



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Probate & Admin. Cause 210 of 2007

PETER NZWILI KITHEKAPETITIONER /RESPONDENT

VERSUS

NDETO MUTEVU.....OBJECTOR/APPLICANT

RULING

1. Kitheka Kanee alias Musembi died on 3.4.1978 but it was only on 10.5.2007 that Peter Nzwilli Kitheka (who says that he is the only son of the deceased) petitioned for grant of letters of administration to the estate. In his Petition he listed the following as the deceased's Assets;
 - i. L.R.No. Ngamba/Muthetheni/560
 - ii. L.R.No. Ngamba/Muthetheni/557
2. I note from a certificate of official search dated 27.6.2007 that land parcel number 557 aforesaid is jointly owned in equal shares by Kitheka Kanee (deceased) and Kioka Kilonzo (deceased). It comprises 4.8 hectares.
3. On 31.10.2007, one Ndeto Musevu filed an objection to the grant of letters to Peter Nzwilli Kitheka for reasons that he had allegedly purchased 6 acres out of land parcel numbers 557 and yet the petitioner who was aware of the purchase failed to disclose Ndeto's interest in the land when he filed his Petition. On 29.11.2008 the said Ndeto pursuant to Rules 49, and 73 of the Probate and Administration Rules and predicated on the provisions of section 45 and section 47 of the Law of Succession Act filed an application in which he sought orders to stop Nzwilli, one Victor Mbwii and the Chief, Miu Location from intermeddling with the estate until the cause is determined. I ordered the latter two to be served with the summons but they failed to appear.
4. In any event, the complaint is that before the distribution of the estate, the Chief, Miu location and Victor Mbwii entered land parcel number 557 and purported to plant euphorbia trees as boundary markers and thereby awarded Ndeto 3 acres and Mbwii 2 acres and that action amounts to intermeddling in a deceased person's estate. The orders of injunction are therefore sought to stop them from continuing their illegal actions and to preserve the estate.
5. Nzwilli filed a Replying Affidavit on 9.9.2008 and in it he deponed that Ndeto is indeed entitled to land from Kioka Kilonzo's portion of number 557 and that it was the Akanga clan that sub-divided the said parcel of land on 15.6.2002 and Kioka was given his half share comprising 2.4 hectares. That thereafter the Chief, Miu Location was present when the land was being sub-divided between Ndeto and

Mbwii to ensure security because Ndeto was making threats to Mbwii. That therefore no injunction should issue as prayed.

6. To my mind, what amounts to intermeddling in a deceased's estate is precisely what is happening in this case. Section 45(1) of the Law of Succession Act provides as follows:-

“Except in 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.”

7. In the instant case it is admitted that before letters were issued and before distribution by this court, Nzwilli, the Chief, Miu Location and Mbwii entered land parcel number 557 and purported to determine what belongs to Kioka Kilonzo; what belongs to the deceased; what belongs to Ndeto and what belongs to Mbwii. Further, they proceeded to put Mbwii into possession of what they determined is due to him. That is an unlawful action however convenient it may seem to the parties that are involved. The Chief may have been there to enforce security but it matters not because the activity for which he gave security was illegal.

8. I am satisfied that there was intermeddling with the estate of Kitheka Kanee and I have powers under section 47 of the Law of Succession Act to issue an injunction in terms of prayers 3 of the Application with further orders that should intermeddling persist, criminal proceedings under section 45(2) of the Law of Succession Act may be commenced.

9. Costs shall be in the cause.

Dated and delivered at Machakos this 27th day of May 2009.

Isaac Lenaola

Judge

In the presence of: Mr. Kimeu h/b for Mrs Wambua for Applicant

No appearance for Respondent

Isaac Lenaola

Judge