



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO.234 OF 2002**

**IN THE MATTER OF THE ESTATE OF MUTHINI MUU JOHN (DECEASED)**

**GABRIEL MTWARA MUTHINI.....1<sup>ST</sup> ADMINISTRATOR/APPLICANT**

**VERSUS**

**MARY CELLA KANINI MUTHINI. ....2<sup>ND</sup> ADMINISTRATOR/APPLICANT**

**MUTHIO MUTHINI .....3<sup>RD</sup> ADMINISTRATOR/APPLICANT**

**BONIFACE NZIOKA MUTHINI ..... 4<sup>TH</sup> ADMINISTRATOR/APPLICANT**

**AND**

**DOMINIC MUTINDA MUTEVU .....INTERESTED PARTY**

**RULING**

1. By an application dated **15<sup>th</sup> September, 2011**, the applicant (1<sup>st</sup> Administrator) seeks orders against the respondents(2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Administrators) and Interested Party as follows:-
  - i. **That** the sale of part of Land Parcel No. **Muthetheni/Kionyweni/994** by the Respondents to the interested party is unlawful, null and void.
  - ii. **That** the respondents and the interested party be and are hereby restrained from disposing or otherwise intermeddling with Land Muthetheni/Kionyweni/994 or any other property belonging to the deceased.
  - iii. **That** the interested party be and is hereby restrained from accessing, using, cultivating or in any other way interfering with land Parcel No. Muthetheni /Kionyweni/994.
  - iv. **That** cost of this application be provided for.
2. The application is brought pursuant to the provisions of **Section 45, 55, and 95** of the **Law of Succession Act** and all enabling provisions of the law and is based on grounds that the respondents have sold Land Parcel No. **Muthetheni/Kionyweni/994** to the interested party and will continue to do so unless restrained by the court; the purported sale is unlawful, *null* and *void* and it amounts to disposing of/or intermeddling with the estate contrary to the provisions of **Section 45** and **55** of the **Law of Succession Act, Cap 160 Laws of Kenya**.
3. Further in support of the application is an affidavit deposed by the applicant where he avers that his co-administrators have side-lined him which has made it difficult to discharge his duties. His co-administrators have disposed of land forming the estate of the deceased. A sale agreement dated **8<sup>th</sup> May, 2004** has been varied to encompass sale of more land over the years which has

- resulted into the interested party taking possession of and fencing of a substantial portion of the land.
4. In reply thereto the 1<sup>st</sup> respondent depones that the applicant herein is her son who has not spoken to her for the last 20 years and had abandoned them for 10 years prior to the death of the deceased. That the deceased had the land subdivided among all his sons and titles were to be processed. She (1<sup>st</sup> respondent) was given the suit premises while her co-wife was given Muthetheni/Kionyweni/995. The deceased retained the rest of the land and sold of some portions to finance his treatment. He died prior to transferring the land to his family. Admitting having sold of a portion of the suit premises, she stated that it was due to financial problems. She called upon the court to confirm the grant to enable her transfer the portion sold instead of nullifying the sale between her and the interested party.
  5. In a response thereto the 2<sup>nd</sup> respondent stated that the deceased shared out the suit premises. He gave the 1<sup>st</sup> respondent Muthetheni/Kionyweni/994 and gave her Muthetheni/Kionyweni/995. The applicant was given Muthetheni/Kionyweni/999 which he fenced and leased out for grazing. She called upon the court to confirm the grant.
  6. The interested party deponed that he was approached by the 1<sup>st</sup> Respondent in the year 2002. She offered to sell to him land as she was in dire need of money. He resisted the offer but later on accepted to buy 2 acres after the family assured him that he would be registered as the proprietor. To his knowledge other people had also purchased portions from the suit premises.
  7. The deceased herein died on the **9<sup>th</sup> June, 2001**. On the **16<sup>th</sup> March, 2004**, a Grant of Letters of Administration Intestate was issued to the Applicant and respondents herein. Despite the fact that more than **six (6) months** have lapsed, the grant herein has not yet been confirmed.
  8. The 1<sup>st</sup> Respondent herein admits having disposed of a portion of the estate of the deceased ( 2 acres) which she claims to be entitled to the Interested party. The interested party also confirms having purchased it.
  9. **Section 45 of the Law of Succession act, Cap 160 Law of Kenya** provides:-

***“1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purposes, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.***

- a. ***be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment, and***
- b. ***Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.***

10. Dealing with a free property of the deceased person without any authority as stated by the law prior to confirmation of the grant is interference that cannot be condoned by the law. This position was well put in the case of ***Gitari & 2 Others versus Wandai & 5 Others Civil Case No. 2100 of 1987***. Justice Tunoi held thus:-

***“Intermeddling with the property of the dead person consists of taking possession, disposing or otherwise intermeddling with the free property.”***

11. The sale agreement for land entered into between the 1<sup>st</sup> respondent and the Interested Party is dated **8<sup>th</sup> May, 2004**. It was made after the 1<sup>st</sup> Respondent was issued with a Grant of Letters of Administration on **16<sup>th</sup> March, 2004**. **Section 55 of the Law of Succession Act** , provides thus:-

***“ no grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by Section 71”.***

12. Following the provisions of the law it was unlawful for the 1<sup>st</sup> Respondent to dispose of the 2 acres of land that formed the estate of the deceased. The belief that she was entitled to it having been given by the deceased without any transfer having been effected did not give her the authority to deal with the property. The property sold to the interested party will therefore remain the deceased's until the grant is confirmed.

13. This court being duty bound to protect the estate of the deceased person orders as hereunder:-

- i. The purported sale of Parcel No. **Muthetheini/Kionyweni/994** be and is hereby declared unlawful, null and void.
- ii. The administrators of the estate of the deceased or any other person be deterred from intermeddling with the estate of the deceased prior to confirmation of the grant.
- iii. This order shall serve as a notice from this court directing the applicant and respondents to have the grant confirmed.
- iv. This being a succession matter each part shall bear their own costs.

**DATED, SIGNED and DELIVERED at MACHAKOS this 3<sup>rd</sup> day of APRIL 2014**

**L.N. MUTENDE**

**JUDGE**