known as Machakos /Kiandani/1750 is free property of the deceased; secondly, if so whether the Objectors have intermeddled with the same; and lastly whether the mandatory injunction orders sought herein are available to the Applicant.

The sections of the law relied on by the Applicant in this regard are sections 45 and 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. 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.

Section 47 of the 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. Rule 73 of the Probate and Administration Rules likewise affirms the inherent powers of this Court to make such orders as are necessary for the ends of justice, or to prevent the abuse of the process of Court.

On the first issue, "*free property*", **in relation to a deceased person, is defined in section 3 the Law of Succession Act to means the property which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death. The operative time for property to be considered free property is the time the deceased was alive. In the present application it is not disputed that the land parcel known as Machakos /Kiandani/1750 was registered in the deceased's name at the time of his death , and to the extent that there was no claim on the land at the time of his death, was therefore free property.**

**The Objectors' argument is that the property has since been transmitted to the Petitioner and is now registered in his name, and cannot therefore be said to be free property of the deceased.** The legal position as regards the vesting of the property of a deceased person in administrators, is that it so vests in their capacity as the personal representatives of the deceased, and it is indeed the duty of administrators to collect and preserve a deceased's estate in this capacity pursuant to the provisions set out in sections 79 and 83 of the Law of Succession Act. Collection of the assets of a deceased person includes the vesting the deceased's property in the personal representative's name. The property therefore does not lose its character as free property of the deceased, merely for the reason that it vests in the name of the personal representative.

**It is not disputed by the Objectors that the Petitioner was issued with a grant of letter of administration intestate on 20<sup>th</sup> August 2008, which was confirmed on 6<sup>th</sup> April 2009 with respect to the deceased's estate. The Objectors have in addition filed summons for revocation of the said grant dated 29<sup>th</sup> June 2009 which is pending hearing. The land parcel known as Machakos /Kiandani/1750 was registered in the Petitioner's name and a title issued to him pursuant to the said confirmation of grant, by which it was clearly indicated that the said property that belonged to the deceased would be transferred to the Petitioner to hold in trust. The Petitioner is accordingly still under a duty, and is within the law in seeking that the Objectors act to preserve the deceased's estate, and in seeking to stop any intermeddling with the same.**

The Objectors deny that there is any such intermeddling, and that they are constructing on the said parcel of land. They claim an unnamed relative of the deceased is the one constructing on the land. They also claim that the Petitioner is not in occupation of the said portion of the land. Evidence in the form of photographs was attached by the Petitioner that showed buildings in the process of being erected on the deceased land. It is therefore evident that such construction is taking place, and that the Objectors have knowledge as to who is responsible for the said construction. Therefore even if they deny undertaking the construction, the Objectors as beneficiaries are nevertheless also under a duty to preserve the said estate pending final distribution of the deceased's estate.

On the last issue as to whether the injunctions sought by the Petitioner can issue, while the provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules give wide discretion to the Court as to the orders it can make, this Court is still obliged to observe settled principles of law and equity that may be applicable. In the present application, the orders sought are in the nature of final orders seeking the Petitioner and Objectors to undertake or refrain from undertaking certain actions. They are essentially therefore orders for mandatory injunctions.

The principles that are applicable for the grant of such mandatory injunctions were set out by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109**, wherein it

was held that that there must be special circumstances shown over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

As to what constitutes a *prima facie* case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others**[2003] eKLR stated as follows:

**“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

Applying these principles to the instant application, there are some allegations made by the Objectors the Court has found prudent to consider in determining whether this is a clear case for a mandatory injunction to issue. The Objectors averred that there were parties interested in the distribution of the estate, including their mother, who did not give their consent. I have perused the Petition for grant of letters of administration and confirmation of grant filed herein, and indeed the survivors of the deceased brothers of the Petitioner, namely Samuel Mbithi and Titus Kasema Mbithi, are not included as beneficiaries, neither did they give their consent.

Of more concern however to this Court, is that after perusing the pleadings filed herein, I noted that the Petitioner in his affidavit in reply to the Objectors’ summons for revocation of grant that he swore on 22<sup>nd</sup> March 2014 and which was filed on 5<sup>th</sup> May 2014, lists in paragraph 4 thereof the beneficiaries from two houses of the deceased, majority of whom were not included in this administration proceedings. In addition, in paragraph 5 he also refers to additional properties owned by the deceased which were also not included in the list of the assets of the deceased, namely Machakos/Kiandani/2050 and Machakos/Kiandani/2095.

The Petitioner did not deny or confirm the averments by the Objectors that there were beneficiaries who did not consent to the confirmation of grant. To this extent this Court is inclined to give the Objectors the benefit of doubt and the opportunity to argue their Summons for revocation of grant. It may be thus premature to grant the orders sought by the Petitioner, particularly for sub-division of the land parcel known as Machakos /Kiandani/1750 at this stage.

It is therefore my finding that the overriding and common interest and duty of the Petitioner and Objectors is to protect the deceased’s estate pending the hearing of the Objectors’ Summons for revocation of grant. This Court in this regard orders as follows pursuant to section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules:

- 1. The *status quo* that shall obtain as regards all the properties and assets belonging to the estate of the deceased and particularly the land parcel known as Machakos /Kiandani/1750 pending the hearing of the Objectors’ Summons for revocation of grant dated 17<sup>th</sup> July 2009 shall be that the Petitioner and Objectors shall continue to be in possession and occupation of the properties and assets of the deceased that they currently occupy, and the said Petitioner and Objectors shall not sell, transfer, lease or in any manner dispose of or waste the said properties and assets, nor undertake with any further construction and development of the same.**
2. Each party shall meet their respective costs of Chamber Summons dated 12<sup>th</sup> August 2015.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 14<sup>th</sup> day of June 2016.

**P. NYAMWEYA**

**JUDGE**