



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

Prob & Admin Cause 54 of 2005

**IN THE MATTER OF THE ESTATE OF RUTH MUENI MUTUNGA-DECEASED
VERSUS**

1. LEAH BENARD MUTUNGA

2. STEPHEN MULWA MUTUNGA

PETITIONERS

AND

**JOSEPHAT MUIA MASUNGA INTERESTED
PARTY**

RULING

By a Chamber Summons dated 2/3/05, the applicant Leah Mutunga, the mother of the deceased in this cause seeks orders that the Interested Party/Respondent one Josphat Masunga, be restrained from intermeddling or interfering with the deceased's estate in any way pending hearing and determination of this application inter partes. The application is expressed to be brought under Section 45 of Succession Act, Rules 49, 73 of the Probate and Administration Rules. The application is premised on grounds found on the face of the application and an affidavit sworn by the applicant.

The application was opposed and the Interested Party, Josephat Masunga, filed a replying affidavit. The deceased is a daughter of the applicant. She died on 28/11/04. The applicant contends that she was unmarried and had no children but when they went to Mombasa where she lived, upon her death, found that she had a boyfriend, the Interested Party. The applicant buried the deceased in her home in Matiliku. After the deceased's burial, they went to collect the deceased's belongings and found the Interested Party had converted the deceased's household goods listed at paragraph 6 of the applicant's affidavit. She denies that the deceased was ever married to the Interested Party. She found that the Interested Party/Respondent is collecting money on the pretext that he is going to pay the medical bills on account of the deceased but that no medical bill is outstanding. It is also submitted that the Respondent has withheld the deceased's ATM card (bank) and may misuse her Estate. That is why these orders are sought.

The Respondent on the other hand submits that this application is misconceived, lacks merit and is brought in bad faith and hence an abuse of court process. He argues that the Respondent cohabited with the deceased for six years as husband and wife and that the deceased even adopted his name. The Respondent annexed some documents from the hospital in which the deceased was addressed as Ruth Muia, (JMM1). He also annexed letters 'JMM2' in which the applicant allegedly wrote to the deceased and the Respondent in which she referred to him as her child.

The Respondent claims to be the owner of the household goods listed at paragraph 6 of the applicant's affidavit and that he is the one who paid the hospital bills as per annexure 'JMM3' and that he is entitled to collect money to help him offset the bills.

I have carefully considered the application, affidavits filed, annexures thereto and the submissions by counsels. The ultimate question that will have to be answered at the end of these proceedings is whether deceased and the Respondent were husband and wife, whether customarily or otherwise

and whether the Respondent is entitled to administer or benefit from the deceased's estate. That question can only be determined by adduction of viva voce evidence. It is clear from the evidence before the court that the deceased and Respondent had some kind of relationship whereas the Respondent says they cohabited as husband and wife, the applicant claims they were only friends and does not accept the fact of cohabitation. I have seen the statements of account/invoice from Agakhan Hospital, Mombasa, annexure 'JMM3.' The amount at the hospital was payable by the Respondent Josephat Masunga, and the statement from Kalamba Nziu Welfare Association does indicate what the funeral committee contributed monies to cater for the funeral expenses. It indicates that it was care of the Respondent. At this stage, one cannot tell whether it is the Respondent or the deceased or both of them who belonged to that welfare society. What is clear is that the Respondent was involved in the committee but does not seem to have met the expenses. As regards the household goods listed at paragraph 6 of the applicant's affidavit, if indeed the Respondent and deceased cohabited whether as husband and wife or not, each may have had their property in that house. There is no specific evidence to show that all these items belonged to the deceased alone. For that reason, it is my view that the Respondent do continue using the said items for time being till the matter is heard and ownership established. Meanwhile, however, he should not interfere with them or get rid of any of them.

The issue of an ATM card or Bank account is not supported by any evidence. However, since the Respondent seems to have been close to the deceased if there was any account, it is only him who may know about it. Since the parties are not in agreement as to who should administer this estate or be a beneficiary, if there is any such account, it should not be interfered with pending hearing of this cause.

The Respondent annexed documents in which the deceased allegedly used his name Muia. The question is whether use of the name amounts to proof of a marriage. He also annexed letters allegedly written by the applicant to both of them, deceased and Respondent. Again the author of the letters cannot be established at this stage. The last letter (annexture) written by one Masauli, seems to be in the same writing as those allegedly written by the applicant. Whether or not the applicant wrote the letters cannot be established at this stage.

In sum, there is no dispute that the applicant and Respondent have an interest in the deceased's estate and they are not in agreement. Their interests cannot only be proved at a full hearing if they do not agree. Meanwhile, so that there is something to distribute at the end of this cause the estate must be preserved. Since the Respondent had access to part of this estate, he is hereby ordered to preserve the estate and not intermeddle with it. He is restrained from organizing the fundraising intended to collect money to offset the bills in respect of the deceased. The court however allows him to use the household goods listed at paragraph 6 of applicant's affidavit but not get rid of them or adversely interfered with them in any way. Costs of this application will be in the cause.

R.V. WENDOH

JUDGE

Dated at Machakos this 17th day of August 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE