



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1039 OF 2012**

**IN THE MATTER OF THE ESTATE OF KIMEU NDEKE KAVWII alias KIMEU NDEKE  
(DECEASED)**

**CHARLES KYATHE NDEKE.....APPLICANT**

**VERSUS**

**DANCAN MUTUNGA.....1<sup>ST</sup> RESPONDENT**

**DISTRICT REGISTRAR MAKUENI.....2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND SUVEYOR.....3<sup>RD</sup> RESPONDENT**

**RULING**

**The Application**

The Applicant herein petitioned for letters of administration with respect to the estate of the late Kimeu Ndeke Kavwii alias Kimeu Ndeke. He subsequently filed an application by way of summons for the preservation of the said estate pursuant to section 47 of the Law of Succession Act. He is seeking the following orders in the said application:

- a. That the Respondents be stopped from intermeddling with the estate of the deceased by visiting the land to fix boundaries and or altering boundaries whilst the cause is pending in this court, and or before letters of administration are issued to the petitioner.
- b. Duncan Mutunga be restrained from cultivating the land, cutting down trees, erecting structures on the land and claiming to have bought the land from a person who is not related to the family.

The Applicant in his supporting affidavit sworn on 13<sup>th</sup> December 2012 and filed in court on the same date averred that the 1<sup>st</sup> Respondent has been trespassing unto the land parcel No.Ukia/Kilala/115 (hereinafter referred to as “the subject land”) registered in the name of his father, and cultivating, changing boundaries of the land and doing such acts which amount to changing the nature and landscape of the land. Further, that the said Respondent has been inviting the District Land Registrar and the District Surveyor to mark the boundaries of his father’s land which is subject of succession proceedings. The Applicant contends that the Respondents’ acts are contrary to the provisions of section 45 of the Law of Succession Act, and amounts to intermeddling with the estate of the deceased.

**The Response**

The 1<sup>st</sup> Respondent thereupon filed a replying affidavit sworn on 8<sup>th</sup> February 2013 in opposition to the

Applicant's application. In addition, one Joel Ndambuki Mbithi also filed a replying affidavit he swore on 12<sup>th</sup> February 2013 in opposition to the summons for the preservation of the estate. The 1<sup>st</sup> Respondent stated that the Applicant is aware of Succession Case No. 172 of 2002, and is also aware that the 1<sup>st</sup> Respondent has been in occupation of the subject land for two years, having bought the land from Joel Ndambuki Mbithi. Further, that the applicant and his family members having worked on the said land as his employees.

The 1<sup>st</sup> Respondent denied that he has been trespassing on the subject land as alleged, and averred that he has been exercising his rights as a *bona fide* purchaser for value. He stated that it is Joel Ndambuki Mbithi who as the administrator of the estate of the deceased, called the surveyor to ascertain the apportionment of acreages for purposes of confirmation of the grant, and that the Applicant has not enjoined the said administrator in these proceedings, nor does he have capacity to sue the 1<sup>st</sup> Respondent.

Joel Ndambuki Mbithi (hereinafter referred to as "the Deponent") deponed in his affidavit that he is a beneficiary to the estate of the deceased by virtue of being his son, and that the Applicant is a brother to the deceased and not his son as alleged. Further, that the Applicant has no capacity to apply for summons for preservation to the estate of the deceased as he is not a beneficiary to the estate of the deceased, and neither is he a dependant. The Deponent stated that on 16-12-2011 he was issued with letters of administration to the estate of Kimeu Ndeke Kavwii (Deceased) in Machakos High Court Succession Cause No. 172 of 2002, and the grant was confirmed on 8-2-2013. He attached a copy of the letters of administration.

According to the Deponent, the confirmed Grant has transferred the subject land absolutely to Duncan Mwololo Mutunga, the 1<sup>st</sup> Respondent herein, and that it was necessary to find out the acreage of Ukia/Kilala/115 for purposes of confirmation of the grant. He stated that he then asked the District Registrar Makueni to send surveyors to the land for the purposes of ascertaining its acreage and setting the boundaries to it. Further, that the District Registrar Makueni acted on his request and summoned the Applicant herein and other persons who border the subject land for the purposes of determining the boundary to the land.

The Deponent gave a history of the occupation of the said land, and of the decision of family members, including the Applicant, to sell it to a third party, He averred that the 1<sup>st</sup> Respondent has not been trespassing on Ukia/Kilala/115 as the Applicant alleges, and that on the contrary he has been exercising his rights as a *bona fide* purchaser for value and a beneficiary to the estate of the deceased. Lastly, it was deponed that if the Applicant had any complaint to lodge with regard to the estate of the deceased, he should have filed his complaint in the succession cause where the Deponent is the administrator to the estate of the deceased.

### **The Submissions**

The parties were directed by the Court to file and serve submissions on the Applicant's summons. The submissions by the Applicant's counsel Paul Kisongo & Company Advocates which are on record are dated 21<sup>st</sup> April 2015, and appear to be on the summons for revocation of grant. In summary, the Applicant gave a lengthy history of the family of the deceased and the probate proceedings upon the deceased's death. He submits that Joel Ndambuki Mbithi was fraudulently substituted Administrator of the estate claiming that he was the only son of the deceased, and he was issued with a grant which was later confirmed fraudulently whereupon he sold the subject land to Duncan Mwololo Mutunga. Further, that the sale is null and void since section 83 of the Law of Succession Act forbids sale of immoveable property before confirmation.

The 1<sup>st</sup> Respondent's counsel, O.N. Makau & Mulei Advocates, filed submissions dated 27<sup>th</sup> November 2014, wherein he argued that the application herein is an abuse of the court process and should be struck out on the grounds that it is *sub-judice* Machakos High Court Succession Cause No. 172 of 2002. The 1<sup>st</sup> Respondent submitted that the Applicant is aware of Succession Cause No. 172 of 2002 and is a party thereto, having filed summons for revocation therein dated 24<sup>th</sup> June 2013 .

The 1<sup>st</sup> Respondent further submitted that there has been no intermeddling as alleged by the Applicant, as a confirmed grant in respect of the deceased's estate was issued to Joel Ndambuki Mbithi on 8<sup>th</sup> February 2002, and the said administrator entered into a sale agreement with respect to parcel No. UKIA/KILALA/115 on 26<sup>th</sup> October 2011. Further, that section 82 of the Law of Succession Act permits an Administrator to dispose of immoveable property after confirmation of grant. Lastly, that the 1<sup>st</sup> Respondent is thus a *bona fide* purchaser for value and not an intermeddler, and cannot be retrained from using land which he lawfully purchased.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made herein. The issue to be decided is whether the orders for preservation of the estate sought herein are available to the Applicant. The sections of the law relied on by the Applicant is section 47 of the Law of Succession Act, which 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 wants this Court using this law to stop the Respondents from intermeddling with the estate of the deceased.

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.

In the instant case, the 1<sup>st</sup> Respondent has averred that he was sold the subject land by the administrator of the estate of the deceased, namely Joel Ndambuki Mbithi, after the confirmation of grant to the said administrator in Machakos High Court Succession Cause No. 172 of 2002. He has provided evidence of the grant issued to the said Joel Ndambuki Mbithi.

I have perused the file for Machakos High Court Succession Cause No. 172 of 2002 and note that the grant of representation was issued to Joel Ndambuki Mbithi on 16<sup>th</sup> December 2011, and a rectified confirmation of grant to the said administrator indicating the 1<sup>st</sup> Respondent as a beneficiary issued on 8<sup>th</sup> February 2013. The summons for revocation of grant by the Applicant herein was subsequently filed on 24<sup>th</sup> June 2013. There is thus *prima facie* evidence that parcel No. UKIA/KILALA/115 may have been sold to the 1<sup>st</sup> Respondent before issue and confirmation of grant to the said administrator, if the sale agreement for the said parcel was entered into by the said parties on 26<sup>th</sup> October 2011 as alleged by the 1<sup>st</sup> Respondent.

This observation notwithstanding, I also note that the duty of preservation of a deceased's estate can only be that of an administrator, in his capacity as the personal representative of the deceased and in whom the deceased's property vests. This position is pursuant to the powers and duties of an administrator as set out in sections 79 and 83 of the Law of Succession Act. It is for this reason that I find that the Applicant, not having been issued with any grant of administration with respect to the estate of the deceased, has no locus to bring the instant application. I also agree with the 1<sup>st</sup> Respondent that the Applicant ought to have sought the appropriate relief in Machakos High Court Succession Cause No. 172 of 2002 where he is seeking revocation of grant issued therein to Joel Ndambuki Mbithi.

Arising from the foregoing, I accordingly order as follows pursuant to the provisions of section 47 of the Law of Succession Act:

1. The Applicant's summons for preservation of estate dated 13<sup>th</sup> December 2012 **be and is hereby struck out for being defective and incompetent.**
2. **This suit, being Machakos High Court Succession Cause No 1039 of 2012 be and is hereby consolidated with Machakos High Court Succession Cause No 172 of 2002 for purposes of being heard and determined together, and the file for Machakos High Court Succession**

- Cause No 172 of 2002 shall be the lead file for purposes of recording of proceedings.**
- 3. The *status quo* obtaining as at the date of this ruling with respect to the occupation and possession of the property known as UKIA/KILALA/115 shall continue to obtain and be maintained pending the hearing and determination of the summons for revocation of grant dated 24<sup>th</sup> June 2013 filed in Machakos High Court Succession Cause No 172 of 2002 . There shall however be no further transfer of the said land, and/or further destruction, wastage, and/or construction on the same by the administrator, 1<sup>st</sup> Respondent and/or Objector and/or their agents and servants pending the hearing and determination of the said summons.**
  - 4. Each party shall meet their respective costs of the Summons for Preservation of estate dated 13<sup>th</sup> December 2012.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 22<sup>ND</sup> DAY OF OCTOBER 2015.**

**P. NYAMWEYA**

**JUDGE**