



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2014 OF 1998

IN THE MATTER OF THE ESTATE OF PHILIP MUTUKU MUTUGI

(DECEASED)

RULING ON THE PRELIMINARY OBJECTION DATED 23RD FEBRUARY 2004

IN REGARD TO THE SUMMONS DATED 11TH NOVEMBER 2003

The Administratrix of the estate of the late Philip Mutuku Mutugi filed the Summons brought under Section 45, 79, 80 and 82 of the Law of Succession Act and Rules 59, 70 and 73 of the P & A Rules.

The application seeks for orders that:

1. Judah Mulwa Mutungi and Rhoda Wanza Kioko being brother and sister respectively of the deceased Philip Mutungi be stopped for any purpose, take possession or dispose of or otherwise intermeddling with any property in particular Rural house situated in Kalama/Katanga/25 and/or built by and/or belonging to the deceased estate
2. **THAT**, if the said Judah Mulwa Mutungi and Rhoda Wanza Kioko respectively contravenes the above (1) order to be a fine not exceeding ten thousand shilling or to a term of imprisonment not exceeding one (1) year or to both such fine and imprisonment.
3. **THAT** the said Judah Mulwa Mutungi and Rhoda Wanza Kioko be answerable to the rightful administrators to the extent of the aforesaid asset with which they have intermeddled.
4. **THAT**, the aforesaid Judah Mulwa Mutungi and Rhoda Wanza Kioko be condemned to pay the costs of this application and advocates charges hereof

The application is based on the grounds that the deceased passed away on 17th February 1998 and was survived by the applicant, the widow alongside the following children:

- a) Catherine Mweru born 1972
- b) William Muange Mutungi born 1973
- c) Steven Mumo Mutungi born 1978
- d) Mathew Musyoki Mutungi born 1983

The applicant is the administratrix of the deceased estate having been granted with the Letter of Administration on 11th January 1999.

According to the supporting affidavit, the deceased father who is the applicant's father in law caused and subdivided his parcel of land known as Kalema/Katanga/25 and caused it to be registered as follows:

"William Mutungi, Esther Wausi Mutungi, Philip Mutuku Mutungi, Joseph Mutangili Mutungi and Juda Mulwa Mutungi (as trustees for themselves and Nicodemus Ndunda Mutungi, Laban Mulinge Mutungi and Paul Musembi Mutungi)" refer to title deed No. Kalama/Katanga/25 issued on 24th February 1989. The said land was also demarcated and boundaries clearly indicated whereby the late Philip Mutuku Mutungi was allocated plot No.I. The late Philip Mutuku Mutungi constructed and developed a rural home comprising of a big maisonette and whereby he allowed his parents to live with his family until they passed away in 1992 and 2002 respectively.

The applicant complains that since her mother in law passed away in the year 2002, the respondents have locked up the rooms occupied by their mother with their padlocks. These respondents have hindered the applicant's occupation of her matrimonial home. The respondents have threatened the applicant's life.

The applicant contends that the house on plot No. I in the suit premises was solely constructed and developed by her deceased husband using his own resources and the land was allocated to him and it is not part of the assets of the family of her late father in law. The father in law's land was divided into six portions and each beneficiary has their own distinctive share but apart from the deceased, the rest did not develop their respective shares. The applicant therefore argues that the respondents should be punished for intermeddling with the deceased assets. The above is the summary of the applicant's case which was strenuously opposed by the respondent. Judah Mulwa Mutungi and Rhoda Wanza Kioko, both respondents have filed detailed affidavits in respect to the applicant's case. They deny the allegations contained in the applicants application and her claim over the suit premises which they state was not part of the deceased estate. The respondents also filed a Notice of Preliminary objection seeking to strike out the application on the following grounds:

- a) The application is frivolous, vexatious and an abuse of the court process
- b) This honourable court has no jurisdiction to grant the orders sought
- c) The application is incurably defective as the suit property does not form part of the deceased property and estate.

The respondents relied on their replying and supplementary affidavits respectively in addition to submissions. Since the Preliminary Objection is based on a point of Law, I will summarize the issues of law raised herein.

Counsel for the respondent submitted that the suit premises does not form part of the deceased estate. In this regard therefore it does not form part or fit the description of free property as defined under Section 3 of the Law of Succession Act. The property was registered jointly between the deceased and respondents in Trust of two other beneficiaries and upon the demise of the deceased, his name was deleted from the title as shown in the copy of the title and the remaining proprietor are Joseph Mutangili Mutungi and Judah Mulwa Mutungi (as Trustees for themselves and for Nicodemus Ndunda Mutungi, Laban Mulinge Mutungi and Paul Musembi Mutungi).

This was done apparently without the involvement of the applicant by the deceased mother but one wonders how her name was also deleted (refer to paragraph 26 of the replying affidavit sworn on 13th January 2004 by Judah Mulwa Mutungi) and another Title issued on 27th May 1999 with her name as Trustee. What became of the interests of the late Philip Mutuku Mutungi?

According to the respondents their father had subdivided the suit premises in six portions but the allocation was not executed and hence, this dispute cannot be addressed in the Succession Cause of the deceased herein. It is a dispute that can properly be addressed in respect of the estate of the Late William Mutungi and therefore the respondent sought for the dismissal of the application.

This court is minded to administer substantive justice in respect of disputes and especially those disputes that affect families without undue regard to technicalities. There are grey areas that are revealed in this matter that make me make a finding to the effect that upholding this preliminary objection on a point of law would be unreasonable and would cause undue injustice and inconvenience to the applicant. The applicant's came to court seeking for the protection of the rights under the law because she believed rightly or wrongly that plot No. I forms part of the deceased free property. This is because the deceased father had subdivided the land and allotted specific portions to all the beneficiaries. Secondly, the deceased had constructed a rural home which was the applicants matrimonial home using his own resources. I have given due consideration to the matters of law raised in this application and especially Section 3 of the Law of Succession which provides the definition of a deceased free property.

“free property, in relation to a deceased person, means, the property of which that person was legally competent freely to dispose during his life time, and in respect of which his interest has not been terminated by his death”

Counsel for the respondent argued that the presumption herein based on the nature of the registration was that this was a joint tenancy whereby the deceased did not own any specific share. There is sufficient evidence to show that even if this was the presumption in law it can be rebutted due to the reasons that:

- 1) The deceased father had caused out a subdivision scheme and the deceased share was distinctly plot No.I
- 2) The deceased had an estate, upon his demise, his share should revert to his estate and in any case his estate ought to have been involved in the transfer of title.
- 3) When the title was transferred, why was the deceased estate not involved, was the transfer therefore fraudulent? These are questions that beg for an answer and the basis upon which I believe if the respondents' preliminary objection is upheld, this wrong doing either on their part or by others not disclosed, this court would be perpetuating and protecting a wrong doer.

I am also of the firm view that before the application dated 11th November 2003 can be heard or the grant of Letter of Administration can be confirmed, the question affecting the right or interest of the deceased in respect of plot No. I forming part of the suit premises should be resolved. This I believe can be resolved by filing an Originating Summons under Order 36 of the Civil Procedure Rules or a petition for the grant of Letter of Administration in respect of the estate of the late William Mutungi. In this respect therefore and pursuant to the inherent power and jurisdiction vested upon this court by virtue of Section 49 of the Law of Succession and rule 73 of the Probate and Administration Rules to ensure the ends of justice are met in the course of the administration of justice. I direct that the application dated 11th November 2003 be stayed pending the determination of the deceased estate's interests in Plot No.I of Title No. Kalama/Katanga/25. I am not persuaded that the applicant's application is without merit but the above issue should be determined first.

There will be no order as to costs of the Preliminary Objection. I will also order that the status quo in respect of this premises be maintained.

It is so ordered.

Ruling read and signed on 23rd July 2004.

MARTHA KOOME

JUDGE