



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**SUCCESSION CAUSE 192 OF 1999**  
***IN THE MATTER OF THE ESTATE OF MARTA MUKAMI – DCD***  
**AND**  
**JOSEPH MURUTHI WACHIRA & ANOTHER.....PETITIONER**  
**VERSUS**  
**JAMES MATHENGE NDUNYU.....OBJECTOR**

**R U L I N G**

Joseph Muruthi Wachira, Charles Wachira and Ndegwa Wachira hereinafter referred to as the applicants were the Petitioners in Succession cause No. 192 of 1999 which cause related to the estate of their mother Marta Mukami who was the registered owner of land parcel known as Tetu/Unjiru/589 (hereinafter referred to as “suit land”).

James Mathenge Ndunyu (hereinafter referred to as the Respondent) was the objector in this succession cause claiming an interest in the estate following an agreement of sale entered into between him and one Macharia Wachira a son of the deceased who died after the deceased.

On 14<sup>th</sup> April 1989 the letters of administration issued to the Applicants were confirmed and distribution approved each of the 3 applicants getting 1 acre of the land and the objector getting 1.1 acre of the aforementioned land.

Subsequently the applicants sought review of the order made on 14<sup>th</sup> April 1989. The parties were heard by Hon Juma J who granted the application and reviewed the order made on 14<sup>th</sup> April 1989 by confirming the grant in terms of distribution reducing the Respondents share to 1 acre and increasing the share of Charles Kariamburi Wachira to 1.1 acre.

It is against this background that the applicants have now come to this court under rule 73 of the Probate and Administration Rules seeking an order restraining the Respondents from entering into the suit land or putting up any structures therein “until this matter is over.”

By the affidavit of Ndegwa Wachira sworn on 17<sup>th</sup> January 2005 and a further affidavit sworn on 27<sup>th</sup> January 2005, the applicants contend that the Respondent is not entitled to the 1 acre in the suit land because he has not performed his part of the agreement and also because he is now not entitled to specific performance since he was buying from a party who died before the transfer. The applicant maintain

that they have obtained letters of administration in respect of their deceased brother's estate and are in the process of filing a suit against the Respondent and the Respondent should therefore be restrained from altering the status quo by taking possession of the suit land.

The Respondent objects to the application contending that the same cannot be a subject in this succession cause, and further maintaining that he has not refused to honour the agreement except for the fact that there is no one competent to deal with.

Mr. Kebuka Wachira who appeared for the applicants urged the court to grant the application as the Respondent had failed to fulfill the agreed condition.

It was further submitted that a piece of land at Matanya which was to be transferred to the deceased brother's representative was non-existent.

For the Respondent Mr. Waiganjo argued that the application was an abuse of the court process as the court was functus officio following the ruling delivered by Juma J. It was further submitted that the land at Matanya did not form part of the estate in this succession cause and could not therefore be brought into issue.

Upon considering this application, the affidavits in support and in reply, the further affidavits and the submissions of both counsel as well as the entire court record, it is apparent that this application relates to a claim relating to the estate of Macharia Wachira who was a beneficiary of the deceased herein. It is evident that in so far as this succession cause is concerned the administration of the estate has been virtually concluded the letters of administration confirmed and distribution of the estate approved by the court. The court has already adjudicated on the objection raised by the Respondent and ruled that he is entitled to 1 acre in the suit land. It would be a contradiction for this court to restrain the Respondent from taking possession of this one acre when there is an order in his favour which order has not been set aside. Moreover it would be an abuse of the process of the court to grant such a vague restraining order as sought by the applicant i.e. restraining the Respondent "until this matter is over." When there is nothing pending in this particular suit and the applicants obtained letters of administration for the estate of their brother Paul Macharia Wachira on 1<sup>st</sup> August 2002 and two and half years down the road do not appear to have made much head way in pursuing their deceased brother's claim. I find that this is not an appropriate case in which this court should exercise its inherent powers.

Accordingly the application dated 13<sup>th</sup> January 2005 is dismissed with costs. Orders accordingly.

***Dated, signed and delivered this 16<sup>th</sup> day of February 2005***

**H. M. OKWENGU**

**JUDGE**