



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO 24 OF 2005

IN THE MATTER OF ESTATE OF LATE JOEL MUTUA NZIOKA (DECEASED)

MARY MUTHIO MUTUA.....PETITIONER

VERSUS

DANIEL THAIRU MAINA.....OBJECTOR

RULING

INTRODUCTION

1. Before the Court is an application by Chamber Summons dated 20th May 2015 under Certificate and supported by the Affidavit of Mary Muthio Mutua dated 20th May 2015 seeking the following orders:

a. THAT this application be certified urgent, and be heard ex-parte at the first instance.

b. THAT pending hearing and determination of this application, an Order do issue restraining the Objector/Respondent, his agents and servants, and each and every one of them, from in any way in intermeddling with the deceased land Parcel No. NDALANI/NDALANI/1102, and in particular from subdividing, leasing or selling the said land, cultivating, planting crops, putting up structures on, grazing, or in any other way interfering with the said parcel of land.

c. THAT an Order do issue restraining the Objector/Respondent, his agents or servants, and each and every one of them, from in any way intermeddling with the deceased agricultural land parcel No. NDALANI/NDALANI/1102 and in particular from subdividing, leasing the said land, cultivating, planting crops, putting up structures, grazing, or in any other interfering with the said land until the Objector/Respondent protest herein is heard and determined.

d. THAT costs of this Application be paid by the Objector/Respondent

REPLYING AFFIDAVIT

2. The Respondent filed his Replying Affidavit on the 24/7/2015, where he avers that he has been tilling and using parcel No. NDALANI/NDALANI BLOCK 1/1102 since the year 1997 with his family, grazing, planting, and has built houses occupying and only limited to 2 acres up to date. The Respondent also avers that he has built permanent houses, planted horticultural crops, with dairy animals and invested over 3 million on the 2 acres.

ISSUES FOR DETERMINATION

3. The Objector on 9/9/2015 filed a list of issues for determination as follows:

1) Had the Objector purchased 2 acres from NDALANI/NDALANI BLOCK 1/1102 from the deceased?

2) Was the Petitioner rightfully cited to take out the letter of administration of the estate of the late MUTUA NZIOKA?

3) Did the Petitioner know that 2 acres out of NDALANI/NDALANI BOCK 1/1102 were sold by her late husband to the Objector?

4) Did the Petitioner apply for the letters and if the answer is in the affirmative, did she include the Objector as a creditor in the

Letters of Administration?

5) *Is the Objector entitled to protect his interest in the deceased estate as a creditor?*

6) *If the answer to the above is in the affirmative, is the Objector rightfully entitled to apply for revocation of the grant issued to the Petitioner herein as a creditor?*

7) *Who is in occupation and use of the 2 acres purchased by the Objector from the deceased herein?*

FURTHER SUPPORTING AFFIDAVIT

4. The Applicant on 11/11/2015 filed a further Supporting Affidavit that alleged that the Replying Affidavit by the Respondent was full of falsehoods and that one Patrick Nzuka has been leased out a portion of the suit land by the Objector.

APPLICANT'S SUBMISSIONS

5. The Applicant filed Submissions on 26/1/2016 where she alleges that the Sale Agreement between her deceased husband and the Objector was revoked and that the Objector has occupied 4 acres of the subject land instead of the agreed 2 acres.

6. The Applicant also submitted that the Respondent is in contravention of section 45(1) and 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.

7. It is their submission that this Court is vested with the necessary jurisdiction to grant the prayers sought and stop the Respondent from intermeddling with the deceased property.

RESPONDENT'S SUBMISSIONS

8. The Respondent claims that this Court lacks jurisdiction to hear and determine matters of land or leases, boundaries and sub-division of land. They submit that the Environment and Land Court is vested with such jurisdiction by sections 150 of the Land Act and 101 of the Land Registration Act, which provide as follows:

Section 150 of the Land Act

“The Environment and Land Court established in the Environment and Land Court Act is vested with exclusive jurisdiction to hear and determine disputes, actions, and proceedings concerning land under this Act.”

Section 101 of Land Registration Act

“The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

9. The Respondent further urges that the suit should be dismissed on grounds of adverse possession stating that he has been on that land for over 18 years and that he has met all five conditions for adverse possession, that is -

- a) Open and notorious use of the property*
- b) Continuous use of the property*
- c) Exclusive use of the property*
- d) Actual possession of the property*
- e) Non-Permissive, hostile and adverse use of the property*

10. He submits that the provisions of section 45(1) of the Law of Succession Act prohibits intermeddling with the deceased **“free property”** and contends that 2 acres of **NDALANI/NDALANI BLOCK 1/1102** does not constitute “free property” of the deceased. He cited two cases, namely:

1) ***Virginia Wanjiku Mwangi v. David Mwangi Jotham Kamau*** [2013] eKLR where A. Ombwayo J. stated the conditions that one must possess so as to claim adverse possession.

2) ***Ernest Kevin Luchido v. Attorney General & 2 Others*** [2015] eKLR Mrima J. made clear the jurisdiction of the Environment and Land Court over the High Court.

Consequently, the respondent prays that the Application be dismissed with costs.

DETERMINATION

11. The eventual determination of the dispute between the parties in this application must depend on judicial determination of two alternate questions as follows:

- a. *Whether there is an existing and enforceable land sale agreement between the Respondent and the deceased husband of the Applicant; and*
- b. *Whether, in the alternative the respondent is entitled to the land by virtue of adverse possession thereof.”*

12. As a Succession Court, this Court has jurisdiction to deal with the administration and succession of estates of deceased persons and to prevent “intermeddling” therewith in accordance with the provisions of the Law of Succession Act. However, since the promulgation of the Constitution of Kenya 2010, the jurisdiction for the determination of questions of ownership of land is vested in the Environment and Land Court established under Article 162 of the Constitution.

13. However, as the legal title to the suit property is with the deceased, the Court must consider the application for injunction on the basis of the well known principles of interlocutory injunction. In seeking to enforce the agreements for sale, the Respondent must be taken to concede the legal title of the deceased to deal with the land as his free property.

Arguable cause

14. The matter calls for resolution of competing contentions by the applicant on the one hand who cites the Respondent for intermeddling but the Respondent asserts right to the two acres of the deceased’s land through acquisition by sale or, in the alternative adverse possession.

15. In considering whom between the Appellant & Respondent the Court should grant possession of the subject land, the Court considers that the Estate of the deceased is entitled to seek protection from intermeddlers, and the Respondent’s possession of the estate land is intermeddling within the meaning of section 47 of the Law of Succession Act. It would only cease to be intermeddling upon a judicial determination by a competent court validating the sale agreement by an order of specific performance or by a declaration of right through adverse possession as claimed. Then the Respondent’s right and interest in the suit portion of land would have crystallized, and become capable of protection by a succession court. This Court is not the appropriate court to make the determination of ownership, legal or beneficial, by an order of specific performance or adverse possession, that being a matter within the proper province of the Environment and Land Court. Accordingly, I do find that the Applicant has an arguable case for the grant of the application for protection from intermeddling.

16. Moreover, there is no valid proceeding before the Court, even if it were a competent Court, because the Respondent has not filed any proceeding for specific enforcement of the alleged sale agreement of the suit portion of land, if a valid and enforceable agreement with land board consent exists, or for a declaration of right by adverse possession.

Balance of convenience

17. The Respondent claims to have invested heavily on the land and has built permanent houses on two acres of the land which he claims to have acquired by purchase or, in any event, by adverse possession thereof for over 18 years. The Applicant concedes that the Respondent is in possession of the portion of the suit land. In fact she say he occupies 4 acres instead of the 2 acres subject of the agreement, which she contends was later revoked.

18. A question therefore arises as to propriety of issuing the orders sought by the Applicant, which are **mandatory** in nature at the interlocutory stage of the proceedings, which may only be done in the clearest of cases. In view of admitted possession of suit property by the Respondent pursuant to the sale agreement and the claim in adverse possession, I do not find that this is a clear case for grant of an interlocutory mandatory injunction order.

19. Despite the question as to the validity of the of sale agreement and, therefore, the Respondent’s possession having not been determined, it is not in the interests of justice to order the eviction of, and/or delivery of vacant possession by, the respondent whose possession is admitted by the applicant, as he may, upon hearing by a competent Court, be found to have acquired legal or beneficial interest on the suit property.

20. In these circumstances, I think the justice of the case lies in protecting the suit property from intermeddling, subject to the Respondent acknowledged possession, so that no further dealing shall be had with the land by way of lease, transfer or other disposal by the Respondent pending hearing by the competent Court of the question of ownership of the suit portion of land.

ORDERS

21. Accordingly, for the reasons set out above, the court makes the following orders:

1. There shall be an Order for ***status quo*** on the suit portion of land to be maintained as of the date of the Ruling.
2. The Objector/Respondent shall not make any developments on the suit portion of land by way of any construction or building and the Objector shall not dispose of the said portion by transfer, lease, licence or other disposal pending the hearing and determination of the suit herein or until further Orders of a competent court.
3. For avoidance of doubt, the court does not authorize the eviction of the Objector/Respondent from the suit portion of land.

22. Costs in the Cause.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 3RD DAY OF DECEMBER 2018.

G.V. ODUNGA

JUDGE

Appearances: -

M/S Nzei & Company Advocates for the Petitioner/Applicant.

M/S J.A Makau & Co. Advocates for the Objector.