REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 45 OF 2002

IN THE MATTER OF THE ESTATE OF JONATHAN M'ITAMBU M' MUGAMBI (DECEASED)

SILAS RUGUARU M' ITAMBU....................................PETITIONER/RESPONDENT

VERSUS

GEDION MUTWIRI M'ATAMBU.............................1ST OBJECTOR/RESPONDENT

GRACE KAGWIRIA JOHN.......................................2ND OBJECTOR/RESPONDENT

AND

ZIPPORAH MUKOMARANGU MUTWIRI.....INTERESTED PARTY/APPLICANT

RULING

1. The Interested Party/applicant herein is the widow to the 1st Objector herein (now deceased).She is also a holder of Limited Grant of letters of Administration- Ad litem in **Meru Misc. Succession Cause No. 101 of 2018 In the Matter of the Estate of Gedion Mutwiri M' Tambu** hence competent to apply herein.

2. She now seeks for a temporary injunction to restrain the petitioner/ Respondent, one Misheck Mwenda M'Tambu their agents, personal representatives, workers or any one acting at their behest from; (1) interfering with the applicant occupation on L.r. No. Abothuguchi/Ruiga/1987 & 1988; (2) subdividing it, cutting down, selling sawing or ferrying trees and /or timber, cultivating, demolishing the applicants houses evicting the applicant's or constructing any structure on the portion occupied by the applicant her family on the suit land pending the hearing and determination of Nyeri Appeal No. 1 of 2018.

3. The Respondents took out an objection that this Honourable Court does not have jurisdiction to issue injunctive orders for two reasons. One; the remedy is not contained in the acquired provisions enumerated under Rule 63 of the Probate and Administration Rules. I have heard this argument before in cases without number. Two; the court is functus officio.

Injunction not provided in P&A?

4. My reaction to the first objection is that the argument was meticulously tackled by **Emukule J.** in **Succession Cause No, 303 of 2004 In the Matter of the Estate of Kaura Kaura (deceased)** (cited by the Respondent) where he stated;

> **"......whether or not a court has authority under the Law of Succession Act to issue such restraining Orders Hon Ouko J. set out lucidly the provisions of the Civil Procedure Rules which were incorporated expressly under Rules 63 of the Probate and Administration Rules into the Law of Succession. Order XXXIX (Temporary and Interlocutory Orders) of the civil Procedure is not one of the Rules incorporated or imported into the law of Succession. This does not however mean that a court dealing on matters of Succession is prohibited from giving restraining Orders, temporary or otherwise. This view is founded upon the provisions of Section 47 of the Law of Succession Act and under Rules 73 of the Probate and Administration Rules….."**

5. Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules enables tap from inherent jurisdiction where a court as a court of law should serve substantive justice to parties. See the broad terms in which section 47 and rule 73 are cast:

> **47. Jurisdiction of High Court**
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> **The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to**

pronounce such decrees and make such orders therein as may be expedient: Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.

73. Saving of inherent powers of court Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

6. The Constitution also requires courts of law to fashion reliefs that is appropriate to the case which I think follows after the maxim that no one shall suffer wrong without remedy. Therefore, to say that a probate court cannot issue an injunction or orders akin to injunction merely because order 39 of the Civil Procedure Rules is not one of the orders incorporated under rule 63 of the Probate and Administration Rules is not only missing the point but also oblivious of the elegant provisions of the Constitution on substantive justice. But, it is time order 39 of the CPR is linked expressly to the law of succession to avoid such arguments as I have heard here. Be that as it may, is this court functus officio?

Functus officio

7. The Supreme Court explained the principle of functus officio in the case of **Raila Odinga vs. The Independent Electoral & Boundaries Commission & 3 Others** at paragraphs 18 and 19 as follows:

> **"We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept:**
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> **"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.… The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."**
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> **This principle has been aptly summarized further in Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550:**
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> **"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available"**

8. The grant herein was confirmed on 16th June 2004. The court also rendered a judgment dated 5th October 2017, and dismissed the protest by the protestors who include the applicant's. In effect, upon confirmation of grant distribution of the estate was determined. Thus, this matter is concluded. The application now before the court is for a temporary injunction in respect the estate property. The question I should determine is whether the court still has jurisdiction and power to entertain such application or is it functus officio.

9. The application by the Interested Party is interlocutory in nature and is seeking a temporary injunction. Such application must find footing in proceedings that are ongoing. It bears repeating that these proceedings are concluded in so far as this court is concerned. Therefore I think such relief is not tenable here unless it falls within the exception to the rule on finality. Some examples thereof include, application for review or revocation or annulment of grant or provision of dependant or stay of execution pending appeal. Perhaps it serves good purpose to recapitulate that:-

> **The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available"**

Appeal already lodged

10. The 1st Objector (to whom the interested parties' interest relates) was provided for in the grant, i.e. 1.44 acres in Abothuguchi/Ruiga/700. Of significance is that the applicant has lodged an appeal in *Nyeri Civil Appeal No.1 of 2018 In the matter of Jonathan M'Itambu M'Mugambi* contesting this courts determination on the distribution of the estate. She is aggrieved by the decision made on the distribution of the estate and particularly her occupation in Abothuguchi/ Ruiga/1987 & 1988 which she avers they have resided on for 49 years. These are the grounds of appeal and arguments to be presented in the appeal. Notably, these same grounds have also been stated to be the basis for seeking an injunction. In my considered opinion, the applicant should seek remedy in the appellate court rather than in these proceedings. I do not think the application herein could lawfully and competently be lodged in these proceedings. For that reason I dismiss the application for injunction dated 16th October 2018. In passing; Parties should avoid re-opening proceedings in most inappropriate manner as is the case here. Instead, they should be minded to take their grievances to a higher court where the case so demands. I lament that in succession cases, parties keep on coming back to the probate court for relief which should be sought from a higher or other court. I will give examples. Why should a party come back in the probate court to ask for redistribution of the estate because he was not satisfied with the distribution by the same court? Again, why should a beneficiary with a title issued after confirmation come to the probate court for eviction of strangers from his land? Courts should not sign in or accept such invitations. The practice should end as it clogs the judicial system and consumes precious judicial time which could otherwise have been employed to more needy cases. The practice has become an impediment to access to justice by other deserving litigants. The practice should be avoided at all cost.

Dated, signed and delivered in open court this 10th July, 2019

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F. GIKONYO

JUDGE

In presence of

Kiogora for petitioner

Mbaabu for applicant – absent

Applicant – present

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F. GIKONYO

JUDGE