REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Succession Cause 502 of 2006

IN THE MATTER OF THE ESTATE OF ISAIAH MATHUVA WAMBUA SOMBA – DECEASED

1. **ELIZABETH NDULU MATHUVA**
2. **DANIEL NDUNDA MATHUVA**
3. **JACKSON MAITHA……PETITIONERS/APPLICANTS**

AND

1. **JOSEPH MBIU MUTHIANI**
2. **BERNARD MUTHIANI MBIU …….…… RESPONDENTS**

RULING OF THE COURT

1. The Petition for Letters of Administration Intestate to the estate of Isaiah Mathuva Wambua Somba was filed on 6.11.2006 by Elizabeth Ndulu Mathuva, Daniel N. Mathuva and Jackson Maitha Mathuva (the Petitioners). The Petition was drawn and filed by the firm of Nzei & Co Advocates on behalf of the Petitioners.

2. While the Petition was pending hearing, the firm of Nzei & Co. Advocates filed an application under sections 45 (1) and 47 of the Law of Succession Act and Rules 59 (5) and (6) and 73 of the Probate and Administration Rules (P&A Rules) seeking an order that the Respondents, JOSEPH MBIU MUTHIANI and BERNARD MUTHIANI MBIU, their agents and/or servants be restrained from entering into land parcel No. 2099- Kalongo Adjudication Section – and constructing houses thereon, cultivating, cutting trees thereon or in any other way interfering and intermeddling with the said property. The application was filed under Certificate of Urgency. The applicants also prayed that the costs of the application be borne by the Respondents.

3. There were no grounds on the face of the application, but JACKSON MAITHA MATHUVA (Maitha) swore an affidavit in support dated 20/12/2006 in which he stated that he was duly authorized by the 1st and 2nd Petitioners to swear the affidavit. He said that whereas the 1st Petitioner is the deceased's widow, the 2nd Petitioner and himself are sons of the deceased, and that both respondents are not members of the deceased's family. Maitha also deponed that on or about 16.12.2006, the two respondents wrongfully and unlawfully moved into land parcel No. 2099 Kalongo Adjudication Section

and hurriedly commenced construction of permanent houses thereon and also wantonly cut down trees, while falsely claiming to have purchased the said parcel of land from the deceased. Maitha deponed that the respondent's claims of purchase were false and that the two were intermeddling with the deceased's estate and that they should be stopped from doing so forthwith.

4. Annexed to the affidavit was the document marked "JMMI" –Letter from District Land Adjudication and

Settlement officer Makueni District dated 12/07/2006 confirming that land parcel 2099 among others was recorded in the name of MR.MATHUVA WAMBUA.

5. The relevant sections of the Law of Succession Act, (Cap 160) provide as follows:-

" **45(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 purposes, take possession of, or otherwise intermeddle with any free property of a deceased person."**

"**47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as maybe expedient:**

Provided that the High Court may for the purpose of this section be represented by Resident Magistrate's appointed by the Chief Justice."

6. The P&A rules that that have been relied upon provide as follows:-

"**59(5) A summons shall be in one of Forms 104 to 110 as appropriate and be signed by the applicant or his advocate.**

(6) Save where it is otherwise provided in these Rules there shall be filed with every application such affidavits (if any) setting out such material facts and exhibiting such documents as the applicant may think necessary."

7. It is to be noted that the whole of Rule 59 deals with the form of proceedings for applications coming before the court. Rule 73 of the P&A Rules provides as follows:-

"**73. Nothing in these Rules 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."**

This rule 73 gives the court similar wide and discretionary powers as are given under Section 3A of the Civil Produce Act, Cap 21.

8. Before the application could be heard, the firm of M/S Mbulo & Co. Advocates for the 1st Respondent filed a Notice of Preliminary Objection on the grounds:-

a. That the purport (sic) applicants have no lows (sic) standi to bring the applicant (sic) in court;

b. That the land in dispute falls within the purview of the Land Adjudication Act Cap 284 and no court of law can handle a dispute arising and touching on such land without the due observance of the legal mechanism set out in the said Act.

c. That remedy sought by the applicants is not available to them given that the application violates the internal provisions set out for the resolution of disputes under the Law of Succession Act, Cap (sic).

d. That the court cannot invoke its inherent jurisdiction when the law provides a clear process of the resolution of disputes.

9. The Preliminary Objection was argued by Mr Mwania Mbithi advocate on behalf of the firm of M/S Mbulo & Co. Advocates of Nairobi. Mr Mbithi contended that since no grant has been issued in this matter, the applicants lack the capacity to bring this application before court in addition to the fact (according to Mr Mbithi, that any disputes touching on the suit land ought to be resolved under Cap 284 of the Laws of Kenya. With regard to the provisions of section 45 of Cap 160, Mr Mbithi contended that the applicants should seek other remedies provided thereunder namely that any intermeddling should be treated as a criminal offence punishable by (a) a fine not exceeding ten thousand shillings or a term of imprisonment not exceeding one year or to both such fine and imprisonment and (b) the intermeddler is 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.

10. Mr Mbithi also argued that the remedy of injunction is not provided for under the Law of Succession Act, namely that Order 39 of the Civil Procedure Rules is not one of those provisions that has been saved by Rule 63 of the P & A Rules. Rule 63 saves orders 5, 10, 11, 15, 18, 25, 44 and 49 of the Civil Procedure Rules. Mr Mbithi further argued that any applications under section 47 of Cap 160 must be brought under the provisions of the Act itself and not under the provisions of Order 39 of the CPR as the applicants herein have purported to do.

11. The Preliminary Objection was buttressed by the decision in the case of TROUISTICK UNION INTERNATIONAL & ANOTHER versus MRS JANE MBEYU & ANOTHER – Court of Appeal at Nairobi – Civil Appeal No. 145 of 1990. In that case, the Court of Appeal sat on appeal over a judgment of the superior court in which it had been decided that "a parent or next of kin or a personal representative can act as a representative of a deceased person and file an action for the benefit of a deceased's estate without a grant of probate or letters of administration to the estate" (see Nyarangi JA as he then was in ROMAN C HINTZ versus MWANGOMBE MWAKIMA (1988) (KAR 482) as applied by Bosire J (as he then was) in the TROUSTICK Case (above). The learned judges of Appeal in the TROUSTICK Case said that the decision in the HINTZ case (above) was bad law which had to be set aside, and went ahead and reversed it.

12. Mrs A Nzei for the applicants did not agree and argued fervently that section 60 of the Constitution confers upon this court unlimited jurisdiction in both civil and criminal matters and that as such the application before me is competent and ought to be heard on its merit. She also contended that since the filing of the Petition for Grant of Letters of Administration, the deceased's estate which she said was in jeopardy fell under the control of the court until a suitable administrator is found and that in the meantime the applicants have the capacity to bring applications such as the one that is now before me for determination by the court.

13. Mrs Nzei further argued that if the applicants who are wife and sons of the deceased respectively cannot bring these complaints before court then she did not see who else could and further that the court should make the orders sought so as to bring to a stop the intermeddling with the deceased's estate. Mrs Nzei admitted that the applicant's application did not have a prayer to punish the respondents as provided by section 45 (2) of Cap 160.

14. In her further submissions, Mrs Nzei argued that the Law of Succession Act is a self-contained" piece of legislation and that this court has power under the said Act to arbitrate on all issues arising under the Act and coming before it. She contended that it was not necessary for the applicants to first obtain the Grant of Letters of Administration before they can be heard on their application. Mrs Nzei also relied on the decision in the TROUSTICK Case (above), and urged the court to find that the Preliminary Objection is premised on a misapprehension of the law. Mrs Nzei's arguments are based on the finding in the HINTZ Case (above).

15. In reply, Mr Mbithi contended that section 2 of Cap 160 provides in express terms that matters arising under Cap 160 are to be dealt with under the provisions of the Act itself. Section 2 of Cap 160 provides as follows:

"**2 (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of**

this Act shall constitute the law of Kenya in respect of, and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act, and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."

Sub-sections (3) and (4) of the same section 2 of Cap 160 deal with administration of deceased's estate under Muslim Law.

16. Mr Mbithi further replied that it is only the Grant of Letters of Administration that gives a party the power and authority to come to court, and that in the absence of such a grant, the applicants herein have no right to be heard on their application and that the said application should be struck out as being incompetent.

17. From all the foregoing submissions and the pleadings, the issue that arises is whether the respondents have shown that the applicants do not have the locus standi to be before this court on their application. The issues of law that have arisen on this application are very similar to the issues that were discussed by and adjudicated upon by the court in the TROUISTIK Case (above). In that case, the court considered not only the provisions of section 2 (1) of Cap 160 but also considered the provisions of Section 3 (1) and 82 of the Act. Section 3 (1) of Cap 160 defines, among others, an "Administrator" as "a person to whom a Grant of Letters of Administration has been made under this Act." It is a fact in the present case that apart from the filing of the Petition for Grant of Letters of Administration Intestate no grant has been made and therefore there is no administrator for the estate of ISAIAH MATHUVA WAMBUA SOMBA. Section 3 (1) also defines "Personal Representative" as "the executor or administrator of a deceased person," while "Representation" is defined as "the probate of a will or the grant of letters of administration."

18. In the Affidavit in support of the application, Maitha simply describes the applicants thus thus at paragraph 2.

"(2)"THAT the first Petitioner/Applicant is the deceased's widow whereas the second Petitioner/Applicant and myself are sons of the deceased.

19. It is my view that in light of the provisions of Cap 160 and the law as set out in the TROUISTIK Case (above) the applicants had no locus standi to bring their application before the court. Before the TROUISTICK Case (above) it was alright for relatives and others to litigate upon a deceased's estate whether or not they had obtained Grant of Letters of Administration, but that position has now changed so that it is only personal representatives who have the power to enforce by suit or otherwise all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate. As the applicants have not shown that they are personal representatives of the deceased person in accordance with the provisions of sections 2 (1), 3 (1) and 82 of Cap 160, their present application is a non-starter.

20. In the case of OTIENO versus OUGO (1988) IKAR 1048, a case that was decided in 1987 and whose principle was applied in the TROUISTIK Case, the court observed in part that:-

"**The administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does, the action is incompetent at the date of its inception."**

21. I entirely agree with this holding and also with Mr Mbithi's submissions. I do find and hold that the applicants' application was incompetent as at the date of inception. I find that although Mrs Nzei relied on the same authority as the respondents did, the authority does not in any way aid the applicants' case. The applicants would have been well buttressed by the decision in the HINTZ Case, but as stated earlier the decision in the HINTZ Case was found to be bad law that was laid to rest by the TROUISTIK Case. The applicable law in this case is Cap 160 and no other.

22. In the circumstances, I do agree with the respondents' contention that the applicants application is incompetent for the reasons that I have set out above. The application dated 20/12/2006 and filed in court on the same day is therefore struck out with costs to the respondents.

23. Orders accordingly.

Dated and delivered at Machakos this 29th day of January, 2008.

R.N. SITATI

JUDGE