



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Succession Cause 267 of 2005**

**IN THE MATTER OF THE ESTATE OF ELIZA WANGARI KINYUA ...DECEASED**

**PETER CIURI KINYUA .....PETITIONER**

**AND**

**JOSEPH MUTHII KINYUA .....1<sup>ST</sup> RESPONDENT**

**MUNGURIO KIGANJO .....2<sup>ND</sup> RESPONDENT**

**RULING**

This is an application expressed to be brought under Sections 45 and 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules but is seeking orders which are, strictly speaking injunctive in nature. Indeed the first prayer is one for temporary injunction to restrain the respondents/protestors from interfering with 5 acres portion occupied by the applicant.

Secondly the applicant prays that the respondents/protestors be restrained from intermeddling with the deceased's estate pending the hearing and determination of this cause.

Injunction is an equitable remedy available under Order 39 of the Civil Procedure Rule. The Law of Succession Act is a self-regulating legislation in the sense that it makes very elaborate procedural provisions under the Probate and Administration Rules.

Indeed those Rules are explicit as to which provision of the Civil Procedure Rules apply to succession proceedings. Rule 63(1) of the Probate and Administration Rules lists 8 provisions of the Civil Procedure Rules which apply to succession matters. Order 39 is not one of them. Injunctive reliefs are by implication not available in matters of Probate and Administration. This has been held to be the position in the following cases Nbi Succession Cause No.1014 of 1993 in the case of *In the Matter of the Estate of the Late Njuguna Kabuthu (Deceased)* (unreported). See also *In the Estate of Kibowen Komen (Deceased)* NKR Succession Cause N.500 of 1997 and *In the Matter of the Estate of Muchae Kiilu Musumba and Beatrice Kathini Kiilu, Petitioner*, MKS P & A Cause No.89/2003.

Although the Jurisdiction of the High Court as expressed in Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules donate wide powers the power to grant injunctive orders are expressly excluded by Rule 63(1) aforesaid.

Instead Sections 45(1) and 46 of the Law of Succession Act criminalizes any intermeddling with the property of a deceased person and provides elaborate procedure to be followed by the Police, Assistant Chiefs and Administrative Officers to deal with any intermeddling. Should this position be wrong, I am of the view that injunction is not tenable in the circumstances of this case.

Although the applicant has not averred that he occupies 5 acres of the suit land, and that the respondents have no property/interest in the said 5 acres, I am satisfied from the affidavits filed in reply to this application that the respondents have equal interest on the suit land and indeed occupy it together with the applicant. That being the case, the applicant has not proved a *prima facie* case as an order of injunction in the terms prayed would have the effect of restraining the respondents from doing any act on Parcel

No.Mweru/Kagio/396. I see no loss that the applicant will suffer which cannot be compensated in damages.

None has been shown. On a balance of convenience the respondents stand to suffer most should the orders sought be granted as their averments that they are in physical occupation of the suit land have not been controverted.

For the reasons, this application is dismissed with costs to the respondents.

DATED AND DELIVERED AT MERU THIS 8<sup>TH</sup> DAY OF JUNE, 2007

**W. OUKO**

**JUDGE**