



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 72 of 2009**

ALICE NTHENYA MUTUNGWA ROBERT MULI MATOLO

**(Suing as the Legal Administrators of the estate of WALLACE
MUTUNGWA MATOLO (DECEASED).....PLAINTIFFS/APPLICANTS**

VERSUS

**SUSAN KAVATA MUTUNGA ALIAS SUSAN KAVOSE
MUTUNGWA.....DEFENDANT/RESPONDENT**

RULING

1. The Application before me is premised on section 3A and section 63 (e) of the Civil Procedure Act. The specific prayer sought is that the Defendant be “***restrained by an order of mandatory injunction from remaining on and trespassing on land parcel number Makueni/Kivani/576 or from doing any other prejudicial act thereon pending the hearing and determination of the suit herein.***”
2. From the Supporting Affidavit and the Replying Affidavit of the Defendant, there is no dispute that L.R. No. Makueni/Kivani/576 is registered in the names of Wallace Mutungwa Matolo (deceased). There is also no dispute that the Plaintiffs are administrators of his estate and that there is pending before this court, H.C. Succession Cause No. 275/2007 in which the Defendant is listed as an Objector and has filed an Application under section 76 of the Law of Succession Act to revoke the temporary grant issued to the Applicants on 30.10.2008.
3. I have perused Succession 275/2007, aforesaid and I note that the Summons for Revocation of Grant dated 5.5.2009 is still pending and is undetermined. In that summons and in the present Application the status of Alice Nthenya and Susan Kavata Mutungwa as wives is challenged by the other and neither in that cause nor in this suit has that issue been determined. In the present suit, orders of eviction and injunction as well as general damages and mesne profits are sought against the Defendant. Alice claims that she was married to the deceased in 1949 and a certificate of marriage (***annexture “ANM1”***) authenticates that fact. She admits that the deceased had a relationship with Susan and for that reason, threw her out of her matrimonial home, and Susan moved in and presently occupies houses that, in her view, belong to her and that Susan has no lawful claim to any part of the deceased’s estate including land parcel number 576 aforesaid.
4. Susan’s response is that she had children with the deceased and that the deceased constructed the house she occupies on the deceased’s land and that the children of the deceased with her also live on the land. Further, that the deceased sold parts of number 576 to third parties who are being threatened with eviction by the 2nd Plaintiff/Applicant and their interests may be prejudiced if any adverse orders are made at this stage of the proceedings. That the estate should first be distributed and the entitlement, if at

all, of all parties be determined. She denies wasting the land as alleged.

5. One other issue that I should allude to is that the Respondent does not deny Alice's status as a wife of the deceased but adds that both of them have equal right to the estate and one Moffat Nzyusyo Matolo supports her in that regard. Moffat is a son of Alice and brother of Robert Matolo, co-Applicant. Moffat in his affidavit sworn on 28.4.2009 depones that his mother left the deceased's home in 1956 and went to live with Robert until the deceased died in 2006. That in that period, Susan lived with the deceased and had six children with him.

6. I have seen no response to the allegation that Susan was married under Kamba customary law to one Mutunga Kimeu Linda and that in a Plaint filed in Makeni SRMCC No. 162 of 2006, Linda averred that Susan deserted him in 1970 and that he was entitled to a declaration that Susan was his wife and in the alternative, his dowry should be refunded to him.

7. Section 63(e) of the Civil Procedure Act provides as follows:-

a) “ ...

b) ...

c) ...

d) ...

e) ***make such other interlocutory orders as may appear to the court to be just and convenient.***”

8. Further, section 3A of the Act provides as follows:-

“Nothing in this act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

9. In interpreting section 3A, Kneller Ag. J.A. in Wanjau vs Muraya [1983] KLR 276 held as follows ;

“Section 3A of the Civil Procedure Act (cap 21), although saving the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the power of court, should not be cited where there are appropriate section or order and rule to cover the relief sought (Hassan Karim & Co. Limited vs Africa Import and Export Central Corporation Limited [1960] E.A. 396.”

10. In this case, what is really being sought at this stage is an order of eviction of the Defendant, her agents or “any other person claiming through her to any part of land parcel number. 576 registered in the names of the deceased, Wallace Matolo. Peripherally however, I am also being asked to determine whether Susan was or was not a wife of the deceased. That is why, I think, Mr. O.N. Makau for the defendant has pointed me to the decision of the Court of Appeal in Phylis Karanja & another vs Rosemary Karanja and another C.A. Civil Appeal No. 313/2001 where the court had to determine whether the deceased in that case, James Karanja Mwaura, was polygamous or not.

11. My mind is clear that I cannot in the interests of justice at this interlocutory stage determine fully whether or not Susan, and crucially her children, and third parties, are or are not entitled to land parcel number 576. It is not denied that Susan and her children are on the land by the authority of the deceased and that Alice was evicted therefrom decades before the death of the deceased, Wallace Matolo. It is unclear if indeed the deceased sold portions of the land to other parties but it is telling that Moffat, his son by Alice, is certain that his step-brothers and sisters are on the land and that his father has incurred debts and that the 2nd Plaintiff, his brother is attempting to evict Susan, her children and third parties and that in case it is the Plaintiffs who should be restrained from further interfering with the suit land.

12. Mandatory orders are by their nature final and in this case I am not satisfied that the Defendant is prima facie an unlawful trespasser. She may ultimately be found to be or not to be a wife of the deceased or even his dependant, notwithstanding her alleged marriage, if at all, to Mutunga Linda. To issue final orders now would be wholly prejudicial to her, her children and the other unnamed persons who are on the land. In any event, the letters of administration issued to the applicants are being challenged within **H.C Succ No. 275/2007** and to issue orders adverse to any party will certainly prejudice those proceedings.

13. The wider interests of Justice would necessitate that I decline to grant the orders sought and will instead dismiss the application dated 23.3.2009 with costs to the Respondent.

14. Order accordingly.

Dated and delivered at **Machakos** this **29th** day of **July 2009**.

Isaac Lenaola

Judge

In the presence of; Mr. Makau for applicant

Mr. Masika for Respondent

Isaac Jenaola

Judge