



**REPUBLIC OF KENYA**

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

**Prob & Admin 234 of 2002**

**IN THE MATTER OF THE ESTATE OF MUTHINI MUU JOHN**

**AND**

**GABRIEL MTWARA MUTHINI ..... APPLICANT**

**RULING**

By an application dated 27.10.2004 the petitioner/applicant moved the court under Order 39 Rule 1 (a) and 9 of the Civil Procedure Rules and Section 3A Civil Procedure Act seeking the following prayers

(b) A temporary Order of injunction do issue against the respondents to nullify, stop or reverse all the land sales done by themselves and that there be delivery of accounts on the occupied parcels of commercial plots in relation to accrued interests.

(c) The respondents be restrained from wasting, disposing disputed assets i.e. the tractor and that it be arrested and kept in safe custody till the suit is finalised.

(d) The respondents and other beneficiaries be stopped from in any manner damaging the estate by felling down trees.

(e) Costs of the suit.

In reply to the said application Mr. Mwangangi counsel for the objector/respondents filed a notice of preliminary objection dated 8.11.2004 whose purport is that the application is incompetent and an abuse of the court process. The objector did not specify the nature of the incompetency or how the application was an abuse of court process. He argued that if it is assumed that the application is properly before the court under the Civil Procedure Rules, then it is defective as it offends order 50 Rule 15 (2) which states that every motion and summons shall bear at the foot words that if the party served does not appear at the time and place mentioned an order will be made and proceedings will proceed as the court may think just and expedient. A look at the application does show that that footnote is not included. In reply to this objection counsel for applicant urged that the footnote does not go to the substance of the application as it merely advises the other party of the consequences of non attendance. I do agree with him that the defect is in respect of the form of the application does not warrant the striking out of the application. It merely puts the other party on notice.

The respondent also urged that the applicant mentions intermeddlers of the estate in the supporting affidavit and orders are sought as against them and yet they are not parties to the suit. I do agree that at paragraph 8 of the affidavit of Gabriel Mtwara Muthini, the buyers of the estate are named but they have not been made parties to this suit and yet orders of injunction are sought against them which is irregular. The said orders can not be issued against people not party to the suit.

In prayer (b) of the application apart from the prayer for injunction the applicant prays for accounts. Order 39 does not provide for grant of orders of accounts. That prayer is totally misplaced.

In prayer (b) of the chamber summons, the applicant prays for an order reversing what has already been done. Such an order cannot issue under Order 39 Rule (a). Order of injunction envisages a situation preventing a future event not a past as prayed in this application.

The petitioners moved the court in Probate and Administration cause. It is urged that the Civil Procedure Rules do not apply to Probate and Administration proceedings. Rule 63(1) of Probate and Administration Rules limits the application of the Civil Procedure Rules to Probate and administration matters. Only Order V, X, XI, XV, XVIII, XXV, XLIV and XLIV apply to proceedings under Probate and Administration matters. Order 39 Civil Procedure Rules is not one of the orders that applies to probate and administration proceedings and I do agree that the application is totally incompetent and can not stand. Counsel for applicant raised the issue of the preliminary objection being vague and did not disclose the points of incompetency of the applicants application. This issue was raised after Mr. Mwangangi for respondent had already argued the preliminary objection. That objection to the preliminary objection should have been raised before the preliminary objection was argued. It is true that the preliminary objection was vague but once it was drafted as it was, a look at the applicants application should have been able to put the applicant on notice as to what the preliminary objection was all about.

I am satisfied that the application dated 27.10.2004 is fatally defective and the court upholds the preliminary objection and that application is hereby struck out with costs to the respondents.

Dated at Machakos this 23rd November 2004.

R. V. WENDOH

JUDGE