



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

P & A CAUSE 169 OF 2003

IN THE MATTER OF THE ESTATE OF MAJOR HUDSON WAFULA – DECEASED

THROUGH

ANN AMIMO AND MANCHESTER WAFULA AND HALIMA

MUCHEKE WAFULA INTERESTED PARTY

RULING

This is an application by way of Summons under rule 49 of the Probate and Administration Rules dated 5th May 2005, filed by Messrs. Chemitei & Company Advocates on behalf Margaret Kamene Wafula. It seeks for the following substantive orders:

- 1) That Halima Mucheke Wafula, the interested party herein be restrained by a temporary injunction from interfering with Margaret Kamene Wafula's peaceful occupation of the deceased's land situated at Mautuma Settlement Scheme plot No.1365 in Jerusalem village, Mbakalu Location, pending the hearing and determination of this application and thereafter pending the hearing of the main succession cause.
- 2) That Halima Mucheke Wafula, the interested party herein, be reprimanded by this honourable court for intermeddling with the estate of the deceased before the finalization of the succession cause.
- 3) That the interested party herein be restrained from intermeddling with the deceased's estate before the conclusion of the succession cause.

The application has grounds on the face of the summons and is supported by the affidavit of Margaret Kamene Wafula sworn on 9th May 2003. The grounds are basically that Margaret Kamene Wafula was the mother of the late Major Hudson Wafula, the deceased herein. That she has been residing in the home, farming the subject land since 1997 and using a phosho mill on the subject land that was bought by the late Major Hudson Wafula before he died. That the interested party Halima Mucheke Wafula has been engaged in a systematic destruction of property on the deceased's land with a view to evicting her from the land in order to defeat the succession cause. That on the 6th May 2003 the interested party threatened to flatten the house where Margaret Kamene Wafula had been staying on the subject land. The affidavit supports the grounds of the application and also sought for protection of the court for Margaret Kamene Wafula.

The application was opposed through a replying affidavit sworn by the interested party Halima Mucheke Wafula on 10th May 2005, which was filed. The affidavit in opposition is a long one. In

summary, it deponed that Halima Mucheke Wafula was the wife of the deceased Major Hudson Wafula. That the late Major Hudson Wafula was allocated 2 acres of land by Mautuma Settlement Scheme in 1999. That in the year 2000 both Halima Mucheke Wafula and the late Major Hudson Wafula constructed a semi-permanent house on the land for a farm worker. That they decided that the mother of the late Major Hudson Wafula, Margaret Kamene Wafula should come and stay on the land to supervise the farm. That she the said Margaret Kamene Wafula came on the land with her elder daughter Risper Wafula and her seven children. That a Mr. Tallam, who was the seller of the land comprising of two acres, had attempted to fraudulently transfer the two acres of land to Margaret Kamene Wafula who was the mother of the deceased Major Hudson Wafula. That since the demise of her husband, Halima Mucheke Wafula had allowed her mother-in-law (Margaret Kamene Wafula) to continue managing the phosho mill and use the proceed for her upkeep.

That it was not true that she had engaged in a systematic move to evict her mother-in-law from the land, but that her mother-in-law had caused her customers to insult and assault her making her life very difficult. That during the hostilities she involved a District Officer at Lugari to try and solve the problem, and that it was agreed that both her mother-in-law and sister-in-law move from that piece of land to another place.

That she bought a piece of land for Risper Wafula and the said Risper Wafula had since moved to that land. However, her mother-in-law had asked for more time before she could return to her matrimonial home which she was supposed to do by 1st March 2005. That her mother-in-law asked for an extension to stay at Mautuma Scheme until 6th May 2005. When she made arrangements for the transport of the things and arrived at Mautuma farm at about 2.00 pm, she was shocked to find a big group of people being addressed by her father-in-law and the house had been destroyed.

She believed that the house had been flattened by her mother-in-law's *changa* customers. She denied destroying the house on the land as the same was destroyed in her absence. She deponed that the letters from Messrs. Chemitei and Company Advocates annexed to the supporting affidavit to the application marked MKW (a)-(d) were full of falsehoods and contradictions.

Before the application was heard the interested party Halima Mucheke Wafula through her counsel Messrs. Odede and Company Advocates raised a preliminary objection that the application had no locus standi to bring the application and that the same should be struck out. I dismissed the said preliminary objection, declined to strike out the application and decided that the application would be heard and determined on its own merits.

At the hearing of the application, Mr. Kathili for the applicant submitted that the application was for preservation of the estate. He submitted that the status quo at the time of the death of the late Major Hudson Wafula should be maintained. Under section 45 of the Laws of Succession Act (Cap.160 Laws of Kenya), the court could issue orders to meet the ends of justice. In his view, there had been interference with the estate of the deceased. He submitted that it was not in dispute that the land at Mautuma belonged to the deceased. The interested party had confirmed that fact in paragraphs 2 and 8 of the replying affidavit. No orders were made on the vesting of the property of the deceased either to the interested party nor to the applicant. Therefore, neither of the contenders could claim ownership of the deceased's property.

The interested party had also acknowledged in paragraphs 3,4,12 and 22 of her replying affidavit that there were structures on the land at Mautuma. She also acknowledged that Margaret Kamene Wafula was in occupation of the land at Mautuma at the time of the death of the deceased. This was from the contents of paragraphs 4, 5, 6 and 7 of her replying affidavit .

There was, in his view, admission in paragraphs 17,18, 19, 22 and 23 of the replying affidavit that the interested party had interfered with the estate of the deceased herein. This she did by convening meetings with the District Officer Lugari when the matter was already in court. She also deponed to an agreement as to who should move away from that land. That was insubordination of this court.

The destruction of the properties was not in dispute and every party seemed to be blaming the other. This court was the one with jurisdiction to order that there should be no interference with the estate of the deceased. He submitted that no one should interfere with the estate. He urged the court to find that the interested party had admitted interference and she should be reprimanded by the court.

Mr. Gumbo for the interested party relied on the replying affidavit of the interested party Halima Mucheke Wafula. He submitted that his client was not to blame for the demolition of the houses at Mautuma. All parties

He submitted that the deceased was buried on the parcel of land at Mautuma. In Luhya customary law, where the deceased was buried operated as his matrimonial home and so the mother of the deceased should not purport to take it and claim the same. The mother-in-law of his client who is the current applicant, had a husband who had pension and could take care of her.

The application was for equitable orders. The applicant had not come to court with clean hands as she had interfered with the harvest. The interested party could not be blamed for interference. What had taken place were only family negotiations and not interference. He submitted further, that section 45 of the Law of Succession (Cap.160 Laws of Kenya) provided for the remedy for intermeddling of a deceased person's estate. That remedy had not been exhausted. The orders sought in the application were for injunctions and were not available to the applicant under rule 69 of the Probate and Administration Rules. Also Order 39 of the Civil Procedure Rules had not been mentioned or relied upon. It is not available to the applicant. He sought to rely on the case of John Nganga Mwangi & Another –vs- Samuel K. Mwangi, Eldoret High Court P&A. No. 89 of 2003 (unreported). He also referred to rule 61 of the Probate and Administration Rules. In his view, the Registrar should have given directions before the hearing of the application. Rule 60 required any interested party to enter appearance. It was irregular for the applicant to rely on that authority given to her to make the application by way of affidavit. Allowing a status quo could also mean that the interested party should be allowed to plough and not account for the proceeds to the Public Trustee.

I have considered this application and the submissions of both counsel. In my view, the issues for determination are –

1. Whether the applicant can legally bring this application in the way that she did, not being one of the petitioners in this matter.
2. Whether there has been interference to the estate of the deceased relating to plot No.1365 Jerusalem village Mautuma Settlement Scheme.
3. Whether this court should issue the orders sought.

It is apparent from the application and documents filed in support of the application as well as the replying affidavit, that the applicant Margaret Kamene Wafula is the mother of the late Major Hudson Wafula. It is also not in dispute that the interested party Halima Mucheke Wafula is the wife of the late Major Hudson Wafula. It is not in dispute that the late Major Hudson Wafula owned the two acres of land at Mautuma Settlement Scheme, which is the subject of this application. It is not in dispute that, as at the time that the deceased passed away there was a house on the subject land and a posho mill. It is also not in dispute that at the time that the deceased died, the house on the land was occupied and used by the applicant and the proceeds of the posho mill were received and used by the applicant herein. It is not in dispute that while this matter was pending in court, the said house was completely demolished. It is not in dispute that the interested party has attempted, during the pendency of this Probate and Administration Cause, to have the applicant moved away from the land in question and also to receive the proceeds of cultivation and posho mill from the subject land.

On the issue as to whether the applicant has a legal basis for making the application before this court, I have already ruled on this in my ruling of 31st May 2005. I still stand by that ruling, that the applicant can legally bring this application.

I now go to the second issue as to whether there has been intermeddling or interference. From the records, so far, the court has not appointed anybody as the administrator of the estate of the deceased. The petitioners are Anne Amimo Wafula and Manchester Wafula. However, once the petition was filed, objections were filed on behalf of the interested party, Halima Mucheke Wafula, on the grounds that the petitioners were strangers. The court made an order on 3rd October 2003 that the estate be administered by the Public Trustee. However, thereafter, the interested party Halima Mucheke Wafula herself started making her own applications for determination of the beneficiaries of the estate instead of the Public Trustee. Then, there arose the disputes that have now come to this court which do not appear to have involved the Public Trustee.

In terms of section 29 of the Law of Succession Act (Cap.160 Laws of Kenya), the applicant being a parent of the deceased could as well be a beneficiary or a dependant of the deceased. It is not in dispute that she was occupying and using the subject land, the house and posho mill when the deceased died. That was therefore the status quo, which is protected In terms of section 45 of the Law of Succession Act. In my view, that status quo can only be changed by the court.

There is already this succession cause that is pending. From the contents of the affidavits and submissions, I am of the view that the interested party has tried to intermeddle with the estate (the land and developments). She had no business trying to pursue disputed settlements or transfers of people who were on the land without coming to court. She had no business preventing the applicant from harvesting produce or getting proceeds from the posho mill without an order of the court. I find that the interested party intermeddled with the estate of the deceased.

The third issue is on the reliefs sought. Is the applicant entitled to obtain an interlocutory injunction against the interested party? The provisions for temporary injunctions are laid out in Order XXXIX of the Civil Procedure Rules. In my view, that Order does not apply to applications under the Law of Succession Act (Cap.160). In this regard, I reiterate to my ruling in Eldoret High Court Succession Cause No.89 of 2003 John Nganga Mwangi –vs- Samwel K. Mwangi, where I held that the orders under the Civil Procedure Rules that are specifically applicable to Probate and Administration Causes are specified under rule 63 of the Probate and Administration Rules. These are Orders V, X, XI, XV, XVIII, XXV, XXIV and XLIX of the Civil Procedure Act. Order XXXIX of the Civil Procedure Rules is not mentioned and therefore is not applicable to Probate and Administration Causes. The reliefs provided therein under Order XXXIX in the form of injunctions are therefore not applicable to Succession Causes. Therefore I find that the relief of injunction sought by the applicant against the interested party cannot be granted by the court in the application herein.

However, in our present application, the applicant has also sought for orders against intermeddling with the estate of the deceased. Under section 45 of the Law of Succession Act (Cap.160 Laws of Kenya), the law provides for protection of a deceased person's estate from intermeddling. The law, in fact, makes intermeddling with the deceased's estate a criminal offence. The section provides that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. I have already found that the interested party has intermeddled with the deceased's estate.

In my view, unless there is an order from the court, the status quo pertaining as at the time of the death of the deceased has to continue. Any objection to that status quo has to be with the approval of the court. Therefore, in my view, the action by the interested party in asserting that since her late husband was buried on the said land, the land becomes his matrimonial home and that the applicant and others therein should move away, is intermeddling with the estate of the deceased.

If she wanted the applicant to move away or if she wanted the proceeds from farming, the posho

mill e.t.c., an application should have been made by her to this court for that purpose. She has however taken that upon herself without coming to court. It is therefore my view, that there is need to protect the deceased's estate from the intermeddling of the interested party, Halima Mucheke Wafula. I will therefore grant orders to restrain Halima Mucheke Wafula from intermeddling with the deceased's estate before the conclusion of this succession cause

I have been asked to reprimand the interested party for intermeddling with the estate of the deceased. The law (Section 45 Law of Succession Act) makes it an offence to intermeddle with the estate of a deceased person and imposes a fine, not exceeding Kshs.10,000/= or a term of imprisonment not exceeding one year or both fine and imprisonment. The law also makes the intermeddler answerable to the executor or administrator of the said estate to the extent to which he has intermeddled with the estate, after deducting any payments made in the course of administration.

I will not reprimand or impose any penalty sanctions at this stage. However, I give a strong warning to the interested party, Halima Mucheke Wafula against any further intermeddling with the deceased's estate. It is for this court to decide on the beneficiaries and distribution of the estate. It is not for her to decide that the land where her late husband was buried becomes her property to the exclusion of others.

The contentious issue as to who was responsible for destroying or damaging the house or developments on the farm will be determined in the substantive Succession Cause and will be taken into account by the court in the distribution of the estate.

In the result, I allow this application and order that the status quo as at the time of the death of the deceased, be maintained until the finalization of the succession cause, unless otherwise ordered by this court. I also order that the interested party, Halima Mucheke Wafula, be and is hereby restrained from intermeddling with the deceased's estate before the conclusion of the administration cause.

The costs of this application will be in the cause.

Dated and delivered at Eldoret this 3rd day of October 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. Gumbo for the interested party.

N/A For The Applicant