



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2773 OF 1999

IN THE MATTER OF THE ESTATE OF PETER MBUTHIA MUTOKAA (DECEASED)

BETWEEN

LUCY WAIRIMU MBUTHIA APPLICANT

AND

1. RUTH WANJIRU MBUTHIA

2. STEPHEN MWANGI RESPONDENTS

RULING

1. This matter relates to the estate of one Peter Mbuthia Mutokaa, who died testate on 15th February 1999.

2. In his will dated 6th October 1993 he had appointed his wife Lucy Wairimu Mbuthia, together with his daughter – Pauline Wambui Mbuthia and his sister, Grace Wanjiku Mutokaa, executrixes of the said will. Monetary bequests were made to Rahab Wambui Mutokaa, Grace Wanjiku Mutokaa, John Njenga Mutokaa, Jane Ruguru Mutokaa and Waithera Mutokaa, being his mother and siblings, respectively. The remainder of the estate was to devolve upon the wife, Lucy Wairimu Mbuthia, and all the children of the deceased absolutely and in equal shares.

3. Representation to the estate was sought by the three executrixes through a petition lodged in court on 7th December 1999. A grant of probate of the written will was made to the petitioners on 5th April 2000. The grant has not been confirmed todate.

4. On 28th March 2014, a summons for revocation was lodged at the registry by the widow of the deceased, Lucy Wairimu Mbuthia, in her capacity as executrix of the will of the deceased and therefore his personal representative. She explains that one of the executrixes, Grace Wanjiku Mutokaa, is dead, while the other executrix, Pauline Wambui Mbuthia, lives outside the jurisdiction and has evinced no interest in the administration of the estate.

5. The said application names Ruth Wanjiru Mbuthia and Stephen Mwangi as respondents. The applicant avers that Ruth Wanjiru Mbuthia was once married to the deceased, in 1967, but then she deserted him and left him with four (4) children. When the deceased married the applicant in 1985, he was living without a wife, with the four children. The said Ruth, hereinafter referred as the first respondent, is the mother of the second executrix, Pauline Wambui Mbuthia. The marriage between the deceased and the first respondent is said to have been dissolved by court order in **Divorce Cause No. 67 of 1993**. It is

averred that the first respondent initiated a suit, **HCCC No. 1329 of 1999 (OS)** against the executrixes after the deceased's death but the said suit has never been withdrawn.

6. The relationship between Stephen Mwangi and the estate of the deceased has not been spelt out in the affidavit of the applicant. The said Stephen, hereinafter referred to as the second respondent, appears to be a partner, agent, servant or employee of the first respondent.

7. The applicant's case is that the respondents have been interfering with estate property, in particular the lands at Olkalau – LR Nos. 3777/535 and 540. The second respondent has been tilling it with a tractor on the ostensible authority of the first respondent. The applicant seeks that the two of them be restrained from so interfering with the said lands, and specifically that the two be evicted from the said lands, with the help of the police. She would also like the first respondent specifically barred from interfering with any of the assets of the deceased given that she is not named as a beneficiary of any of the assets of the estate according to the will of the deceased made on 6th October 1993.

8. Attached to the applicant's affidavit sworn on 28th March 2014 are several documents. There is the grant of probate of the will of the deceased made on 5th April 2000. Certificate of death of the executrix, Grace Wanjiku Mutokaa, who died on 3rd February 2005. The will of the deceased executed on 6th October 1993. Copy of the Originating Summons in **HCCC No. 1329 of 1999 (OS)** filed by the first respondent seeking division of matrimonial property. Finally, is copy of the order extracted on 26th February 2014 from the order given on 15th June 2005 dismissing the suit in **HCCC NO. 1329 of 1999 (OS)** for want of prosecution.

9. The first respondent replied to the application vide her affidavit sworn on 24th April 2014. She avers that she has challenged the will on grounds that it was forged. She explains that she did not desert her husband but that she left for further studies abroad and during that absence her husband filed for divorce. She states that it was only after his demise that she discovered that he had obtained a decree of divorce. She asserts that all the assets listed in the petition were acquired with her efforts and goes on to illustrate how that was so. She states that the deceased had no capacity to bequeath assets that had been acquired in the name of one of the companies given that she was an equal shareholder in the said company. She further accuses the applicant of mismanaging the estate and failing to account for her administration of the same. She alleges that the Ol kalau property was acquired by her joint efforts with her husband but was eventually registered in his name. She has attached one document to the affidavit, being the memorandum and articles of association, in respect of Mbuthia Enterprises Ltd, to demonstrate that she was a co-owner of the company with the deceased.

10. The second respondent swore an affidavit on 26th May 2014. He states that he was approached by the first respondent in January 2014 to carry out cultivation and planting works on LR No. 3777/535. They drew up a labour agreement, where he was to plough, harrow, plant maize, spray and harvest the same on behalf of the first respondent. He says that he has nothing to do with LR No. 3777/540. He has attached a copy of the said labour agreement dated 7th January 2014.

11. The matter was placed before me for directions on 22nd September 2014. I directed that the application dated 28th March 2014 be disposed of by way of written submissions. Both sides did file their respective written submissions. The applicant's submissions are dated 6th October 2014 and were filed in court on the same date. The first respondent's written submissions are dated 18th October 2014, and were filed in court on 15th October 2014. There is nothing on record to indicate that the second respondent filed submissions.

12. In the submissions filed on behalf of the applicant, it is submitted that the respondents have contravened Section 45 of the Law of Succession Act Cap 160, Laws of Kenya, by entering estate property and cultivating it when they were not authorized in law to do so. It is submitted that the first respondent has filed a summons under Section 26 of the Law of Succession Act, which implicitly suggests that she concedes the validity of the will of 6th October 1993.

13. On the other hand, the first respondent submits that there is no jurisdiction for a probate court to grant injunctive orders and cites my decision in **HCSC No. 1016 of 1993 In the matter of the Estate of Ng'ang'a Njoroge Njuguna** (deceased). She states that the applicant has been guilty of failure to account for her administration of the estate and therefore she has contravened Section 83(e) of the Law of Succession Act.

14. It is not in dispute that the applicant is a holder of a grant of probate in respect of the estate of the deceased, together with two other individuals named in the will. By virtue of Section 79 of the Law of Succession Act, the estate of the deceased vests in the holder or holders of the grant of representation. For avoidance of doubt, Section 79 states as follows:-

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him a personal representative.”

15. The effect of Section 79 of the Law of Succession Act is that the property making up the estate of the deceased vested in the applicant and her co-executors upon their appointment as personal representatives of the deceased on 5th April 2000. They became the representatives of the deceased in respect of his property. They took his place as the owners of the estate property. They acquired the powers of the deceased to deal with the property as he would himself have dealt with it were he alive. They became entitled to exercise all the powers of an owner – to sue and be sued over the assets, to enter into contracts of sale and lease over the property, among others.

16. The first respondent, on the other hand, is not named in the will as executrix. In fact, she is not even named beneficiary of any of the assets which make up the estate. It is common ground that she was at one time a spouse of the deceased who was divorced through a judicial process. As she does not hold a grant of representation to the estate of the deceased, she is not entitled to handle or deal with the estate of the deceased.

17. The law on who is entitled to handle the property of the dead person is Section 45 of the Law of Succession Act. The said provision states as follows:-

“45(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 with”

18. The person to handle the property of a dead person is the person who has authority from written law or from a grant of representation. The person holding a grant of representation has the estate vested in them by virtue of Section 79 of the Law of Succession Act, and therefore there is legal authority for such person to handle such estate property. Written law refers to some statutory provision which allows a named person or officer to handle estate property. Section 46 of the Law of Succession Act allows named public officers to take certain steps with respect to protection of estate property.

19. Unless a person is authorized in written law or holds a grant of representation in respect of certain property, they have no legal basis to handle estate property. Interfering with estate property would

expose them to liability by virtue of Section 45 of the Law of Succession Act.

20. Handling of estate property by unauthorized persons is referred to as intermeddling with estate property by Section 45. The provision specifically mentions the taking of possession of such property or its disposal by such persons. Doing so has been criminalized under Section 45(2)(a) of the Law of Succession Act.

21. The first respondent has asserted that she is entitled to the property on account of her having at one time been a spouse of the deceased. She alleges that she contributed to the acquisition of some of the assets and that some are in fact registered in joint names with her and the deceased. Unfortunately, she has not provided any documentary proof to support these assertions.

22. What the first respondent is asserting is that she is justified to deal with the property in question. It is common ground that she has entered into an agreement with the second respondent to do certain works on one of the assets.

23. The assertions and acts of the respondents when taken against the clear wasting of Sections 45 and 79 of the Law of Succession Act point to violations of the law by the said respondents. Both have not pointed at any written law which has authorized them to deal with the estate property in the manner that they have done, and none of them claims to hold a grant of representation with respect to the said property. In sum, the property does not vest in them and they have no legal authority or justification to have dealt with it in the manner that they have.

24. The fact that the first respondent was at one time married to the deceased does not clothe her with any status to justify violation of Section 45 of the Law of Succession Act. Whatever rights she may claim over the estate property await determination in her pending summons under Section 26 of the Law of Succession Act. Such rights have not accrued, and will not accrue until the said summons is resolved in her favour. Any acts that she may engage in prior to the favourable determination of that application would be a foul of Section 45 of the Act, and would constitute her an intermeddler.

25. The conclusion to be drawn from the facts so far presented to court is that the respondents have had no legal justification to forcibly enter the property known as LR 3777/535 and 540 and to cultivate thereon. The incursions amounted to intermeddling and both respondents are liable to prosecution under Section 45(2) (a) of the Act.

26. The next matter for consideration is whether the two ought to be stopped by way of injunction from continuing these acts of intermeddling. I am aware that in some of my previous decisions I have held that injunctions are not available in probate proceedings. This position is informed by the fact that the provisions of the Civil Procedure Rules governing injunctions were not imported into probate practice. Consequently, there is no basis for grant of injunctions.

27. Such orders are not available especially against third parties. The design of probate proceedings is to confine them to matters as between the estate and heirs, beneficiaries, survivors and dependants. So that claims by or against third parties should not be entertained within a probate cause. Such claims are best dealt with in a civil suit properly commenced by a third party against the estate and *vice versa*.

28. For acts of intermeddling by heirs, survivors, beneficiaries and dependants however it would be prudent to deal with them within the framework of the succession cause. Although the provisions of the Civil Procedure Rules governing injunctions have not been imported into probate practice, the provisions of Section 45 of the Act clearly suggest that there is jurisdiction for the probate court to make orders for the preservation and protection of the estate. Such orders can be granted under Rule 73 of the Probate and Administration Rules which saves the inherent powers of the probate court.

29. The first respondent has not been named as a beneficiary in the will of the deceased, and consequently she would appear to be an outsider, a third party. However, she has lodged an application in the cause under Section 26 of the Act for reasonable provision. She is no doubt seeking to bring herself within the

definition of dependant in Section 29 of the Act. That being the case, the probate court can properly consider granting preservatory orders against her in terms of Rule 73 of the Probate and Administration Rules, as read with Section 45 of the Act.

30. The second respondent is not a member or former member of the family of the deceased. He is neither a heir, survivor, dependant or beneficiary of the estate of the deceased. He is clearly an outsider or third party. The ideal situation should be to deal with him in a civil suit outside the probate process. However, his misdemeanours are intertwined with those of the first respondent. Their cases are one.

31. An issue has been raised about accounts. I doubt that the first respondent is the right person to raise the matter for the reasons that I have alluded to above, but this court can on its own motion address the issue.

32. The deceased in this case died in 1999. Representation to the estate was granted in 2000. That grant is yet to be confirmed. Indeed, no application has ever been placed before the court for confirmation of the grant. No reason has been proffered for this. The first respondent cannot be the reason for it as her application, and indeed the only one by her in this cause, was filed only on 17th June 2014. The applicant has not sought to explain what she has been doing with the estate since 2000 when she obtained probate.

33. The office of an executor is one of trust. The holder of the office stands in a fiduciary position to the persons who have an interest in the property of the estate and indeed with respect to the estate in general. The property of the deceased vests in the holder of the grant to hold in trust, not for themselves, but for the benefit of those who are interested in the estate property. The grant holder is obliged in law to account to such persons regarding their administration of the estate. The applicant has been personal representative for fifteen (15) years todate. There is obviously a case for the applicant to render an account.

34. In the upshot I am inclined to make the following orders-

- a. **That I declare the respondents to be intermeddlers in the estate of the deceased, and in particular regarding LR Nos. 3777/535 and 540;**
- b. **That the respondents shall forthwith stop interfering in any manner whatsoever – including being in possession, being in occupation of, farming, cultivating, ploughing, harrowing, harvesting, among others with LR Nos. 3777/535 and 540 until other or further orders of this court;**
- c. **That for the purpose of preserving and protecting the estate of the deceased the respondents, whether by themselves, their servants, agents, employees or whomsoever are hereby barred or restrained from cultivating, using, trespassing on, or in any other manner whatsoever interfering in any way with LR Nos. 3777/535 and 540 situated at Ol Kalau in Nyandarua County until further or other orders of the court;**
- d. **That the respondents are hereby granted thirty (30) days from the date of the order to move themselves and their equipment from the said parcels of land, in default of which they shall be forcibly evicted;**
- e. **That the Officer Commanding (OCS) the Ol Kalau Police Station is hereby directed/ordered to forcibly evict the respondents and their agents, servants or employees from the said parcels of land upon expiry of the thirty (30) days given in (d) above;**
- f. **That the applicant shall in the next forty five (45) days of the date of this ruling give a comprehensive and full account of her administration of the estate of the deceased for the period running from 5th April 2000 to the date of the delivery of this ruling;**
- g. **That the first respondent shall obtain a date at the registry to be given on priority for**

directions on the disposal of her summons dated 16th June 2014; and

- h. That the matter shall be mentioned on a date to be given at the delivery of the ruling for compliance.

DATED, SIGNED and DELIVERED at NAIROBI this 10TH DAY OF JULY, 2015.

W. MUSYOKA

JUDGE

In the presence of Miss Musyoka for Mr. Gichachu advocate for the Applicant.

In the presence of Mrs. Wainaina for advocate for the 1st Respondent.

Mr. Karanja for Mrs. Mwanzia for 2nd Respondent