



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 103 OF 2017**

**IN THE MATTER OF THE ESTATE OF MATHEW MULAVU MUSYIMI (DECEASED)**

MILLICENT MBATHA MULAVU ..... 1<sup>ST</sup> APPLICANT

LUCY MWENDE MULAVU ..... 2<sup>ND</sup> APPLICANT

**-VERSUS-**

ANNAH NDUNGE MULAVU ..... 1<sup>ST</sup> RESPONDENT

DOMINIC MUTUKU MULAVU ..... 2<sup>ND</sup> RESPONDENT

JACKSON KIOKO MULAVU ..... 3<sup>RD</sup> RESPONDENT

MUTUKU MULANDI ..... 4<sup>TH</sup> RESPONDENT

**RULING**

**INTRODUCTION**

1. The application for determination is dated 13/10/2017. It is brought under Section 47 of the Law of Succession Act and seeks injunctive orders against the 4<sup>th</sup> Respondent.
2. The Applicants are daughters of the deceased, the 1<sup>st</sup> Respondent was the deceased's wife but she has also passed on. The 2<sup>nd</sup> Respondent is a son of the deceased and the surviving Administrator. The 3<sup>rd</sup> Respondent is a son of the deceased but has passed on as well.
3. The application is premised on the ground *inter alia* that the Administrators have sold land parcel No. Kathonzweni/Thavu/646 to the 4<sup>th</sup> Respondent who is now engaged in acts of construction and has adamantly refused to stop. The Applicants contend that the entry of the 4<sup>th</sup> Respondent onto the aforesaid land is unlawful and that unless this honorable Court restrains him, the deceased's estate shall suffer irreparable harm.
4. The application is opposed through the replying affidavit of Dominic Mutuku Mulavu sworn on 15/11/2017. He avers that the Applicants have no capacity to bring the application as they do not have a grant of representation. Further, he contends that this Court lacks the necessary jurisdiction to entertain the issues raised in the application.
5. Directions were taken on 16/11/2017 that the application be canvassed by way of Written Submissions. Both sides complied and filed their respective submissions.
6. Having looked at the application, the replying affidavit, the rival submissions, the authorities cited therein as well as the entire record, it is my considered view that the following issues arise for determination.

***a) Whether the Court has jurisdiction.***

***b) Whether the Applicants have locus standi to bring the application.***

**JURISDICTION**

7. Whenever the issue of jurisdiction is raised, the Court is under an obligation to deal with it *in limine* because without it, the Court cannot make one more step.

8. The Respondents submit that the issues raised in the application in relation to the 4<sup>th</sup> Respondent are about land and as such, they should be canvassed in the Environment and Land Court.

9. The Applicant's allege that the land parcel has been sold to the 4<sup>th</sup> Respondent but no evidence has been tabled to that effect. The Respondent has not expressly denied the Applicants' allegation in his replying affidavit but has done so in his submissions. He has even indicated that there is a certificate of official search attached to his submissions but I did not find it. Be that as it may, it is trite that evidence should not be introduced in the submissions.

10. As it is, there is nothing to guide the Court with regard to the ownership of the land parcel, however, there is common ground among the parties that it should form part of the deceased's estate.

11. The law of Succession Act, Cap 160 (*herein after 'the Act'*) is basically concerned with the administration of estates of deceased persons and the High Court is vested with powers to determine any dispute under the Act. The argument by the Respondent that this is a land matter is therefore misplaced.

12. On the issue of injunctions, the Respondent submits that the Act does not grant any authority to the Court to grant injunctive orders and that the Court cannot resort to Rule 73 of the Probate and Administration rules. He relies on **Nairobi High Court Succession Cause No. 1647 of 2001; Re Estate of Kilungu** where Khamoni J. (*as he then was*) held that the Act does not allow the Court to entertain an application for injunction.

13. Section 47 of the Act 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.”***

14. On the other hand, Rule 73 of the Probate and Administration Rules provides that:-

***“73. 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.”***

15. My reading of the above sections is that the High Court is clothed with wide powers to do what is necessary to ensure that the ends of justice are met.

16. Each case will of course present a different set of facts which the Court will take into consideration in the exercise of its discretion. The authority cited by the Respondent is from a Court of concurrent jurisdiction and therefore only persuasive in nature.

17. Further, the Court of Appeal has pronounced itself on the issue of Injunctions. In the case of **Floris Piezzo & Another –vs- Giancarlo Falasconi (2014) eKLR**, while considering whether an injunction can issue in a Succession Cause the Court of Appeal expressed itself as follows;

***“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause. The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court's inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the Law of Succession Act gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased's estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court's jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”***  
(Emphasis mine).

18. The upshot of the foregoing is that this Court has jurisdiction to issue all manner of orders including injunctions to preserve the estate.

19. At this juncture, it is important to look into whether the land has been sold.

20. The Applicants submit that it is apparent from their supporting affidavit that the land has been sold to the 4<sup>th</sup> Respondent. It is actually not apparent because as stated herein above, no evidence to that effect has been attached. The attached photographs are just that. They do not speak into the issue of the alleged sale.

21. There is however a veiled admission from the Respondent that the 4<sup>th</sup> Respondent has actually entered the land. I have referred to it as veiled because it was introduced in the submissions. The Respondent goes on to submit that by allowing the 4<sup>th</sup> Respondent to be on the land, he was well within his scope of authority as vested by section 82 of the Act.

22. I do not agree with the Respondent. The powers conferred upon him as a personal representative do not extend to allowing third parties to take possession of the free property of a deceased person. He has overstepped his mandate and it is my considered view that the actions of the 4<sup>th</sup> Respondent amount to intermeddling.

**LOCUS STANDI**

23. From the record and the orders issued by this Court on 06/06/2018, the only Administrator of the estate is the Respondent.

24. Section 82 (a) of the Act provides that a personal representative shall subject to any limitation imposed by their grant, have the power 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.

25. Our Courts have churned out numerous authorities in affirmation of this well settled principle. It is therefore trite that anyone seeking to do anything on behalf of a deceased person must first obtain the relevant authorization.

26. In **Mks HC Succ. Cause No. 80 of 2011; Alexander Mutunga Wathome –Vs- Peter Lavu Tumbo & Anor (20150 eKLR)**, the Court stated as follows;

***“In law, one can only represent the estate of the 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. The Applicant has in this respect not produced evidence to show that he has been given such a grant of representation with respect to the 2<sup>nd</sup> protestor’s estate and cannot therefore be substituted in the place of the 2<sup>nd</sup> protestor” (emphasis added).***

27. The Applicants, despite being beneficiaries, have not demonstrated that they have the legal standing to institute proceedings on behalf of the estate. I am therefore satisfied that the Applicants lacked the capacity to lodge and sustain the application.

28. As for the issue of intermeddling, I am of the view that the Act contains elaborate provisions on how one can be empowered to protect the estate. Intermeddling is a criminal offence and nothing stops the Applicants from reporting the matter to the police. There are also provisions on how to obtain a limited grant. In a nutshell, lack of locus goes to the core of the matter and not even rule 73 can enable the Court to circumvent.

**CONCLUSION**

29. The court finds that the instant application is incompetent and thus court makes the following orders;

**- The application is struck out with no orders as to costs.**

**SIGNED, DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF JULY 2018, IN OPEN COURT.**

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**C KARIUKI**

**JUDGE**