



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 885 OF 2010**

**IN THE MATTER OF THE ESTATE OF MARTIN MUTUKU KAINDI**

**(DECEASED)**

**JOICE LOKO KALOKI.....1<sup>ST</sup> ADMINISTRATOR/APPLICANT**

**PHILOMENA NGINA MAINGI..... ADMINISTRATOR/APPLICANT**

**VERSUS**

**STEPHEN MUTHINI NZUKU .....OBJECTOR/RESPONDENT**

**RULING**

1. The application dated **12<sup>th</sup> March, 2013** is brought pursuant to the provisions of **Sections 45 and 47** of the **Law Succession Act, Rules 49 & 73** of the **Probate and Administration Rules**. It seeks orders restraining the Respondent from intermeddling and/or interfering with the property of the estate of the deceased herein by trespassing into, excavating, keeping or storing materials and constructing on land title No. **Athi River/ Athi River Block 1/1617** and any other property belonging to the estate of the deceased. Secondly, that the court direct the **DCIO, Machakos** to commence investigations and prefer charges against the respondent for intermeddling and interfering with the property of the deceased.
2. The application is supported by an affidavit deponed by the Applicant, **Joyce Loko Kaloki** who depones that she is a wife to the deceased; the respondent claimed that the deceased jointly with his brother **Loki Kathule** sold to him Plot No. **Machakos/Kiandani/2623 and 2624**; then Plot No. **620 at Makutano junction**. That it was established that the **Machakos/Kiandani/2623 and 2624** were non-existent as they belonged to the Estate of **Robert Kaindi Kala** (deceased) her father-in-law and the estate that was subject of **Succession Cause No. 500 of 2008**, where a grant had been issued and confirmed on **15<sup>th</sup> February, 2013**. She stated further that the respondent fenced a portion of Parcel No. **Athi-River/Athi River Block 1/1617**. He has started excavation work on the land. Unless restrained he will continue intermeddling with the Estate of the deceased.
3. In response, the Respondent stated that the application was supported by a defective affidavit that did not enjoin the 2<sup>nd</sup> Administratrix as an Interested Party and/or having authorised the applicant to swear on her behalf. He stated that he bought Plot No. 620 at Kyumbi from the deceased therefore seeking restraining orders against him lacked merit. The application was premature as **Loki Kathule** had not supported the application. The application was brought in bad faith and the applicant stood to suffer no damages.
4. I have considered rival submissions of both counsels for the applicant and respondent.
5. The background of this matter is that the applicant and her sister-in-law **Philomena Ngina Maingi** took out Letters of Administration in respect of her deceased husband **Martin Mutuku Kaindi**.

Assets listed as belonging to the deceased include- **Athi River/Athi River Block 1/1617**. A parcel of land registered jointly in the names of the deceased **Loki Kathule Kaindi** who is said to be his brother who is in custody (prison). A grant of **Letters of Administration Intestate** was issued on the **25<sup>th</sup> March, 2011**. On the **26<sup>th</sup> July, 2011** an application for confirmation of the grant was made notwithstanding that six (6) months had not lapsed. An application was made by the applicant seeking orders to withdraw **Kshs. 1,500,000/=** from the deceased's account. At this juncture the respondent applied to come into the matter as an objector. In a replying affidavit to the application he deponed that the deceased sold to him properties which made him a beneficiary of the Estate of the deceased. He averred that monies in bank that the applicant sought were proceeds of the said sale of Plot **Number Machakos/Kiandani/2623-2424** measuring 029-0.010 Ha that belonged to him but was sold by the deceased without his knowledge. Parties negotiated and following a consent recorded, monies were released to the applicant through a court order on **13<sup>th</sup> July, 2012**.

Thereafter the applicant filed the instant application.

6. According to **Section 45 of the Law of Succession Act**, no person is supposed to intermeddle with any free property of a deceased person. There must be legal authority from the court prior to any person dealing with the deceased person's property. In the premises the deceased's property must be preserved and/or protected prior to the beneficiaries being authorised to distribute it.
7. The orders sought are restraining orders to deter the respondent from intermeddling with the deceased's property. He allegedly trespassed onto property **Athi River/Athi River Block 1/1617** said to be part of the deceased's property. A perusal of the affidavit in support of the petition for Letters of Administration Intestate (*Form P&A 5*) shows that the said property is included as an asset forming the deceased's estate but it is indicated as having been registered in the joint names of the deceased and his brother **Loki Kathule Kaindi**. The Respondent has demonstrated that in the year **2002** he purchased Land from the deceased, title Number **Machakos/Kiandani 2623-2624** which does not seem to be in dispute. In the year **2005** he also bought from him and his brother **Loki Kathule Plot No. 620** situated at **Makutano Market**.
8. The applicant admits that the deceased sold some land to the Respondent but states that it was curved out of parcel number **Athi River/Athi River Block 1/1727** that the deceased and his brother **Loki Kathule** inherited from their late father following distribution of property in Succession **Cause No. 500 of 2008**. Annexure "**JLK 2b**" is a certificate of Official search for parcel No. **Athi River/Athi River Block 1/1617**. The proprietors are **Loki Kathule Kaindi** and **Martin Mutuku Kaindi**. In order to prove that the respondent was in occupation of the wrong parcel of land it was important for **Loki Kathule** to swear an affidavit to support the allegation. Without such evidence this court cannot tell whether or not the respondent is in occupation of what he indeed purchased from the deceased and his brother **Loki Kathule** or not. The applicant has therefore failed to demonstrate the alleged trespass.
9. Despite the fact that the applicant has not demonstrated a *prima facie* case requiring issuance of orders sought, the court has a duty of protecting the deceased's property. The only way this court can discharge that duty is to ensure the application for Confirmation of the Grant is heard and determined immediately. Parties herein are therefore directed to fix a date for hearing of the application on priority basis.
10. The upshot of the above is that the application dated **11<sup>th</sup> March, 2013** stands dismissed. Each party shall bear their own costs.

**DATED, DELIVERED and SIGNED** this **22<sup>nd</sup>** day of **JANUARY, 2014**.

**L.N. MUTENDE**

**JUDGE**