



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 704 OF 2010

IN THE MATTER OF THE ESTATE OF BENJAMIN MUTHANGYA NGATI – DECEASED

KYAMBI MUTHANGYA.....APPLICANT

VERSUS

BEATRICE KAMENE MUTHANGYA.....1ST RESPONDENT

JOHN KIMANZI MUTHANGYA.....2ND RESPONDENT

RULING

1. The Application dated 1st August, 2014 seeks the following orders:
 1. That the court be pleased to make an order to preserve the estate and to prohibit the Administrators/Respondents or any Third Party from disposing or transferring to themselves or any third party or in any other manner dealing with all those parcels of land known as:-
 - i. Mwingi/Mwingi/2201
 - ii. Mwingi/Mwingi/Kanzanzu/268, 271, 272, 873, 880, 1696, 1721, 1759, 2937, 2955, 2957, 2960 in the confirmed grant pending the hearing and determination of these summons.
 2. That the court be pleased to issue an order restraining the Administrators/Respondents or Third Party from forcibly evicting the Applicant from all or any of land parcel numbers stated in 1 above and/or an order for *status quo* pending the hearing and determination of these summons.
 3. That the court be pleased to issue an order restraining and/or prohibiting the District Land Registrar Mwingi from registering any dealings with regard to all or any of the Land parcels named in 1 above pending the hearing and determination of these summons.
 4. That the Grant of Letters of Administration made to the Administrators/Respondents on 17th January 2011 and confirmed on 18th November 2011 be revoked and/or otherwise annulled.
 5. That the costs of this Application be awarded to the Applicant.
2. It is stated in the affidavit in support that the Applicant is the first wife of the deceased. That the Applicant is a widow of the deceased and together they had five children namely:
 - i. Syombua Muthangya – Adult
 - ii. Kasau Muthangya – Adult
 - iii. Kanini Muthangya – Adult
 - iv. Musili Muthangya – Adult
 - v. Munanu Muthangya – Adult

3. That the 2nd wife of the deceased, Beatrice Kasyoka Muthangya passed on and left the following children:
 - i. Francis Mathenge Muthangya
 - ii. Elijah Muthangya
 - iii. Kilonzo Muthangya
 - iv. Ngati Muthangya
 - v. Musyoka Muthangya
 - vi. Ruth Kasyoka Muthangya

4. That the 1st Administrator, Beatrice Kamene Muthangya was the deceased's third wife and together they had the following children:
 - i. John Kimanzi Muthangya (2nd admin.)
 - ii. Isack Mutuku Muthangya
 - iii. Elijah Mutunga Muthangya
 - iv. Peter Lumumba Muthangya

5. The Applicant's complaint is that the Administrators filed this Succession Cause without the knowledge of the 1st and 2nd house of the deceased. That the Applicant never consented to the Application for a Grant of Letters of Administration nor renounced her rights. The Applicant exhibited a letter from the office of the Chief, Kavuvwani Location of Mwingi which reflects the three widows of the deceased and their children.
6. The Application is opposed. According to the affidavit in reply sworn by the 1st Respondent, the deceased had two wives only. That is the first wife Beatrice Muthangya died in the year 2005 without leaving behind any children and the 1st Respondent and children. In the petition for the Grant, the Respondents annexed a letter from the office of the Assistant Chief, Mwingi sub-location which supports that position. It is further stated that the Applicant is not the deceased's widow but a wife to the brother to the deceased who is using her to gain access to the estate of the deceased. The Respondents accused the Applicant of intermeddling with the estate of the deceased by disposing the property of the deceased and authorizing developments on some of the properties.
7. The application was canvassed by way of written submissions.
8. The core of the dispute herein is who the beneficiaries of the estate of the deceased are. Was the deceased married to three wives or two wives? Did the wife who passed away leave behind any children?
9. On one hand, the Applicant's averments are that the deceased had three wives and all of them were blessed with children. The Applicant's contention is supported by a letter from the Area Chief. On the other hand, the Respondent's position is that the deceased had only two wives and one wife had no children. That position is equally supported by a letter from the Area Assistant-Chief.

10. There is no reason why the court at this stage would believe one affidavit and not the other. Obviously the contents of both affidavits cannot be true. In the premises, the issue as to who is a wife and who is a child of the deceased can only be determined by way of *viva voce* evidence.

11. Taking into account the peculiar circumstances of this case, I allow prayer 1, 2 and 3 of the application. Prayer No. 4 to be determined by way of *viva voce* evidence. Each party to continue occupying the portions of the land that they are currently occupying and keep peace. Costs in cause.

.....

B. THURANIRA JADEN

Dated and delivered at Kitui this 15th day of October, 2015

.....

B. THURANIRA JADEN

JUDGE