



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 538 OF 2007**

**IN THE MATTER OF THE ESTATE OF MUINDE KILONZO NGAO (DECEASED)**

**MBULA MUINDE.....PETITIONER/APPLICANT**

**-AND-**

**MUNYAO MUINDE.....1<sup>ST</sup> RESPONDENT**

**ROBERT MUTUKU MUTISYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Chamber Summons dated 16<sup>th</sup> November, 2017, the Applicant herein, **Mbula Muinde**, substantially seeks the following orders:

- 1. That the Respondents herein be restrained from unlawfully evicting the petitioner/applicant and her children from the deceased's land parcel No. Matungulu/Katine/2263 and from interfering with her occupation of the suit land.**
- 2. That the 1<sup>st</sup> Respondent be restrained from intermeddling with the deceased's estate by selling the deceased's land parcel No. Matungulu/Katine/2263, either to the 2<sup>nd</sup> Respondent or to any other person.**
- 3. That the 2<sup>nd</sup> Respondents his agents or servants be restrained from entering the deceased land parcel number Matungulu/Katine/2263 and ploughing thereon, cultivating, planting crops, erecting structures or fences thereon or any way intermeddling with the deceased's land parcel No. Matungulu/Katine/2263.**
- 4. That the 2<sup>nd</sup> Respondents his agents or servants be restrained from entering the deceased land parcel number Matungulu/Katine/2263 and ploughing thereon, cultivating, planting crops, erecting structures or fences thereon or any way intermeddling with the deceased's land parcel No. Matungulu/Katine/2263.**
- 5. That the Honourable Court order dated 6/7/2015 revoking the grant issued on 22/7/2008 be set aside and the petitioner/applicant herein be allowed to file summons for confirmation of grant.**

2. According to the applicant, she is the administrator of the estate of the deceased herein, **Muinde Kilonzo Ngao**, having been issued with Grant of Letters of Administration Intestate on 22<sup>nd</sup> July, 2008 after the 1<sup>st</sup> respondent together with the other beneficiaries despite being aware of the succession proceedings declined to sign the consent and failed to file a protest nor summons for revocation of grant. It was averred by the applicant that she was deceased's second wife, the first wife being **Mwikali Muinde**. According to the petitioner, she got married to the deceased in 1974. The applicant averred that throughout her life with the deceased she lived on the deceased's land parcel No. Matungulu/Katine/2263 whereon the deceased built for her a home and her children while the first wife and her children including the 1<sup>st</sup> Respondent were settled on the deceased's land at Mbau Nzau in Makeni County.

3. However, in or about June, 2017, the 1<sup>st</sup> Respondent went to the applicant's home on land parcel No. Matungulu/Katine/2263 and unlawfully evicted her and her children therefrom and since then she and her children have been living with well-wishers. According to her the 1<sup>st</sup> Respondent has purported to sell part of the deceased's said land to the 2<sup>nd</sup> Respondent and has purported to occupy the other portion and the 2<sup>nd</sup> Respondent has deposited building stones and sand thereon and is threatening to commence construction of a permanent structure thereon. In the meantime, the applicant and her children have been threatened with violence and arrest should they dare to return to the said land. Indeed, one of her sons, **Ndonye Muinde**, was assaulted by the 1<sup>st</sup> Respondent and his workers when he went back to the said land and a report to the relevant authorities was ignored and he was instead pursued for arrest. The applicant therefore urged the court to allow the application.

4. In response to the application the 1<sup>st</sup> Respondent asserted that being the first son of the deceased from the first house, he is entitled to a share of his property. According to him the suit parcel was initially plot no. Matungulu/Katine/823 but the petitioner transferred the same without their knowledge immediately after the death of the deceased. He denied that the petitioner lived in the said land with the deceased and averred that she only took advantage of the deceased's mental situation and when they got into a relationship, she settled on the said land.

5. According to the 1<sup>st</sup> Respondent, the petitioner met the deceased sometimes in 1991 and because he had money having disposed of some properties, she took advantage of his said mental disturbance and persuaded him and this was the time she alleged to have married the deceased.

6. The 1<sup>st</sup> Respondent averred that the parcel of land at Mbui Nzau is his and does not belong to the deceased and that he only took his parents to live with him when the deceased got sick and continued to stay with them. It was his case that the petitioner obtained the letters of administration illegally, unlawfully and without consent from the rest of the beneficiaries of the deceased's estate. He however denied that he evicted the petitioner but averred that the petitioner sold her share of almost  $\frac{3}{4}$  of the parcel of land and cannot demand to be the only beneficiary of the lands left by the deceased. According to him the parcel allegedly sold by him does not belong to the petitioner since he is entitled to its share as a beneficiary.

7. On the part of the 2<sup>nd</sup> Respondent, it was denied that the 1<sup>st</sup> Respondent purported to sell or that he has occupied property known as Matungulu/Katine/2263 as alleged by the Applicant. According to him, the Applicant and 1<sup>st</sup> Respondent together with their children sold his father's property known as Plot No. 796 Katine land section on 12<sup>th</sup> May, 1994 and that the Photographs attached are for property known as Katine 796 and not Matungulu/Katine/2263. He therefore denied that he has put any building stones or sand on Matungulu/Katine/2263 as alleged and the said stones were put by his father on Matungulu/Katine/796.

8. He therefore averred that the application against him is misconceived and a sham by the Applicant to drag him into the succession cause for no apparent and justifiable cause.

#### **Determination**

6. I have considered the application, the affidavit in support of and in opposition to the application and the submissions filed. In this case it is not in dispute that land parcel no. Matungulu/Katine/2263 was the property of the deceased and therefore belongs to his estate. It is also not in dispute that the applicant herein was the administrator of the deceased's estate though the grant that was issued to her was on 6<sup>th</sup> July, 2015 revoked and the matter was marked as closed.

7. Section 45 of the *Law of Succession Act* provide as follows:

*(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

*(2) Any person who contravenes the provisions of this section shall—*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.*

8. I associate myself with the opinion of Musyoka, J in Veronica Njoki Wakagoto (Deceased) [2013] eKLR that:

**“The effect of [section 45]...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”**

9. I also agree with the position in re Estate of M'Ngarithi M'Miriti [2017] eKLR that:

**“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”**

10. It follows that any action taken by a person whose effect would be to interfere with a property of a deceased intestate without being

authorised to do so by the court amounts to intermeddling with the estate under section 45 of the *Law of Succession Act*. Absence an order from this court, no one is lawfully authorised to interfere with the estate of a deceased.

11. **Lenaola, J** (as he then was) in **Republic vs. Chairman Machakos Land Disputes Tribunal & Others Ex Parte Late Mutheke Ndeti & Others Machakos HCMA NO. 252 of 2006** held that:

**“It is trite law that the interests of deceased persons cannot be tampered with unless a properly appointed legal representative has been handed over the management of their estates.”**

12. In my view, where a grant has been issued, it is only the administrators who are empowered to administer the estate of the deceased since it is only the administrators that can under section 83(e) the *Law of Succession Act* be called upon to account.

13. In this case the contention is that the respondent is in effect intermeddling with the administration of the deceased’s estate by purporting to dispose of part thereof to the 2<sup>nd</sup> Respondent. However, there is no evidence of such disposal and the 2<sup>nd</sup> Respondent has expressly denied that the said property has been sold to him. To the contrary, the 2<sup>nd</sup> Respondent contends that the photographs relied upon by the applicant are in respect of Plot No. 796 Katine land section belonging to his father which the Applicant and 1<sup>st</sup> Respondent together with their children sold on 12<sup>th</sup> May, 1994 and that the materials thereon were placed there by his father.

14. In the absence of any evidence that the 1<sup>st</sup> Respondent has sold land parcel no. Matungulu/Katine/2263 and that it is the 2<sup>nd</sup> Respondent who is in possession thereof, no injunction can issue against the 2<sup>nd</sup> Respondent. However, as the 1<sup>st</sup> Respondent is not the administrator of the estate of the deceased, he has no business intermeddling with the estate. If he has any issue regarding the manner in which the grant was issued to the applicant/petitioner or the manner in which the estate is being administered, he ought to take the necessary legal steps to protect his interests.

15. On the other hand, the grant that was issued to the applicant/petitioner herein no longer exists the same having been revoked. In this application though there is a prayer seeking that the said order be set aside, no reasons have been given in the affidavit as to why the same ought to be set aside. There is simply no material placed before me on the basis of which such discretion can be exercised.

16. Accordingly, none of the parties herein have the power to intermeddle in the estate of the deceased and all the parties herein are restrained from so intermeddling.

17. As the applicant did not comply with the directions of this court to furnish the court with soft copies the applicant will bear the costs of the 2<sup>nd</sup> Respondent.

18. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 11<sup>th</sup> day of December, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Nzei for the applicant**

**CA Geoffrey**