



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 2426 of 2011

IN THE MATTER OF THE ESTATE OF NAFTALI MUTUNGI MWANGI (DECEASED)

PETER MAKOME MUTUNGU.....1ST APPLICANT

SAMUEL MWANGI MUTUNGU.....2ND APPLICANT

-VERSUS-

MARY WANGARI MUTUNGU.....RESPONDENT

RULING

This application is brought by summons dated 12th September, 2012 and taken out under **Sections 45 and 47 of the Law of Succession Act, Cap 160 Laws of Kenya, Rules 49, 59 and 73 of the Probate and Administration Rules and all other enabling provisions of the Law.** The Applicants thereby seek orders that:-

1.....(Spent)

2. That this Honourable Court may be pleased to grant an order of injunction restraining the respondent either by herself, agents, servant or licences from intermeddling, transferring, interfering, selling and or disposing off the deceased properties and compelled to produce all the original documents pertaining to the deceased properties of which documents are in her custody pending the hearing and determination of this application.

3. That this Honourable Court may be pleased to grant an order of injunction restraining the respondent either by herself, agents, servant or licences from intermeddling, transferring, interfering, selling and or disposing off the deceased properties and compelled to produce all the original documents pertaining to the deceased properties of which documents are in her custody pending the hearing and determination of this Succession Cause or until further orders of this Honourable Court.

4. That the Respondent be ordered to reveal all the other unidentified properties which belonged to the deceased.

5. That cost of this application be provided for.

The application is supported by the annexed affidavit sworn by the 1st Applicant **PETER MAKOME MUTUNGU** on the 11th September, 2012 and is based on the grounds specified on the face of the application. Most salient among those grounds are that:-

1. That Mary Wangari Mutungu is the 2nd wife of the deceased and she has already sold the deceased Motor Vehicle Registration No. KAH 156X among other deceased properties.
2. That the said Mary Wangari Mutungu has already offered for sale other deceased properties.
3. That the said Mary Wangari Mutungu is in the process of transferring the deceased properties which are the family's source of livelihood.
4. That the Respondent has no letters of Administration of the Estate of the late Naftali Mutungu Mwangi to warrant her to sell and or dispose off, or transfer the properties of the deceased.
5. That the petition for the Letters of Administration was filed on 4th May 2012, but the grant of Letters of Administration are yet to be issued.
6. That unless the injunction orders are granted, the applicant's family members shall suffer irreparable loss of their father's inheritance forever while the Respondent will not be prejudiced as she will continue to enjoy the proceeds from the sale of the deceased properties.

I note that the application is not opposed, as there is no replying affidavit or grounds of opposition filed. There is no affidavit of service on record.

After considering the application and the submission by counsel for the Applicant, I take the view that the main issue for consideration is whether the Applicants have made out a case for the grant of interlocutory injunction.

I note that the Applicants have moved the court under **Section 45 of the Law of succession Act, Cap 160** which provides for the protection of the property of the deceased. Indeed subsection (1) of the said **Section 45** provides thus:

“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 purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.

Indeed it is the Applicants' contention that the said Naftali Mutungu Mwangi (deceased) died intestate on 25th February 2011. I have seen a copy of the death certificate No. 003477 and dated 29th April, 2011. The Applicants have averred that the Respondent herein has no letters of Administration to warrant her to sell, dispose off and or transfer the said deceased properties, and further the petition for the Letters of Administration was filed on 4th May 2012, but the grant of letters of Administration are yet to be issued. What one can discern from the facts therein is that there is a need to accelerate the issuing of the grant of letters of Administration so that the estate may be distributed speedily once and for all. This would put to rest all the issues raised in this matter.

It would be important to note that the applicants herein have alleged intermeddling of the deceased properties by the Respondent herein, and they have relied on the provisions of **Section 45** of the Law of Succession Act cited above. It is imperative to note that the law does not operate in a vacuum. The said section is aimed at protecting the properties of the deceased person, as it prevents any person from taking possession or disposing of, or otherwise intermeddle with, any free property of a deceased person.

Although in the present case, letters of Administration is yet to be issued, the Applicants have relied on the inherent powers of the court as provided in **Section 47 of the Law of Succession Act**, which provides thus: ***“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient”.*** The question is, can this court grant the orders sought in this application even in the absence of letters of administration?, My considered view is that the said powers in **Section 47 of the Law of Succession** cited

above can only be exercised by the court within the premise of the law. This is a court of law, and as been said above the law does not operate in a vacuum.

Indeed it was held in the case of *Christine Achieng Ogesa & Another v. British American Asset Managers Limited (2012)eKLR* that **Without a grant of representation or a special limited grant ad colligenda bona, the Applicants have no legal capacity to sue the Respondent as yet for payment to them of the money the deceased's estate is entitled to. Indeed, S.45(1) of the Law of Succession Act prohibits intermeddling with the property of a deceased person and S.45(2) creates penal sanctions for intermeddling.**

I will also be guided by the decision in *Virginia Edith Wambui Otieno versus Joash Ochieng Ougo & Omolo [1982 – 88] 1 KAR 1049* in which the court held that ***an action started by an intestate's intended administrator, before the granting of Letters of Administration, is incompetent at the date of its inception.***

Also, a look at ***Section 46 of the Law of Succession Act***, one notices that the said section enjoins the police, chiefs or administrative officers to preserve the estate of a deceased person in their local areas before the grant is issued. I am of the humble opinion that in view of the said ***Section 46 of the Succession Act***, before the grant is issued, as in the instant case, the Applicants cannot bring an action in respect of the estate of the deceased. The applicants have not demonstrated that they sought the help of a police officer or indeed their local chief in as far as the meddling with the deceased properties by the Respondent is concerned. At least from the records, there is no such report from the police or chief etc.

In conclusion, in view of the foregoing, I take the view that the application lacks merit and should fail. Accordingly, the application should be dismissed.

DATED, SIGNED and DELIVERED at NAIROBI this 18th DAY OF APRIL, 2013.

W. M. MUSYOKA
JUDGE