

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

PROBATE AND ADMINISTRATION 242 OF 2003

IN THE MATTER OF THE ESTATE OF JOHN MUTUA MUSYOKI

AND

GEORGE MUSYOKI MUTUA :::::::::::::::::::: PETITIONER

R U L I N G

By way of Notice of Motion dated 30.9.2003 the applicants seek an order that respondents be restrained from interfering with the quiet possession of a portion of land parcel KITETA/KAKUSWI/461 bequeathed to Josephine M. Nzyimi by her father Nzyimi Mutua before he died and that they be restrained from selling the said land and that any land sold be taken into account during the distribution.

The application was supported by the affidavit of George Musyoki Mutua a son to the deceased John Musyoki Mutua. He is co applicant with Josephine Nzyimi his brother's daughter. The brother is now deceased and that the brother bequeathed part of his share in parcel No. 461 to the 2nd applicant where she settled and built a permanent house which she is entitled to inherit if she does not marry. It is deponed that the 2 respondents have been disposing off portions of that land and also leasing it and interfering with the 2nd applicants developments on the land that is bricks that she made and bench terraces.

A replying affidavit was filed in opposition. Basically its contents are that the 2nd applicant is a stranger to the respondents and not entitled to the prayers sought and they denied that they are selling parts of the land.

The respondents annexed a copy of search of the said land and it shows that the said land is 111 hectares. That is vast tract of land.

Counsel for respondent had filed a notice of preliminary objection which was argued along with the application. It is to the effect that application is totally defective as it offends provisions of Rule 59 (1) – (6 of the Probate and Administration Rules. Rule 59 provides that except where provided in the Rules, every application to court will be by way of a petition caveat or summons. The present application is defective in that it is brought as a Notice of Motion.

Counsel also submitted that the formant is wrong as the form should be in form of Form 104. I have had a chance to see Form 104 and I do find that the format of the Notice of Motion does not conoirm with the format as laid down in the Rules. It is defective.

Is there merit in the application? I do find that the applicants allegations are vague. If the respondents have been selling land or leasing the same, the names of those involved in the transactions should have been given by the applicants.

The land is vast, the court has not been told how much or which part of the land the applicants occupy and which portion in particular has been sold or interfered with. We have not been told when and how much of the terraces were damaged or how; how many bricks destroyed.

I do agree with Counsel for Respondent that the application is vague and even if court were persuaded to look at the substance other than the form, the application lacks merit. It is dismissed with costs.

Dated, read and delivered at Machakos this 4th day of May, 2004.

R. V. WENDOH

JUDGE