



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

**Civil Suit 25A of 2006**

**JACINTA NAMBUI M'THITURA ..... PETITIONER**

**VERSUS**

**JOHANA MUGABI ..... 1<sup>ST</sup> RESPONDENT**

**MISHECK GITUMA.....2<sup>ND</sup> RESPONDENT**

**DEMARCATION OFFICER KANGETA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner in this Cause is one Jacinta Nambui M'Thitura who is only one of the 3 wives of M'Thithura Kathia (deceased) whose estate is the subject of these proceedings. Upon filing the cause and before any other step was taken, she filed an Application on 2.2.2006 under Order L Rule 1 and XXXIX Rules 1 and 3 of the Civil Procedure Rules, s. 45 of the Law of Succession Act and the thrust of it was that orders in the nature of an interlocutory Application should be granted to stop the Respondents from intermeddling with the deceased's estate and that the estate be preserved until the cause is finalized.

2. In her supporting Affidavit sworn on 2.2.2006 she depones that the Respondent entered the deceased's land parcel number Kangeta Adjudication/2827 on 25.1.2006 and purported to sub-divide it. That the said sub-division is unlawful and would amount to intermeddling with the deceased's estate before the cause was finalized.

3. In response the Respondent filed a Replying Affidavit sworn on 22.2.2006 in which he depones that it is true that there exists a dispute over land parcel number 2827 Kangeta Adjudication Section and that through objection Case No. 54/1993, it was ordered that 0.64 acres of that land be transferred to the Respondent and the Respondent do transfer 0.64 acres of his land to the deceased. That the deceased was not satisfied and filed Maua PMCC 45/97 but he died before the same could be heard. That case was declared to have abated on 15.9.2005 and the Demarcation Officer had no choice than to implement the decision arising from the objection proceedings. It is his argument that all legal steps have been followed by the Respondent in acquiring the 0.64 acres due to him.

4. S.45(1) of the Law of Succession Act stops any person from interfering with taking possession of or disposing of any **"free property of a deceased person."** That is the claim by the Applicant; that the Respondent is intermeddling with the property of the deceased. Free property presupposes that the property is free of any encumbrance known to law. I have noted that the land under reference is held under the Land Consolidation Act, Cap 283. The objection that was heard and determined between the deceased and the Respondent were proceedings under that Act. I have seen a letter dated 28.5.1977 addressed to the deceased in which an important point of law was raised; that of s.8(1) of the Act. That Section estops any court from hearing any case arising from land that is still under consolidation. The advise contained in that letter was that the deceased should await implementation of the decision arising from the objection, obtain consent if unhappy and then challenge the implementation in court. As it is, the deceased filed SRMCC No.45/97 without such consents from the Land Adjudication Officer who stated as much in the letter aforesaid. The suit was declared to have abated on 15.9.2005. Where does that place the parties?

5. It places the parties in the same position as they were once the objection proceedings were

determined. This would be as at the last page of the objection proceedings which is that the description and identification of the parcels of land belonging to the Respondent and the deceased should be such that 0.64 acres should be given to each of them in the manners deponed to by the Respondent and which I have set out above. If this be the position and the Respondent on 25.1.2006 attempted to implement that decision, can he be said to be intermeddling with the “**free property of the deceased**”. I do not think so because the decision of the Land Adjudication Officer remains a lawful decision until there is another lawful decision to the contrary.

6. Having so said however, land is a very sensitive subject and at the time of consolidation and demarcation it is even more emotive. I note that the deceased left a very large family – 3 wives and 13 children. On parcel No. 2827 to which they are all entitled, is added the Respondent’s claim. To carve out the Respondent’s portion now is to open a pandora’s box and would only complicate the succession. It would be best that the sub-divisions are done at the same time i.e. at the determination of this cause.

7. In the interests of justice and in fairness to both parties, the demarcation of the land in question should be put on hold and the status quo between the parties maintained until the Succession Cause herein is determined. These are the orders of court.

8. I shall make no order as to costs.

9. Orders accordingly.

Dated, signed and delivered in open court at Meru this 2<sup>nd</sup> Day of May 2006

**ISAAC LENAOLA**

JUDGE