



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 46 OF 2013

IN THE MATTER OF THE ESTATE OF M’ ITUNGA M’ IBITU

GLADYS NKIROTE M’ITUNGA.....PETITIONER/RESPONDENT

Versus

JULIUS MAJAU M’ITUNGA.....OBJECTOR

EVERLYN WANJA.....1ST APPLICANT

NAOMI MWENDWA MAJAU.....2ND APPLICANT

BONIFACE MUGENDI.....2ND RESPONDENT

RULING

Intermeddling with estate

[1] By Summons expressed to be brought pursuant to Section 45 (1) & (2) and 47 of the Law of Succession Act, CAP 160 Rule 59 and 73 of the Probate and Administration Rules and all other enabling provisions of the Law, the Applicants have sought the following orders:

1.spent
2. *THAT this Honourable court be pleased to issue restraining orders restraining the Respondent in particular Boniface Mugandi (the 2nd Respondent) either by themselves, their agents, assigns or employees from felling the eucalyptus trees therein or in any other way from interfering with the Applicant’s occupation, user and enjoyment of land parcel no. Abogeta/U-Kithangari/732 until inter partes hearing of this application.*
3. *THAT Honourable court be pleased to issue restraining orders restraining the Respondent and in particular Boniface Mugendi either by themselves, their agents, assigns or employees from felling the eucalyptus trees therein or in any other way interfering with the Applicants occupation, user and enjoyment of land parcel no. Abogeta/U-Kithangari/732 and indeed the entire deceased’s estate until completion of the succession cause.*
4. *THAT the honourable court be pleased to order the Respondents to account for the proceeds of sale of eucalyptus tree growing in the deceased estate.*
5. *THAT the honourable court be pleased to summon the Respondents to show cause why they*

should not be committed to civil jail for intermeddling with the deceased estate.

6. THAT the costs of the Application be provided for.

[2] The Application is supported by the grounds on the face of it and an affidavit sworn by the 1st Applicant. Briefly, the Applicants case is that the 1st Applicant's husband Julius Majau M' Itunga was the Objector in Meru High Court Succession Cause NO. 46 of 2013, and that prior to the conclusion and distribution of the estate M' Itunga M' Ibutu the Objector herein died. Consequently, the Applicant's filed an application before the Chief Magistrate's court at Meru for the substitution of the Objector's name vide Meru MISC Succession Cause No. 82 of 2016 which application was allowed.

[3] The Applicants contended that M' Itunga M' Ibitu's (deceased) wishes in his will dated 22nd February 2012, was that the suit property should be shared equally between Charity Muthoni, Lydia Maiti, Gladys Nkirote each getting two acres therein and the balance of 9 acres going to Julius Majau- her husband. She further contended that the deceased in his will specifically in clause 9 had indicated that eucalyptus trees growing in his estate were to be used in facilitating the distribution of his estate which included subdivision and issuance of titles to ensure that his dependants benefit fully. But, the Applicants contended that the Respondents in total disregard of the ongoing Succession Cause and the testator's wishes had embarked on felling the eucalyptus trees therein and selling them. She stated that these actions amounted to intermeddling, a wrong punishable under the law.

[4] The Petitioner in the Replying Affidavit filed in court on 25th September 2015, did not seem to oppose the Application. She however admitted that she fell down 5 trees growing on the suit property which also formed part of the deceased estate; she felled the trees not for purposes of selling as alleged but for rehabilitating her dwelling home, She however averred that she planted the trees with her late husband and that she therefore saw absolutely no harm in harvesting the trees for her upkeep and sustenance.

DETERMINATION

[4] I have carefully considered this Application and the rival submissions by the parties. The Application before me has inter alia been brought under Section 45 of the Law of Succession Act CAP 160 of the Laws of Kenya which establishes a criminal offence of intermeddling with the estate property. I will consider that aspect in depth.

[5] In this case, the Applicant has accused the Respondent of intermeddling with the estate of the deceased through felling of trees growing in the estate property. Is the act complained of intermeddling in the sense of section 45 of the Law of Succession Act? Whereas the law of succession does not define what intermeddling with the property of the deceased is, there is ample judicial decisions on acts which may amount to intermeddling. For instances, in the case of **BENSON MUTUMA MURIUNGI vs. C.E.O. KENYA POLICE SACCO & ANOTHER [2016] eKLR** the court observed that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

[6] See also the case of **MACHAKOS HIGH COURT CIVIL CASE NO. 95 OF 2001 JOHN KASYOKI KIETI – vs- TABITHA NZIVULU KIETI & AOTHER** it was held that doing anything affecting the estate of a deceased person amounts to intermeddling. In the case cited, the court considered commencing a suit on behalf of the estate before obtaining a grant of representation to be an act of intermeddling with the estate. Again, consider the case of **GITAU AND TWO OTHERS -vs- WANDAI AND FIVE OTHERS (1989) KLR 231** where it was held that entering into an agreement to sell estate property before getting a grant or without such a grant is an act of intermeddling.

[7] The Petitioner openly- and boldly so- admitted to felling trees forming of the deceased estate allegedly to rehabilitate her dwelling her house. She seemed to justify her actions on the grounds that she had planted the said trees with her deceased husband and that she saw no harm in harvesting some of the trees for her own upkeep and sustenance. I think the Petitioner’s argument as surviving spouse should be given an ear by the law especially given the contributions by each spouse towards the acquisition of the properties in question. I refuse to believe that, immediately one of the spouses dies, the surviving spouse is reduced to mere squatter on the property the acquisition of which he or she has contributed. I also refuse to believe that the death of one spouse takes away the right of the surviving spouse to the property. This area requires acute court attention as many surviving spouses especially women end up being squatters and are evicted without mercy from the property by their children. This is happening on a daily basis in stubbornly patriarchal societies of Kenya. This is a sad state of affairs for the affected living spouse; the death of the other spouse routs all she possessed and cherished and makes her position obscure. Thus, I think it is about time the law of succession is aligned in order to bring it in conformity with the Constitution on rights of living spouses. I am aware that the Court of Appeal has considered the provision of life interest to spouses and found the provision that life interest for women is extinguished upon remarrying to be prohibited discrimination under the Constitution. Therefore, I will disallow the request for intermeddling for two reasons; (1) the acts complained of were committed by the Petitioner who is the administrator of the estate, and not the 2nd Respondent; and (2) no evidence was tendered to prove the allegations that the trees that were felled had been sold. They may have been used for the purpose stated by the Petitioner. I will, however, require the Petitioner within 30 days to file in court an inventory of the trees felled by her.

What about restraining orders?

[13] The Petitioner admitted that she felled some of the eucalyptus trees to rehabilitate her house. There are also some claims of interference with the occupation of the estate property by the Applicant. As distribution is yet to be decided upon by the court, thus, it makes sense to maintain the status quo by stopping any further felling of trees unless with the order of the court. I am aware these trees are part of the assets provided in the will herein.

Orders

[14] Accordingly, I make the following specific orders:

- 1. The Petitioner shall, within 30 days, file in court an inventory of the trees felled by her.**
- 2. The Petitioner and the 2nd Respondent either by themselves, their agents, assigns or employees are restrained from (1) further felling the eucalyptus trees in the estate and/or (2) in any other ways interfering with the Applicants occupation, user and enjoyment of land parcel No. Abogeta/U-Kithangari/732 until the hearing and determination of this succession cause.**

[15] Except what I have specifically granted all other requests in the application dated 2nd September 2016 are denied. This being a succession cause, there will be no order as to costs.

Dated, signed and delivered in court at Meru this 28th day

of November 2016

F. GIKONYO

JUDGE

In the presence of:

Wamacha advocate for Mokuu advocate for petitioner

Kibiti advocate for objector – absent

F. GIKONYO

JUDGE