



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Prob & Admin Cause 160 of 2005

JANE SYOMOI NZELU

AGNES KIKUYU MWANGI

VINCENT MWANIKI MWENGI.....RESPONDENTS/PETITIONERS

AND

JAPHETH KIMANZI MWENGI.....APPLICANT/INTENDED OBJECTOR

R U L I N G

1. The first of the two applications before court is the chamber summons dated 1/11/2006 which was filed in court on the same day. The application is expressed to be brought under sections 45(1) and 47 of the Succession Act Cap 160 Laws of Kenya and Rule 73 of the Probate and Administration (P & A) Rules made under Cap 160. The applicants seek orders:-

- (i) ***THAT this application be certified as urgent, and be heard ex-parte at the first instance.***
- (ii) ***THAT the interested parties, JAPHETH KIMANZI MWENGI and EVERLYNE MWIKALI ISINGI be restrained by an order of this court from in any way intermeddling and/or interfering with the deceased's estate, which includes plot No.4096/228 situated within Kitui Township and registered in the name of the deceased.***
- (iii) ***THAT the purported sale transaction of part of plot No.4096/228 between the interested parties be declared null and void and JAPHETH KIMANZI MWENGI be restrained from occupying the house in plot No.4096/228 within Kitui Township.***
- (iv) ***THAT the costs of this application be paid by the interested parties.***

2. The application is supported by the sworn affidavit of **Jane Syomoi Nzelu (Syomoi)** dated 1/11/2006. She says that she is one of the administrators of the estate of **Justus Mwengi Nzelu**, deceased, and that she is fully conversant with the issues in dispute and that she has the authority of her co-applicants to swear the affidavit. However, no such authority as is claimed by her is exhibited on the file or with her affidavit. She also says that she and her co-administrators have already been issued with Letter P & A 41, though the same is yet to be confirmed. It is her contention at paragraph 3 of the affidavit that one **Japheth Kimanzi Mwengi**, the 1st respondent has been intermeddling with the deceased's estate for his own benefit and without involving the other members of the family who are all beneficiaries. The deponent has pointed out that the said Japheth Kimanzi Mwengi (Kimanzi) has been living in the house, situated on plot No.4096/228 in Kitui Township without paying rent to the deceased's estate for the last

6(six) years (counted from November 2006) and that the amount due to the estate of the deceased as at 1/11/2006 was Kshs.432,000/=.

3. The deponent also says that Kimanzi has in fact sold part of the said plot to **Everlyne Mwikali Isingi** (Mwikali) without the knowledge and/or consent of the administrators and all members of the deceased estate. The deponent exhibited annexure marked “**JSN1**” which is a copy of an Agreement of Sale between Kimanzi and Mwikali dated 4/10/2006. In that agreement, Kimanzi describes himself as the “**owner of all that parcel of land known as parcel No.228 Zone O23 Block 2, Kitui Municipality, having purchased same from Kitui Trade Development joint Board, on account of Justus Mwengi Nzelu, now deceased, the original owner thereof.**”

4. The portion that was sold was a 60’x126’ plot for Kshs.260,000/= (Kenya shillings Two Hundred Sixty Thousand only). According to Syomoi the whole of plot No.4096/228 is listed as part of the property of the estate of the deceased. For these reasons, Syomoi prays that Kimanzi be restrained from in anyway disposing of any part of the said property which forms part of the deceased’s estate. She also prays that Mwikali be restrained from taking possession of the suit property sold to her and that the purchase price already paid by Mwikali be refunded to her by Kimanzi.

5. An interim order restraining the two respondents from intermeddling with the suit property was issued by this honourable court on 1/11/2006. The application is opposed. The respondents filed both Grounds of Opposition and a Replying Affidavit sworn by Kimanzi on 28/02/2007. It is a long 25 – paragraph affidavit. At the hearing hereof Mr. Mate, Counsel for the respondents opted to rely on the Replying Affidavit. In the said Affidavit, Kimanzi says that the suit property was developed by the deceased herein long before the 1st and 2nd applicants became the deceased’s 2nd and 3rd wives respectively, and that it was Kimanzi’s mother who contributed substantially to the development of the suit property before her demise in 1988. Kimanzi also says that the suit property was given to him by the deceased sometime in the year 1993 for his (Kimanzi) own use and that of his siblings who were still attending school; and that that is how, since 1993, he has continued to collect rent from the suit property.

6. Kimanzi also says that all that the 1st and 2nd applicants are up to is to deprive him and his maternal siblings of the benefit accruing from the suit property after the two have squandered the other properties that were left to them by the deceased. Kimanzi singled out the 2nd applicant who he alleges disposed of one of the deceased’s properties at Nzalae without any authority from the court. Kimanzi also says that following the deceased’s failure to repay the outstanding loan which stood at Kshs.30,525/= as at 2006 from the Kitui Trade Development Joint Loan Board for which the suit property was given as security, he (Kimanzi) had to pay it. The receipt for one such payment dated 16/10/2001 shows the amount paid was Kshs.3000/= and same was paid by Justus Mwengi Nzelu although on the top thereof, the amount is said to have been paid by Kimanzi. I hasten to add here that the purported annexure “**JKM8**” plus the other annexures marked JKM-1 to JKM-7 are not properly on record. They are not properly marked as annexures and are therefore struck off from the record. The court will not cast its eye upon the said documents again.

7. Kimanzi also says that he bought the suit property after the same had been advertised for sale and none of the other family members was ready to redeem it. He claims that since he is now the beneficial owner of the plot, which he says he bought for valuable consideration, no one should disturb him over it. He also says that the sale of part of the suit property to Mwikali was to raise funds to pay off accumulated rates to the Kitui Municipal Council.

8. During the hearing of this application, Mr. Mulu for the applicants submitted that there is no doubt that the suit property is still in the name of the deceased and therefore forms part of the deceased’s estate. Mr. Mulu submitted that Kimanzi had no authority to sell part of the suit property since all the transactions which Kimanzi purported to do to salvage the said property were taken after the death of the deceased.

9. Mr. Mulu referred the court to the Further Affidavit sworn by Vincent Mwaniki Mwengi (Mwaniki) sworn on 19/10/2007. Mwaniki says he is the older uterine brother to Kimanzi and that it is him (Mwaniki) who represents the interests of their mother’s house in the deceased’s estate. He also says that

Kimanzi's allegations that some members of the deceased's family are trying to deprive him and his siblings of their rightful share in the deceased's estate is all lies, and that if anything, the suit property being a town plot should be for the benefit of the three houses of the deceased's estate and that in any event, each of the three houses is settled on the various parcels where the deceased had allocated each of his three wives before he died. According to Mwaniki, the expenses incurred by Kimanzi (if any) in redeeming the suit property are recoverable from the income of the deceased's estate. In essence, Mr. Mulu submitted that Kimanzi had no capacity and no authority to deal with a deceased's estate in the manner that he did.

10. For his part, Mr. Mati submitted that the application dated 1/11/2006 did not comply with the provisions of section 45 of Cap 160 and that the applicant has not demonstrated that there is any intermeddling with the deceased's estate. He submitted that the Respondent has clearly shown that at the time of the deceased's death, there was a loan outstanding to **Kitui Trade Development Authority** and that if the respondent had not paid off the said loan, the suit property in dispute would have been disposed off by the said creditor. Mr. Mati submitted further that because the deceased had encumbered the suit property, it could not be said to be free and available for the deceased's estate as provided for by section 3 of Cap 160. Section 3 of Cap 160 gives the following definitions:-

“estate” means the free property of a deceased person” and “free property”, in relation to a deceased person means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated.”

11. Mr. Mati produced annexures 5,6,7 and 8 to show that the respondent paid off the debt including rates to the Kitui County Council that had encumbered the suit property. Mr. Mati contended further on behalf of the respondent that for a long time the administrators of the deceased's estate who are the applicants herein did not bother about the dependants of the deceased's estate and therefore that what the respondent did was to salvage the suit property and that he did so with clean hands.

12. It is not denied that the respondent occupies the suit property but it is contended that the respondent has been in occupation of the suit property through receipt of rents that he (respondent) received on behalf of his siblings who are still in school.

13. There is the 2nd application dated 12/06/2007 which is brought under Rule 49 of the Probate and Administration Rules (P & A) seeking in the main an order setting aside the dismissal order against the respondent's application dated 22.09.2005. The applicant/respondent contends that his application dated 22/09/2005 was never heard on the merits due to a default committed by the applicant's counsel and further that the dismissed application raises grave matters that need to be canvassed fully and determined on the merits. The application is supported by the sworn affidavit of **Kimanzi** dated 12/06/2007 in which he says that due to a lapse in communication between himself and his advocate, they did not attend court on 30/07/2006 when the dismissal order was made. It is contended on behalf of Kimanzi that without having had the benefit of hearing the parties and especially Kimanzi on that application, the court's dismissal order should be set aside.

14. Kimanzi's application for reinstatement of the application dated 22/09/2005 is opposed. The Replying Affidavit is sworn by **Syomoi** who says that since it is **Kimanzi's** counsel who took the hearing date for the application dated 22/09/2005 and served a hearing notice upon her counsel, then Kimanzi's failure to attend court was inexcusable. In any event, Syomoi argues, there has been inordinate delay in bringing this application for reinstatement. For completeness, rule 49 of the P & A Rules reads as follows:-

“49. A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these rules shall file a summons supported, if necessary by affidavit.”

15. By the application dated 22/09/2005, **Kimanzi** had contended that there was need to hear and determine the suit on merit since the grant was obtained fraudulently through concealment of relevant and

material facts by the Petitioners/Applicants and further that the applicant/objector did not give his consent to the application for grant of the limited grant to the administrators. Kimanzi says that his failure to object to the grant within the 30 days period was not deliberate and that it was caused by the unprecedented speed with which the administrators obtained the limited grant on 6/06/2005 during the pendency of the main application for grant of the full grant. He says further that the purported thumb print on Form 38 was forged and that he had reported the matter at the police for investigations. He did not however avail evidence of the report to the police.

16. In response to **Kimanzi's** application dated 12/06/2007 Mr. Mulu for the administrators contended that the said application was a mere afterthought particularly in view of the 7-8 months delay. Mr. Mulu submitted further that **Kimanzi** is only interested in delaying the matter further and that this court should not let him abuse its process by allowing the application. Finally, Mr. Mulu submitted that Kimanzi has not demonstrated what prejudice he is likely to suffer if the dismissed application is not reinstated. He urged the court to dismiss Kimanzi's application with costs to the administrators/respondents.

17. I shall deal first with the application dated 1/11/2006. I have carefully considered the application as filed the submissions made to me and the law upon which the same is premised and in my view, the application has merit. By the provision of section 3 of Cap 160, **Kimanzi** had no authority to deal with the suit property as he did. Section 71(1) of Cap 160 provides that it is only upon confirmation of a grant that distribution of any capital assets of a deceased person can be made. In the instant case, **Kimanzi** went ahead and distributed parts of the deceased property first without the consent of the administrators and second without waiting for confirmation of the Grant of Letters of Administration Intestate. On the basis of the above, I would and do hereby allow the application dated 1/11/2006, and order that:?

- i. ***The interested parties, JAPHETH KIMANZI MWENGI and EVERLYNE MWIKALI ISINGI be and are hereby restrained from in any way intermeddling and/or interfering with the deceased's Estate, which include Plot No.4096/228 situated within Kitui Township and registered in the name of the deceased;***

- ii. ***The purported sale transaction of part of Plot No.4096/228 between the interested parties be and is hereby declared null and void and JAPHETH KIMANZI MWENGI be and is hereby restrained from occupying the house in Plot No.4096/228 within Kitui Township.***

- iii. ***Costs of this application shall be paid by the Interested Parties.***

18. I now return to the application dated 12/06/2007 by which application, the applicant seeks an order reinstating the earlier application dated 22/09/2005. I have considered the reasons given for and against the said application and I am of the view that since the said application goes to the core of the dispute between close family members, the same should be heard on its merits so that the court is put in such a position that it would be able to give a balanced decision in the matter. In the circumstances, I allow the application dated 12/06/2007 and order that the applicant therein proceeds to fix the application dated 22/09/2005 for hearing within 45 days from the date of this ruling, failing which both the application dated 12/06/2007 and the earlier application dated 22/09/2005 shall stand dismissed.

19. As to costs, I order that **Japheth Kimanzi Mwengi** the respondent in the application dated 1/11/2006 and the applicant in the application dated 12/06/2007 shall bear the costs of both applications.

It is so ordered.

Dated and Delivered at Machakos this 14th day of May 2008.

R.N. SITATI

JUDGE

Delivered by: Lenaola J

In the presence of::

Mr. Kilonzi holding brief for Mr. Mati for Objectors

Mr. Mulu for Applicant

I. LENAOLA

JUDGE