



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO. 79 OF 2007**

**ANNE KENDI MBAYA.....PETITIONER**

**VERSUS**

**JONATHAN M'NKANATA M'MUGWIKA.....OBJECTOR**

**R U L I N G**

This is an application by petitioner Anne Kendi Mbaya brought under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.

The applicant is seeking Prayer No.3 which seeks the following orders:-

***“ That pending the hearing and determination of the cause, the Honourable Court be pleased to issue an order, restraining the Objector JONATHAN M'NKANATA M'MUGWIKA, his agents, workers, assigns, employees or anybody else acting on his behest, employment or direction, from interfering with the Petitioner's occupation and use of L.R. No.NKUENE/URUKU/261”.***

The application is based on the following grounds:-

- 1. That the applicant is wife of the deceased***
  
- 2. That the deceased left the Petitioner in actual occupation of L. R. No.NKUENE/URUKU/261 which land is still registered in the name of the deceased.***
  
- 3. That while this cause is still pending, the objector has wantonly wasted the estate of the deceased despite protestation from the petitioner.***
  
- 4. That on 22<sup>nd</sup> July, 2011 the objector wasted 688 tea bushes and on 26<sup>th</sup> July, 2011 the objector wasted a further 147 tea bushes.***
  
- 5. That the intentions of the objector manifested through his actions is to evict the petitioner from her husband's estate.***

The application is further supported by the applicant's affidavit dated 9<sup>th</sup> August, 2011. The applicant in her affidavit has deponed that the deceased left behind several properties one of them being L. R.

No.NKUENE/URUKU/261 in which they had planted inter-alia several thousands of tea bushes that after death of the Applicant's husband she continued plucking the tea bushes on L.R.NKUENE/URUKU/261 and uses the proceeds thereof to educate her daughter Tracy Ntinyari and meet her daily requirements. It is further deponed the respondent who is father-in-law to the applicant invaded the applicant's home and land on 22/07/2011. That the respondent pruned a total of 688 tea bushes without consent of the applicant. It is deponed by the applicant the tea bushes were not ready for pruning and they were thus wasted. That on 26<sup>th</sup> July, 2011 the respondent pruned a further 147 tea bushes without applicant's consent and when tea bushes were not ready for pruning. The applicant annexed photographs marked AKM 1(a), (b) and (c) showing pruned tea bushes. That protest was made to area Chief who wrote a letter on 29<sup>th</sup> July, 2011 confirming actions of the respondent, letter is annexed and marked "AKM2". It is further deponed by the applicant that even if the applicant and the respondent were appointed as joint Administrators of the estate of the deceased that does not give the respondent a licence to deny the applicant a chance to utilize her husband's properties for the purposes of taking care of the minor child and educating her. The applicant further stated that she is afraid that the respondent is hell-bent on evicting the applicant from the house where she was left by the deceased. It is further deponed the respondent being father-in-law ought at least to help and support the applicant in educating the grandchild but instead he is destroying the source of the applicant's income which is used to educate the deceased child.

The applicant further stated that unless the respondent is restrained from further interfering with applicant's home and tea bushes on parcel 261, she would suffer because she will fail in her duty of educating and taking care of her daughter.

That the pruned tea bushes will stay bare until mid-October, 2011 and that the period 24<sup>th</sup> and 26<sup>th</sup> July, 2011 till October, Applicant shall lose the income from the wrongfully pruned tea bushes.

The respondent filed a Replying Affidavit on 26<sup>th</sup> August, 2011 in response to the applicant's application. The respondent stated that the estate to which is subject matter is of his son the late Simon Mbaya Nkanata and applicant is respondent's daughter-in-law.

It is stated by the respondent he objected to the granting of letters of administration of the deceased estate to the applicant because it was filed secretly without his consent yet he is beneficiary of the said estate. He attached documents detailing of being next of kin marked "JMMI (a) and (b)".

It is further deponed by the respondent that he was initial proprietor of parcel NKUENE/URUKU/261 but transferred the same to the deceased as a gift on understanding that he shall maintain the Respondent's other children(children of Joseph Kamathi Nkanata) who have been orphaned by death of their father; attached thereto is a copy of Green Card marked "JMM2" which shows respondent was at one time registered as proprietor and to date his title is in the name of the deceased having been registered on 23/03/2004.

It is further deponed that Joseph Kimathi Nkanata(deceased) had planted several tea bushes and coffee trees planted by the respondent. That the deceased herein settled on Plot 261 with the petitioner and respondent's youngest daughter namely Susan Ndumba Nkanata, whom the deceased was paying school fees for.

That upon death of Simon Mbaya Nkanata, respondent's daughter could not get the financial assistance she needed and returned to respondent's home, where the respondent strived to educate her until completion of her education. It is deponed by the respondent that the applicant abandoned the matrimonial home and got a job outside Meru leaving all the Estate under the management of her father namely Daniel Mburugu.

It is also deponed the applicant sold all the livestock and fowls, then proceed whereby she has never accounted for. That the deceased house was leased out to a third party called Fredrick Kinoti and that Daniel Mburugu started utilizing the tea bushes and other food crops on the said land for his own selfish needs without considering the plight of my other deceased son's(Joseph Kimathi) children who are

orphans. The respondent further claimed Daniel Mburugu cut down more than 10 mature Blue Gum trees without his consent and proceeds have never been accounted for.

It is alleged that the applicant's conduct is such that the respondents see it as the applicant did not consider the respondent as her in-laws. The respondent further in his affidavit claim that it is unfathomable that the applicant can seek injunctive orders against myself, yet he is protecting the interest of his grandchildren who are orphans. It is further stated the application is made malafidely\*\* so that the applicant and her father can reap the maximum benefits from the estate at her exclusion of other deponents who were under care of the deceased prior to his demise and who are now under care of the respondent.

It is further deposed that the applicant has gradually plundered the Estate with assistance of her father yet she is gainfully employed in a hospital at Thika. Mr. Mwirigi in his arguments before court relied on applicant's affidavit. He however, added that the objector do not reside at the deceased Estate but visits the Estate. He further submitted the respondent did not deny pruning the tea bushes. He further submitted that the alleged other son's beneficiaries who are alleged to be right persons to be using the tea bushes have not filed any application under the Law of Succession Act and this is an exercise to cover the respondents unlawful acts. He submitted the respondent in Replying Affidavit under paragraph 10 and 11 claims the applicant has intermeddled with the Estate yet no action was taken against the applicant as per Section 45 of the Law of Succession Act.

Mr. Mwirigi referred me to the case of:-

**Ann Amino & Manchester Wafula & Halima – Vs- Muccheke Wafula HC P &A 169 of 2003.**

This is a ruling by Geoffrey Dulu, J. This is a ruling of the High Court and is not binding on my court but is persuasive. In that ruling George Dulu, J stated:-

***“ It is not in dispute that she was occupying and using the subject land, the house and posho mill when the deceased died. That was therefore the status quo, which is protected in terms of Section 45 of the Law of Succession Act. In my view, that status quo can only be changed by the court.....”.***

Is the applicant entitled to obtain an interlocutory injunction against the interest party? The provisions for are laid out in Order XXXIX of the Civil Procedure Rules. In my view that does not apply to applications under Law of Succession Act(Cap.160).

I have perused the provisions of Rule 63 of the Probate and Administration Rules, which clearly states the following provisions of Civil Procedure Rules, namely Order V,X,XI,XV,XVII,XXV,XLIV, and XLIX shall apply for far as relevant to proceedings under the Probate and Administration Rules. Order 40 of Civil Procedure Rules deals with Temporary Injunction is specifically excluded for succession matters.

I therefore for these reasons agree with the ruling of George Dulu, J that there is no provision for granting Temporary Injunction orders in Succession Cause matters. Mr. Kioga in his response in court argued that the applicant's application is misconceived. That both applicant and respondent are Joint Administrators and as such are equal in power in the administration of the estate. He was concerned now a joint Administrator can come to court and ask court to exclude a Joint Administrator. He stated that is a misconception of the law.

He further argued the procedure adopted by applicant is wrong as Section 47 of the Law of Succession is a Section declaring jurisdiction of court and that all applications not provided for by the Rules are brought to court under Rule 49 of the Probate and Administration Rules. He said the application is therefore misconceived. Mr. Kioga then repeated the contents of the respondents Replying Affidavit, which, I have analyzed that the respondent in pruning tea bushes he was not committing wastage but improving on the tea bushes. He reiterated that land was given as a gift on conditions set for out in the Replying Affidavit.

In this application there is no dispute that NKUNE/URUKU/261 is registered in the name of Simon

Mbaya Nkanata. There is also no dispute that there are tea bushes on the said land. It is further admitted at the lifetime of the deceased he was in occupation of the suit premises with the applicant. It is equally admitted both applicant and respondent are Joint Administrators of the deceased estate.

It is further not in dispute that the respondent on 22<sup>nd</sup> July, 2011 invaded the applicant home and land and pruned 688 tea bushes and on 26<sup>th</sup> July, 2011 pruned further 147 tea bushes without consent of the applicant; claiming to be improving on them.

I do not agree with the respondent that in pruning tea bushes when they were not ready for pruning was improving them. The respondent was pruning the tea bushes is depriving the applicant income or to show displeasure with applicants inviting her father to her matrimonial home and leasing the house to a third party.

It has been argued that the application is misconceived as it is brought under Section 47 of the Law of Succession Act instead of Rule 49 of the Probate and Administration Rules.

***Section 47 of the Law of Succession Act provides:-***

***“ The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and provide such decrees and make such orders therein as may be expedient.....”.***

***Rule 49 of the Probate and Administration Rules provides:-***

***“ A person desiring to make an application to the court relating to the Estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit”.***

I have considered Section 47 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules and do not agree with Mr. Kioga's argument that one cannot bring an application under Section 47 of the Law of Succession Act. The Section clearly states court can entertain any application in respect of any dispute under the Law of Succession Act. Rule 49 of the Probate and Administration Rules deals with applications for which no specific provision is made with the Probate and Administration Rules.

The applicant can bring up an application against a Joint Administrator. The Law of Succession do not exempt action being brought against a Joint Administrator when is in breach of the provisions of the Law of Succession Act.

***Section 45 of the Law of Succession Act provides:-***

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

The Section above quoted did not in anyway authorize a co-administrator to intermeddle with the Estate which he is an administrator.

The applicant's application under Prayer 3 of the Chamber Summons dated 9<sup>th</sup> August, 2011 is not clear as to what the applicant wants as it seems to be seeking an injunction order on one part and the other to be seeking for an order to restrain the respondent from intermeddling with the deceased Estate.

I would like to state that it is not the duty of the Advocate drawing pleading to clear to be clear in the

nature of prayers being sought; as such failure to do so may result into injustice to the litigants.

Our issue of injunction as earlier on stated in matters of Succession Causes is no provision to granting injunction. I therefore hold that injunction orders cannot issue in this cause.

On issue of intermeddling with the deceased Estate there is no dispute that the respondent has been pruning tea bushes and causing wastage to the Estate. He has had no justification for doing and I find his acts are unauthorized by the Law of Succession Act, or by a grant of representation and he ought to be restrained from continuing with his acts of intermeddling.

In the circumstances, the respondents, his agents, workers, assigns, employees, or anybody else acting on respondent's behest is restrained form intermeddling with the deceased estate  
L.R.No.NKUENE/URUKU/261.

On issue of occupation and user of L. R. No.NKUENE/URUKU/261 as it is not in dispute the applicant was in occupation on using the subject land, being the house and the land before and at time of death of the deceased. The status quo ought to be maintained. That status quo is protected under Section 45 of the Law of Succession Act and has to continue.

On issue of costs the matter involves daughter –in-law and her father in-law over the Estate of the Applicant's husband and the respondent's son. I therefore order that each party bear its own costs.

DATED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2011

**J. A. MAKAU,**  
**JUDGE**

*DELIVERED IN OPEN COURT IN PRESENCE OF:*

1. Mr. Mwirigi for petitioner/applicant
2. Mr. Kioga for objector

**J. A. MAKAU**  
**JUDGE**