



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 22 of 2005

IN THE MATTER OF THE ESTATE OF MBURUGU MUNGANIA (DECEASED)

SUSAN MWITIABI
PETITIONER/APPLICANT

VERSUS

JOSPHAT MUTHOMI MBURUGU 1ST
RESPONDENT

SIMON MBURUGU 2ND
RESPONDENT

RULING OF THE COURT

The petitioner/applicant filed the chamber summons application dated 16.6.2004 brought under sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law in which she seeks the following orders:-

- (a) That this honourable court be pleased to order the proceeds held by KTDA to be released to the applicant.
- (b) Costs of this application be provided for.

The application is premised on four grounds that appear on the face thereof:-

- (a) The tea leaves in issue were picked from the appellant’s tea bushes.
- (b) The above is evidenced by a letter for (sic) KTDA annexed herein and marked SMII
- (c) There is need for money to pay for school fees for one of the brothers to the respondents.
- (d) No prejudice will be suffered as the tea picked is nieve (sic)

The application is also supported by the sworn affidavit of the applicant made on 16.6.2004. She has deposed therein that after the death of her husband, one MBURUGU MUNGANIA, she gave each of the two respondents 2 acres of land on which they planted tea. That the 2nd respondent was assigned No. IM 240180 while the 1st respondent was given No. IM 240180 at Imenti Tea Factory. It is to be noted that

both of these numbers are the same. According to annexure, SM II, the 2nd respondent's number is IM 240204. She has deposed further that the two respondents delivered the tea leaves on the applicant's behalf though the deliveries were made in their own names. The applicant produced a letter dated 11.2.2002 from Imenti Tea Factory. She has also deposed that in the course of time, the two respondents neglected their own tea bushes and started picking her tea bushes. At paragraph 10 of the affidavit, she refers to the two numbers as her numbers and that she needs money therefrom for the education of her son, one MUTEMBEI MBURUGU who was by the time of swearing the affidavit a student at Mombasa Polytechnic. That on the application of the applicant, the two accounts at Imenti Tea Factory were frozen between February, 2002 and September 2003.

In her further affidavit sworn on 21.2.2006, the applicant states that consequent upon the court order dated 26.2.2003, the parties, under the chairmanship of the area chief, agreed that after subdivision of the land, the respondents would allow the applicant to pick the tea so that she could get money to pay fees for her son Mutembei Mburugu. She states further that because the respondents did not allow her to pick the tea bushes as agreed, she also could not comply with the spirit of the court order.

The application is opposed by the sworn affidavit of JOSPHAT MUTHOMI MBURUGU dated 13.2.2006. He refers to the court order dated 26.2.2003 which required the parties to convene a meeting to agree on the mode of distribution of LR NO. NKUENE/URUKU/294 which is the subject matter of this cause. That the intended meeting was held when it was agreed that the applicant would subdivide the suit land among her sons after which she would be allowed to pick the tea bushes which fell on the respondents' respective portions. The award was duly filed in court on 9.7.2003. That the applicant refused to comply with the spirit of the award, and that for her failure to comply with the spirit of the award, the applicant is not entitled to the orders she seeks.

During the hearing of the application, the parties wholly relied on their respective sworn affidavits.

The issue for determination is whether the applicant is entitled to the orders she seeks from this court? After carefully considering the respective contending views from both sides, I am not persuaded that the applicant has made out a case for the orders she seeks. The orders sought are discretionary in nature, and consequently, the applicant must show that he/she has come to court with clean hands. In this case, the applicant wants to have the cake and to eat it at the same time. Let the applicant perform her part of the bargain before she asks the respondents to do their part.

In the result, the application is found to have no merit. The same is dismissed. Each party shall bear their own costs.

Orders accordingly.

Dated and delivered at Meru this 17th day of July, 2006.

RUTH N. SITATI

J U D G E