



**No.128/2013**

**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 215 OF 2013**

**IN THE MATTER OF THE ESTATE OF KILONZO MBWALA NGESU (DECEASED)**

**1. FRANCIS MUSYOKI KILONZO**

**2. DORCAS NDUKU WAMBUA.....PETITIONERS /APPLICANTS**

**VERSUS**

**VINCENT MUTUA MUTISO....RESPONDENT/INTERMEDDLER**

**RULING**

1. By general summons dated 29<sup>th</sup> April 2013 brought pursuant to provisions of Section 45(1) and 47 of the Law of Succession Act, and Rule 73 of the Probate and Administration Rules, the applicants seek issuance of restraining orders against **Vincent Mutua Musiso**, the Respondent from intermeddling and/or interfering with the land parcel **Iveti/Mung'ala/943** being part of the deceased's estate.
2. The application is supported by an affidavit deponed by **Francis Musyoki Kilonzo**, the 1<sup>st</sup> applicant who has authority from the 2<sup>nd</sup> applicant to so depose in which he states that land parcel No. **Iveti/Mungala/943** herein after "*the deceased's property*" is registered in the name of **Kilonzo Mbwala Ngwesu** (deceased). That the respondent, a person not related to the deceased has unlawfully entered into the deceased's property and is now drilling a borehole and committing other acts of wanton destruction thereon. That it is expedient for the court to grant orders preserving the estate of the deceased.
3. In a response thereto the respondent deposed an affidavit stating that he purchased the parcel of land in issue from the petitioners herein who needed money to purchase an artificial leg for the 1<sup>st</sup> applicant and secure release of the 2<sup>nd</sup> applicant's grandson from prison. Following their mutual agreement he occupied the land and started cultivating it.
4. Further, he stated that indeed they were the applicants who intermeddled with the estate of the deceased. However, he alluded to the fact that the sale agreement acknowledge the fact that the estate belonged to the deceased and the applicant's claim of authority to dispose it of. He viewed himself as a beneficiary of the estate by virtue of being a purchaser, hence sought his inclusion into the schedule of distribution. He however denied an allegation that he intended to drill a borehole on the deceased's estate. He called upon the court to defend his interest of a purchaser's right.
5. Rival submissions by both counsels for the Applicant and Respondent have been considered.
6. The order sought by the applicants reads as follows:-

***“THAT the respondent /intermeddler, Vincent Mutua Mutiso, be restrained from intermeddling and/or interfering with land parcel Iveti/Mung’ala 1943 which is part of the deceased’s estate hereof”.***

7. The prayer as framed does not disclose if it seeks a temporary relief or a permanent one. To grant such a prayer or not would require the court to act in accordance with the law. Ordinarily an injunction order would be sought pursuant to Order 40 of the Civil Procedure Rules. The Probate and Administration Rules do not provide for an injunctive relief as Order 40 of the Civil Procedure Rules is not one of the Civil Procedure Rules stipulated as being applicable to Succession matters (see Rule 63(1) of the Probate and Administration Rule; In the matter of the estate of **Kibomen Komen** (deceased) **NKR Succession Cause No. 500 of 1997**; In the matter of the **Estate of Michael Kiilu Musumba and Beatrice Kathini Kiilu-Petitioner, MKS P&A Cause No. 88/2003**; and **Peter Guri Kinyua versus Joseph Muthii and another [2007] eKLR**.
8. However, by virtue of Section 47 of the Law of Succession Act, this court must determine the issue brought before it in a just manner.
9. Section 45(1) of the Law of Succession Act provides as:-

***“Except so far as expressly authorised 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”.***

10. It has been demonstrated that the deceased died on 1<sup>st</sup> September, 1987. Then in the year 2012, prior to a grant of representation being obtained under the Law of Succession Act, the applicants herein disposed of the deceased’s property to the respondent. In a sale agreement entered into by the parties, the applicants needed money to purchase an artificial limb for the 1<sup>st</sup> applicant and to secure release of the 2<sup>nd</sup> applicant’s grandson from prison.
11. Reasons given do not fall within the ambit of Section 45(1) of the Law of Succession Act. The deceased was survived by six (6) other defendants/beneficiaries. Disposing of the land belonging to the deceased was indeed intermeddling with the estate of the deceased.
12. Looking at the mutual agreement entered into between the applicants and respondent attested by **R.M. Matata & Co. Advocates** paragraph 5 & 6 states;-

***“5) The vender undertakes to file a succession cause in respect of the deceased estate to facilitate transfer of the purchased parcels of land in favour of the purchaser.***

***6) The purchaser shall take possession of the purchased land parcel immediately.”***

13. Ideally, it is the sale that was transacted that prompted the applicants to file the succession cause on 16<sup>th</sup> April 2013. This was followed by this application 13 days later.
14. In granting any order sought this court would be exercising its jurisdiction as a court of equity. This court must therefore uphold principles of equity and justice. An applicant seeking such orders must come before the court with clean hands. The maxim on the principle of equity is expressed as follows;--

***“No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault.. a court of equity shall not assist a person in extricating himself or herself from circumstances that he or she has created.”***

15. Circumstances giving rise to this application were created by the applicants. By coming up with such an application following the sequence of events as set out clearly show that they acted in bad faith. What can be envisaged from their action is intent to defraud. This is a case where both parties knowingly intermeddled with the estate of deceased; therefore the respondent can equally

not pose as an innocent purchaser. This court cannot protect him. All parties herein ought to be prosecuted pursuant to Section 45 (1) and (2) of the Law of Succession Act.  
16. From foregoing, Orders sought by the applicants cannot issue. The application is dismissed with costs to the respondent.

**DATED, SIGNED and DELIVERED at MACHAKOS this 12<sup>TH</sup> day of NOVEMBER, 2013.**

**L.N. MUTENDE**

**JUDGE**