



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.8 OF 2019**

**IN THE MATTER OF THE ESTATE OF PAULINE MUTHONI GATU (DECEASED)**

**A N D –**

**DR. FRANCIS PAUL KERRE.....PETITIONER/APPLICANT**

**- V E R S U S -**

**CECILIA NYAMBURA GICHIA.....1ST RESPONDENT**

**PATRICK WAMBUGU GICHIA.....2ND RESPONDENT**

**LUCY NJAMBI GICHIA.....3RD RESPONDENT**

**ANDREW BATU GICHIA.....4TH RESPONDENT**

**R U L I N G**

Before me is the summons dated 20/5/2019 filed by *Dr. Francis Paul Kerre*, the Petitioner/Applicant, against the four Respondents:

1. *Cecilia Nyambura Gichia*
2. *Patrick Wambugu Gichia*
3. *Lucy Njambi Gichia*
4. *Andrew Batu Gichia*

He seeks the following orders:

1. *That pending the hearing and determination of this cause, the respondent be restrained from cutting down trees, leasing out, erecting structures, demarcating, transferring, cultivating and or in any other way interfering with the deceased's homestead LR.Laikipia/Nyandarua/159;*
2. *That pending the final distribution of the estate of the deceased, the respondents be restrained from intermeddling with the estate of the deceased;*
3. *That the OCS Karuga Police Station to ensure that the order is complied with.*

The application is premised on grounds that the respondent are wasting the estate by cutting down trees, leasing out the land and renting out the main house and homestead to students as hostels, demarcating the land and denying the petitioner access to the estate and that the said acts amount to intermeddling with the estate before it is distributed.

The applicant swore an affidavit to the effect that the deceased left behind the suit land which is approximately 55 acres for all her 6 children but the respondents have started cutting down mature blue gum and pine trees without his knowledge and consent; are leasing out the homestead to students from Laikipia University, leasing out large pieces of land to tenants for farming, subdividing and demarcating land to themselves.

The 1st and 2nd respondents filed a replying affidavit, opposing the application and confirmed that they are siblings of the applicant; that

prior to her death, the deceased called the surveyor and gave clear instructions on how to subdivide the suit land amongst her children according to her will; that the subdivision was done and each was put in possession and each person started tilling their portions, erected houses, farming or leasing out even when the deceased was still alive. Copies of mutation GNG 1(a) and (b) were annexed; that even the applicant was put into occupation on his portion of choice and he too started using the land; that the applicant became dissatisfied with the manner in which the deceased had subdivided the land and put a restriction on the land to ensure that the mutations could not be registered and so by the time of the deceased's death, the process was in complete; that the deceased wrote her Will dated 9/4/2016 and another on 4/8/2016 appointing the applicant and 4th respondent Andrew Gatu as executors but also went ahead to cause the subdivisions; that the applicant filed this cause and ignored the input of the 4th respondent; that the main house was bequeathed to the 4th respondent who has built other residential houses thereon during the life time of the deceased and leased it out to students; that the applicant's intention seems to be to bring the respondent's developments to come to a standstill; that the applicant addressed a demand letter to the 4th respondent who resides in UK but not to all the respondents and the allegation that they were cutting trees is false.

The applicant filed a further affidavit in which he reiterates the earlier averments and insists that there had been no subdivision during the life of the deceased that the deceased never assigned any specific portions to any of the beneficiaries and that the rents earned by the 4th respondent should be accounted for.

Mr. Waichungo, counsel for the applicant urged that the respondents arguments relate to distribution yet what they seek is preservation of the estate; that the mutation form does not show what property went to who.

Mr. Sigilai, counsel for the respondent on his part argued that the application is an abuse of the court process because at the time he filed this application, there was no administrator of the estate or anybody granted letters of administration; that the applicant has no locus to bring the application and should be struck out; that the complaints by the applicant are against fellow beneficiaries of the estate and he does not have superior rights over the others; that the application is not anchored on any prayer in the cause and cannot stand.

As to whether the applicant has the locus to bring this application:

The applicant petitioned this court on 11/4/2019 seeking to be appointed as administrator. He has not yet been appointed as such and so he should have moved the court for a limited grant for purposes of preserving the estate. In my view, he should have moved the court under Section 67 of the Act and Rule 36 of the Probate and Administration Rules for grant *ad colligenda bona* for purposes of preservation of the estate. I do agree that the applicant lacks the locus to bring the application.

However, the issues raised of intermeddling are so serious that the court on its own motion can still intervene under Section 47 of the Act. I will therefore go ahead and consider the allegations made.

Section 47 of the Laws of Succession Act Cap.160 provides as follows:

*“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.”*

The above section grants this court wide powers for the protection of the estate of a deceased person. I believe that would include such an application where the applicant is alleging intermeddling. Section 45 of the Laws of Succession Act prohibits the intermeddling with the deceased's property.

It reads as follows:

*“Section 45.*

*No intermeddling with property of deceased person*

*(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.”*

Cutting of trees, leasing out or pulling down of houses or even making alterations to such a property before the property is distributed is deemed to be intermeddling and it attracts criminal sanctions.

From the pleadings, it is apparent that the applicant and the respondents who are all the deceased's children are in dispute over the deceased's estate. Although the respondents contend that the deceased had already subdivided the land and shown each where their entitlement was yet

the mutation form that is annexed does not reveal that fact nor did they tell the court exactly where each was settled. There is no evidence of subdivision placed before this court.

The applicant attached photographs of felled trees. It seems the respondents claim to be entitled to cut the trees but again since we do not know if indeed each beneficiary was allocated their portion, it cannot be ascertained at this stage where the trees were felled from.

The respondents do not deny the fact that there are students being accommodated in the deceased's house but they have an explanation that the students were accommodated there even during the life of the deceased and that the deceased gave the house to the 4th respondent. That will call for evidence. If indeed the students were accommodated there before the deceased's death, then there would be no reason to interfere with that arrangement save that the one leasing out has to keep proper accounts of the earnings and expenditure from the said leasing, so that in the event that it turns out that it is not his entitlement, then the amounts will be surrendered accordingly.

As for farming, if the respondents have been farming on the land before the deceased's demise, I do not see why they would stop doing so. It is however wrong if the respondents are indeed leasing out the land to strangers for purposes of farming.

Preservation of an estate is important so that by the time of distribution, the estate has not been wasted to the detriment of some beneficiaries or there is nothing to distribute.

I therefore direct that leasing out of land to strangers for cultivation and felling of trees should be put to a halt immediately.

I have given directions on the leasing of the houses to the students, accounts should be kept. If the beneficiaries were using particular parts of the estate, they should continue to do so without putting it to waste.

No orders as to costs.

Dated, Signed and Delivered at NYAHURURU this 5th day of December, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Wanjiru Muriithi for applicant

Soi – Court Assistant