



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CASE NO.97 OF 2014

SUSAN KATINDA LEWA..... PLAINTIFF/RESPONDENT

ANDREW NZIOKA NDAMBUKI PLAINTIFF/RESPONDENT

VERSUS

CHRISTINE NDINDA MAINGI 1ST DEFENDANT

JAMES MAUNDU MAKOLE 2ND DEFENDANT

JOSEPH NZONGA MULANDI 3RD DEFENDANT

AND

ROSE KATINDA MUOKI

PETER MAKAU MULWA APPLICANTS/INTERESTED PARTIES

RULING

1. The Applicants via a **Motion** dated **29.9.2014** seeks injunctive relief against the Respondents over **Mbitini/Iteta/347** pending hearing and determination of the suit. The Motion is brought under Order 40 Rules 1A and 2, Order 51 Rule (i) and 51A, 1B and 3A Civil Procedure Rules Cap 21. The Motion is grounded on the allegation that the Respondents have entered suit land and are building thereon and that the estate will suffer irreparably. The Application is supported by the Affidavit of Susan Katinda Lewa sworn on 29.9.2014.
2. The application is opposed and replying affidavits have been sworn by James Maundu Makole on 21.10.2014, Christine Ndinda Maingi on 21.10.2014 and Joseph Nzonga Mulandi on 21.10.2014. The parties filed submissions to canvass the Motion.
3. The Applicants summary of their contention is that, they are administrators of the estate of Ndambuki Samba who is the registered owner of the suit land. The Respondents have without permission started construction therein of a school sponsored by Makueni County Government.
4. They argue that the estate has not been distributed and no beneficiary has capacity to dispose any portion of the estate without court's consent. The Applicants state that the grants are yet to be confirmed and MKS HC.Succ.375/08 is still pending.
5. The Respondents informed the Applicants that they entered suit land upon purchase of the portion of suit land from a beneficiary. They argue that the construction will impede distribution of the estate. They have established prima facie case to warrant granting of orders sought.

6. The Respondents rejoinder is to the effect that the Plaintiff belongs to one house and the other house of the deceased is represented by Rose Katinda Muoki who was given share by mother-in-law since her son Muoki had passed on. The 2nd Plaintiff is the mother of the 1st Plaintiff.
7. Rose Katinda Muoki sought family clan permission to dispose ½ of the suit land. Those who granted permission included Plaintiffs for sale to 3rd Defendant who sold to the Community to establish a primary school. Sale to 3rd Defendant was on 30.9.06. The 2nd Plaintiff sold 2½ acres to Peter Makau Mulwa in 2007. Peter Makau also bought a portion of land from mother of the 2nd Plaintiff.
8. By the time of the above sale, letter of administration had not been obtained by any of the beneficiaries. 2nd Plaintiff sold ½ of suit land then restricted the balance and then filed succession case. The 3rd Defendant had been in possession of bought portion ½ acre uptill when he sought financial aid from Government of Makueni to build a primary school. The same government contracted 1st Defendant who built the school.
9. The Respondents contend that the Plaintiffs are aware Rose Katinda had sold ½ acre to 3rd Defendant in 2007 while on their side they sold more than 5 acres. They never questioned sale and possession by 3rd Defendant. The Applicants are thus not going to court with clean hands contrary to equity maxim to wit *“he who goes to equity must do so with clean hands.”*
10. The Defendants submits that all parties have wronged the law by selling portions of the estate before distribution. Thus they should be held accountable during distribution in accordance with the share they appropriated. The ½ acre sold and subject to suit is fully built and in use and the same can fall in Rose Katinda’s share at the time of distribution.
11. In any event, the court should cede jurisdiction on the dispute to family court since HC.Succ.No.375/08 is still pending to determine distribution of the suit land. The Respondents thus seek the dismissal of the application.
12. After going through the parties’ cases, before the court and their submissions, I find the following issues emerging:

1. Whether ELC court has jurisdiction to entertain the dispute.
 - a. If yes, whether the disposal of parts of estate before distribution is lawful?
 - b. Whether the Applicant has met the threshold for grant of interim injunction?
 - c. What is the appropriate order in the circumstances?
 - d. What is the order as to costs?

In the Plaint dated 29.9.2014 initiating the instant suit, the Plaintiffs sought declaration that suit land belongs to the estate of Ndambuki Samba and an injunctive relief against Defendants for what is alleged to be intermeddling with the estate property.

13. Under Section 45 of Succession Act, intermeddling of Estate of deceased is prohibited. It is even a criminal offence to intermeddle. The whole suit is based on the alleged intermeddling in form of sale and development of the estate property before distribution of the estate to the beneficiaries. Under the provisions of the Cap 160, the family court is mandated to handle all aspects pertaining to the estate of a deceased person. The ELC court under Article 162 of the Constitution and the provisions of ELC Act 2012 is mandated to deal with occupation, use and title to land plus environmental issues.
14. The core issue in the instant suit is Rose Kendi Muoki sale to 3rd Defendant of ½ of suit land before distribution. It is not denied that she is a beneficiary just like the Plaintiffs. The Plaintiffs have not denied also that they sold of suit land to third party before distribution. The sale by both sides amounts to intermeddling which the court finds falls in the jurisdiction zone of the family court and not ELC.
15. The school as shown by the photographs is complete and it is not denied is in use. The family court in distributing the estate, will decide whether Rose Katinda will get same sold land reduced from her shares and so is the other beneficiaries who have disposed part of the estate properties. For now court finds that the matter should be referred to family court handling HC.Succ.375/08. The parties and the intended parties not yet in the Succession case can ventilate their claims in the

succession court.

16. The court thus makes the following orders:

1. The suit herein is referred to the HC.Succ.375/08 for determination of the dispute arising in the Instant suit.
2. The matter is marked as terminated as an ELC case.
3. Costs in the cause.

Dated and Delivered at Machakos, this 27th day of February, 2015.

CHARLES KARIUKI

JUDGE