



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO. 644 OF 2014**

**IN THE MATTER OF THE ESTATE OF DANIEL MUSAU MUSINGA (DECEASED)**

**JOSHUA MWELELU MUSAU.....CITOR/APPLICANT**

**AND**

**ESTHER BETH MUSAU.....1<sup>st</sup> RESPONDENT**

**CHARLES MUSYOKA MUSAU.....2<sup>nd</sup> RESPONDENT**

**REBECCA MWONGELI MUSAU.....3<sup>rd</sup> RESPONDENT**

**MARTIN MULINGE.....4<sup>th</sup> RESPONDENT**

**RODGERS WAMBUA KASUNI.....5<sup>th</sup> RESPONDENT**

**RULING**

1. The matter herein relates to the estate of Daniel Musau Musinga who died intestate on 24<sup>th</sup> May, 2011.
2. The applicant herein has filed a citation but is yet to petition for letters of administration and the same are yet to be granted.
3. The applicant herein then filed an application for preservation of the estate of the deceased comprised in Land Parcels 24 and 35 Kasikeu and the application was allowed and thereafter the respondents seek to have the said orders set aside.
4. The applicant opposed the application via Replying Affidavit sworn on **26<sup>th</sup> March, 2018**. The said applicant averred that the deceased's estate comprised in Land Parcels 24 and 35 Kasikeu are registered in the names of the deceased and therefore the orders issued are lawful and regular.
5. Parties agreed to canvass the application by way of written submissions.
6. Whereas it appears that the issue in this application is whether or not the orders should be set aside, I find the following issues necessary for determination namely:-

***i. Whether the initial Applicant had locus standi to bring the application.***

***ii. What orders may the court grant?***

7. The citation herein was filed on 14.8.2014 and no application for letters of administration have been made as none have been issued leave alone confirmed. However the respondents are accused of what amounts to intermeddling with assets that form part of the deceased's estate. The 1<sup>st</sup> respondent's justification is that the said land comprised in Land Parcels 24 and 35 Kasikeu are recorded in her names therefore she is entitled to the same. She has attached a copy of a court order as well as a letter from the Land Adjudication and Settlement Department from Kibwezi.

8. Section **82(a) of the Law of Succession Act** provides that;

***“Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”***

In interpreting the above provision of law, the Honourable Court in the case of **Alexander Mutunga Wathome v Peter Lavu Tumbo & Another [2015] eKLR (Machakos Succession Cause No. 80 of 2011)** noted that;

***“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.”***

9. Section 45 of the Law of Succession is to the effect that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

10. It is the court’s view that the actions of the 1<sup>st</sup> Respondent amount to intermeddling with the estate of the deceased. It is this court’s view that the applicant is not yet an administrator to the estate of the deceased and he had the option of filing for a limited grant so as to seek the instant orders and therefore the court finds that the applicant was not properly before court in the first place to seek the orders sought. Hence the orders ought not to have been granted in the first place.

11. Be that as it may, this court is duty bound to prevent wastage of the estate of the deceased and the power to do so is set out under the inherent jurisdiction of the court and under Section 47 of the Law of Succession Act and Rule 73 of the probate rules and to that end the Court has power to grant injunctive orders to meet the ends of justice. This was observed in the case of **The Estate of George M’Mboroki (Deceased) [2008] eKLR** where the court held that **“it holds such intrinsic authority so as to observe the due process of the law, to prevent the abuse of the process, to do justice between the parties and to secure a fair trial between them”**.

12. In the case of the Estate of **Veronica Njoki Wakagoto (Deceased) 2013 eKLR** the court stated **“that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law.....the law takes a very serious view of intermeddling and makes it a criminal offence”**.

13. I am satisfied that if the orders that were issued on 14<sup>th</sup> February, 2018 are vacated, there will be irreparable loss and a miscarriage of justice. The facts speak for themselves that it is not known how the 1<sup>st</sup> respondent acquired registration or otherwise any color of right to land comprised in Land Parcels 24 and 35 Kasikeu and yet the same according to the evidence on record was allocated to the deceased.

14. From the foregoing and after considering the pleadings on the court record, there does exist a serious issue concerning the estate of the deceased and in preserving it, the court must rise to the occasion and ensure that justice as envisaged by the principles in Article 159 of the Constitution is achieved for the sole purpose of preserving the estate of the deceased pending determination of claims by those legitimately entitled to benefit therefrom.

15. On the issue of the locus standi of the applicant in the initial application, Section 54 of the Law of Succession Act provides; **“A court may, according to the circumstances of each case, limit a grant of representative which it has jurisdiction to make, in any of the forms described in the fifth schedule”**. I would advise the applicant to utilize the said provision of the law so that the application does not hang in abeyance.

16. Another course open to the applicant after having taken steps to cite the respondent to take or reject letters of administration **under Rule 22 (1) and (5)(a) of the Probate and Administration Rules** made under **Section 97 of the Law of Succession Act** would have been to proceed to apply for the letters of administration. Under **Rule 22(1)** it is provided that:

**A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.**

**Sub-rule 5 (a) of Rule 22** says:

**If the time limited for appearance has expired and the person cited has not entered an appearance in either the principal registry or the Mombasa registry, the Citor may-**

**a. in the case of a citation under sub rule (1) (that is, of rule 22 cited above), petition the court (if he has not already done so) for a grant to himself;**

17. I caution the Respondents against intermeddling, for having noted that the 1<sup>st</sup> respondent has committed the offence, the applicant is at liberty to cite them for contempt if need be.

18. I therefore make the following orders:-

**(i) The applicant is directed to file an application for limited grant for doing such acts as may be necessary for the preservation of the estate of the deceased and apply for grant of letters of administration, whichever is earlier.**

**(ii) The Orders made on 14.2.2018 shall lapse in 60 days if the applicant fails to comply with the court directions herein.**

**(iii) Costs in the cause.**

Orders accordingly.

**Signed, Dated and Delivered at Machakos this 3<sup>rd</sup> day of April, 2019.**

**D.K.KEMEI**

**JUDGE**