



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS

Probate & Administration 164 of 2006

IN THE MATTER OF THE ESTATE OF NZISA MULWA MUTOO (DECEASED)

VERSUS

1. MAXWELL MWONGA MUTISYA

2. JOSEPH MUSYOKA MUTISYA .....APPLICANTS

versus

1. PETER MUSYIMI MULWA

2. JACKSON KITONGA MULWA ..... PETITIONERS/RESPONDENT

RULING

1. On 15.6.2009, I allowed an application by one Peter Musyimi Mulwa and Jackson Kitonga Mulwa ,and issued orders inter-alia that one Mwonga Mutisya Katiti should vacate parcel No. 34 Lukenya Ranching & Farming Co-operative society Ltd within 60 days of the date of the order. The order was made ex-parte because the Respondent did not appear at the hearing. By his summons dated 20.7.2009 Mwonga Mutisya seeks orders that the said order be set aside.
2. It is his case that on diverse dates between 18.7.2008 and 27.2.2009, he purchased the shares belonging to Dorcas Ndunge Mutuku and Alfonse Mutua Mulwa in Plot No. 34 Lukenya Ranching and Framing Ltd. The shares, in land value, totaled 16 acres and that the vendors were ***“beneficiaries of the estate of Nzisa Mulwa Mutoo (deceased), with equal preference with the Petitioners.”*** That the Petitioners were aware of the sale and that one Philip Kilonzo Mulwa, eldest son of the deceased was aware of the same and ***“supervised”*** the transaction.
3. That when the orders of eviction were issued, the Applicant and his brother, Joseph Musyoka

Mutisya, were unaware of the Application for adverse orders against them and they were therefore condemned unheard.

4. In his Replying Affidavit, Peter Musyimi Mulwa states that Plot No. 34 in Lukenya Ranching and Co-operative Society is part of the estate of the deceased and that the whole estate has yet to be distributed and therefore the purported purchase of part of the estate is unlawful.
5. When I granted the ex-parte orders on 15.6.2009, I noted that the Respondent had been served but chose not to appear. However, I am certain that even if he had appeared, the orders given are lawful and setting aside will serve no lawful or useful purpose. I say so, with respect, because in the Petition dated 1.3.2006, one of the properties listed in the schedule of assets is Plot No. 34 Lukenya Co-operative Society. Letters of administration were then issued to Peter Musyimi Mulwa and Jackson Kitonga Mulwa on 17.9.2008 and to-date the estate has not been distributed and no beneficiary, including Dorcas Ndunge and Alfonse Mulwa has been allocated any part of it. Their conduct in purporting to sell 16 acres out of parcel No. 34 amounts to intermeddling with the estate of a deceased person contrary to section 45 of the Law of Succession Act. That section provides as follows:-

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

***(2) Any person who contravenes the provisions of this section***

***shall-***

***a) be guilty of an offence and liable to a fine not exceeding ten thousand shilling 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.”***

6. A clear reading of the section would show that the purported sale was in fact a criminal offence

and if the Applicants have put up houses on the suit land, the same is a clear breach of the law and this court cannot countenance such action.

7. In a nutshell what I am saying is that the Applicants were served with the Application dated 11.5.2009 but they chose not to oppose it hence the ex-parte orders. Further, from the evidence before me, the applicants are in the wrong and the orders issued are lawful. Their answer lies in proceedings against Dorcas Ndunge and Alfonse Mulwa as well as their “*supervisor*”, Philip Mulwa.

8. The application dated 20.7.2009 therefore has no merit and is dismissed with costs.

9. Orders accordingly.

Dated this 23rd day of May 2010.

**ISAAC LENAOLA**

**JUDGE**

Countersigned and delivered at **Machakos** this 23<sup>rd</sup> day of **May 2010**.

**H.P.G. WAWERU**

**JUDGE**