



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Succession Cause 107 of 2008

IN THE MATTER OF THE ESTATE OF:

JOHNSTONE KHISA KOLOLI :::::::::: DECEASED

AND

GERISHOM W. KOLOLI

AGGREY W. SITATI

HENRY M. KOLOLI ::::::::::PETITIONER/RESPONDENTS

AND

CONCEMPTA M. MUSOMBI

CHARLES M. LWANGA MUSOMBI :::::::::: APPLICANTS

RULING

The Applicant Concepta Machuma Musombi and Charles Michael Musombi in their application dated 21/10/2009 seek for restraining and prohibitive orders against the Respondents Gerishom W. Kololi, Aggrey W. Sitati and Henry M. Kololi from intermeddling with the estate of the deceased Johnstone Khisa Kololi until the grant is confirmed. It also seeks for restraining orders against the purchasers of land in the estate of deceased from constructing any structures on the plots or developing them in any way. It also seeks for orders that the agreement entered into between the administrators of the estate and one pastor Jackson Musasa be declared null and void.

The Applicant aver that upon the demise of the deceased, one of the petitioners purported to sell part of the estate of the deceased before the grant of letters of administration intestate. The Petitioners have been seen severally on the deceased's parcel of land with prospective buyers. The Purchasers have dug a foundation and are about to construct structures on the portions they have bought. It is in the interests of justice according to the Applicants to preserve the deceased's estate.

The first Applicant is the widow and the administratrix of the estate of one Edward Musombi Kololi the 7th child of the deceased in this cause. The 2nd Applicant is a co-administrator of the same estate.

Mr. Situma for the Applicants argued that any sale of portions of the estate of deceased are not valid contracts before the estate is distributed. The way to go is to declare such agreements invalid. The Applicants were Defendants under section 29 of the Law of Succession Act and are entitled to a share in the estate.

The Respondents opposed the application on grounds that the Applicant has no *locus standi* being a grand child of the deceased. Mr. Were for the Respondents argued that section 29 of the Act requires that the deceased must have taken the Defendant in his family before he died. In the letter by the area chief on the list of dependants, the name of the Applicant does not appear. If there is any intermeddling in the

estate, the counsel submitted that section 45 of the Act which creates an offence should be invoked.

From the facts of the application it is evident that a portion of the deceased's estate was sold even before letters of administration intestate were issued. The land was sold to Pastor Jackson Musasa by five people namely: **LUWET KHISA, PETER KOLOLI, ROBERT MAKHANU KHISA, DR. H. M. KHISA** and **NALOKONYA ZABLON KHAMALA** who are referred to in the agreement as the administrators of the estate of the deceased. One of them **H. M. KHISA** is one of the administrators of the estate. Letters of administration intestate were issued to the Petitioners herein on the 28/1/2009 until the estate is distributed, the Petitioners or any other person has no capacity to dispose of all or any part of the deceased's estate. Neither does any other person possess such capacity. Any purported sale of the estate of the deceased or any part thereof is null and void *ab initio* irrespective of who did it at such a time as abovementioned.

As for the *locus standi*, the Applicants are grandchild and widow of the deceased's son respectively. The late son of deceased Edward Musombi Kaloli was a heir to the estate. His name appears on the proposed list of beneficiaries of the estate filed by the Petitioners. As such, his widow has the right to step in and defend the inheritance of her late husband. This relationship has not been denied by the Respondent. I find that the 2nd Applicant has *locus standi* in this application and in the cause.

As for the 1st Applicant who is the grandchild and claims to be a dependant of the deceased, I wish to be guided by the provisions of section 29 of the Act which provides:

“For the purposes of this part, “dependant” means-

- a) the wife or wives, or former wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***
- b) such of the deceased's parents, step –children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***
- c) where the deceased was a younger woman, her husband if he was being maintained by her immediately prior to the date of her death.***

I find that a grandchild qualifies to be a dependant of the deceased upon proof in accordance with section 29 of the Act. Such proof may be required at a later stage in this cause. The 1st Applicant is held to have *locus standi* in this cause.

The buyer of the sold portion of the estate Pastor Jackson Musasa and the sellers were not made parties to this application. However, the people who matter in this cause are the petitioners since they have a legal duty to preserve the estate of the deceased. Having already pointed out that such sale is void *ab initio*, the non-joinder of Pastor Jackson Musasa does not affect this application.

The Applicants have satisfied the court that there is danger of wasting and inter meddling with the whole estate of the deceased if the trend of selling and subsequent developments on the sold portions continues. There is need therefore that the Petitioners take their legal responsibility of preserving the estate for the benefit of all the beneficiaries until the same has been distributed in accordance to the law. I find the application merited and I allow it in terms of prayers 2, 3, 4 and 5. Each party to meet costs of this application.

**F. N. MUCHEMI
JUDGE**