



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 37 OF 2014

IN THE MATTER OF THE ESTATE OF KALEKYE MUTEVU alias PHILES KALEKYE MUTEVU
(DECEASED)

1. DAVID TITUS MUTUA

2. PHILIP MUTUA MUTEVU APPLICANTS/PETITIONERS

VERSUS

JOSEPH MUSYOKA MUTEVU RESPONDENTS

RULING OF THE COURT

1. The **Chamber Summons** before the court is dated 21st June 2016 by the Applicants seeking the following orders:-

- i. **THAT the application be certified urgent and the same be heard *ex parte* in the first instance.**
- ii. **THAT the Respondent herein be detained in prison for willfully disobeying the order of the court issued against him on 20/8/2015.**
- iii. **THAT the Respondent do deposit in court all the proceeds realized from the sale of timber and logs harvested from Plot Number 128 at Mbee Adjudication Section.**
- iv. **THAT the Respondent be personally present during the hearing of the Summons.**
- v. **THAT the cost of the application be borne by the Respondent.**

2. The application is supported by the affidavit of **David Titus Mutua**, the 1st Petitioner herein on behalf of himself and on the behalf of the 2nd Petitioner. The said affidavit is sworn on 21st June 2016.

3. The Applicants' case is that all that known as **Plot number 128 at Mbee Adjudication Section** is a free property of the deceased, but the Respondent has been massively and unlawfully interfered with the said property by cutting down trees, sawing and selling the final product as timber. The Respondent has also been harvesting trees from the said land and selling them as logs. On 7/05/2015, the court allowed a summons seeking restraining orders against the Respondent, and on 20/05/2015, a formal order was issued by court and the same was served upon the Respondent on 7/9/2015. However, the Respondent has continued to intermeddle with the estate despite the service of the restraining order upon him. It is alleged that presently, the Respondent is actively cutting trees on **Plot Number 128 at Mbee**

Adjudication Section and selling them, the proceeds of which do not reach the estate of the deceased. Now the Applicant urges the court to find the Respondent guilty of contempt and to consider detaining him in prison or imposing any other sentence that it deems fit in the circumstances. The Applicant annexed recent photos showing the scale of alleged destruction wrought on **Plot Number 128 Mbee Adjudication Section** by the Respondent.

4. The Respondent **Joseph Musyoka Mutevu** has opposed the application through his replying affidavit sworn on 12th July 2016 and filed herein on the following day. The Respondent's case is that he has not in any way interfered and or engaged in any acts of intermeddling over **Plot No. 128 at Mbee Adjudication Section**. He has not cut any trees belonging to the deceased's estate on the said plots and selling them as logs. His case is that if there were any trees which have been cut down the same was done by a third party as he resides in **Mutituni area** which is far away from the said plot. The Respondent's case is that he is a law abiding citizen and he has always complied with orders of the Court and he has not in any way intermeddled with the deceased's estate. The Respondent's case is that the application is baseless and malicious and should be dismissed.

5. Parties made oral submissions to the application which I have carefully considered. The issues I raise for determination are the following:-

i. Whether allegations of contempt have been proved.

ii. What orders can this court make to preserve the estate?

6. It is the Applicants' case that the Respondent has disobeyed the order of this court restraining him from intermeddling in the estate of the deceased. This court has confirmed the existence of the said orders issued on 20th August 2015. It is also clear that the said orders were served upon the Respondents on 7th September 2015 by **Andrew Kyalo Mwanzia** the process server, pursuant to the affidavit of service dated and filed herein on 15th September 2015. Although the Respondent has denied that he was served, I am satisfied that he was served and that he was aware of the said orders of the court. However, what is not clear to me is how the Respondent disobeyed the said orders of the court. The said orders restrained the Respondent from interfering with the estate of the deceased. The Applicants' case is that the Respondent has been cutting and selling trees which form part of the estate of the deceased. So the issue is whether or not the Respondent has cut and sold trees on plot No. 128 at **Mbee Adjudication Section**. The Respondent has totally denied the allegation. The Applicant has attached photographs intended to show that trees have been cut. **Mr Ngolya** for the Applicant did not make the least attempt to comply with the **Evidence Act** on production of photograph exhibits, and therefore, the objection by **Mr Muia** for the Respondent that the said photographs are inadmissible is upheld by this court. But I need to add that even if the said photographs were admissible, they would not assist the Applicant to prove that the Respondent had cut and sold trees. The photographs only show that some trees were cut. But it does not show from which plot, by who or at what time. The dates on the photographs are presumed to be the date when the photographs were taken, not the date on which the trees were allegedly cut. Even, assuming for the argument sake that the trees were indeed cut, how does this act relate with the Respondent. **Mr Muia** submitted, correctly, that there ought to have been a report from the Forest Department to show an illegal deforestation. This court notes that contempt allegations are *quasi* criminal in nature, and attract criminal sanctions and so any allegation of contempt should be proved clearly so that an alleged contemnor is not punished illegally. This court finds that the allegations against the Respondent have not been proved. This is not to say that there is no intermeddling with the estate. Rather, it is to say that it has not been shown who is doing that, and as soon as the same is done this court will not hesitate to punish the offender.

7. To safeguard the estate of the deceased, this court will order an investigation into the alleged offence so that an appropriate action can be taken against the culprit. An act of deforestation is illegal, and is even more so if it concerns an estate yet to be distributed.

8. In the upshot I make the following orders:-

- a. The **Chamber Summons** dated 21st June 2016 is dismissed with no order as to costs.
- b. The Officer Commanding Station (OCS) of the nearest police station to plot No. 128 at **Mbee Adjudication Section**, and the relevant **Forestry Department**, are hereby ordered and directed to carry out investigations as to whether there is illegal cutting of trees or timber processing and selling of trees from the said plot 128, and if so, by which people, and to establish the damage done and the quantum of sale, which have taken place, and to file a report in this court within 14 days of service of this order upon the said OCS and the relevant **Forest Department**.
- c. Upon the receipt of the report in (b) above, the Applicant shall be at liberty to revive these proceedings if the Respondent is mentioned adversely in that report.

Orders accordingly.

Dated and delivered at Machakos this 20th day of September 2016.

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E. OGOLA

JUDGE