



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 993 OF 2010

***(IN THE MATTER OF THE ESTATE OF GATHUTHI WAHOGO alias JOSEPH WAHOGO
(DECEASED)***

TERESAH NJAMBI MURIUKI.....APPLICANT

VERSUS

JAMES WAHOGO GATHUTI.....RESPONDENT

RULING

The applicant filed a Notice of Motion dated 14th January, 2015 under **Order 8 and Rules, “3(II), 5(III)” and 8 of the Civil Procedure Rules and section 3A, IA, I B of the Civil Procedure Act and also section 45(2)(a) of the Law of Succession Act.**

It is clear at the outset that the application is defective in form because under **rule 59 of the Probate and Administration Rules**, every application to the court in succession proceedings is either by way of a petition, a caveat or a summons whose form is prescribed in the 1st schedule to the Act; there is no provision for a “Notice of Motion”. Again none of the provisions cited in the **Civil Procedure Act** and the Rules made thereunder are applicable to succession proceedings; some of those cited rules do not even exist in the **Civil Procedure Rules**.

Among the prayers that the applicant sought were that the court invokes **section 45(2) (a) of the Law of Succession Act** against the objector for intermeddling with the deceased’s estate and that the beneficiaries be allowed access to their parents’ matrimonial home pending the hearing and the determination of this cause.

The application was said to supported by the applicant’s affidavit in which she has sworn that she is the administratrix of the deceased’s estate and that she has the authority of the rest of the beneficiaries to swear the affidavit on their behalf.

The applicant’s complaint is that the objector is planting trees and harvesting nappier grass on land parcel **No. Muhito/Muyu/443** that forms part of the deceased’s estate contrary to a court order issued by this court.

Apart from allegedly flouting the court order, the respondent is said to have subjected one Lucy Wamuyu to constant harassment with the intention of evicting her from her parent’s matrimonial home. As a result of the respondent’s conduct, the rest of the beneficiaries are unable to access this particular home.

Lucy Wamuyu who is alleged to have been harassed swore and filed a separate affidavit in support of the

applicant's application more or less reiterating what the applicant swore in her own affidavit. She said that the applicant has taken control of the deceased's entire estate to the exclusion of the rest of the beneficiaries.

The respondent filed three replying affidavits in response to the applicant's application. The first of these affidavits was by the respondent himself. The respondent has deposed that he has always lived on parcel **No. Muhito/Muyu/443** where, amongst other developments, he has built a permanent house and grown coffee. He has cultivated the nappier grass he is accused to be harvesting.

Exhibited to his affidavit are copies of an affidavit which was sworn by the deceased in March 1991 allowing him to construct the permanent house in which he is now living and a share certificate from Mukurweini Farmers Co-operative Society Limited in which he is a member by virtue of the coffee he grows on the farm.

Apart from the developments, the respondent states that his first wife and daughter were buried on the same parcel of land.

His brother and his family, so the respondent has deposed, lived and were settled on land parcel, **L.R. No. Muhito/Muyu/415**. Though his brother and his wife are also deceased, the respondent has deposed that his deceased brother's children should be allowed to settle on the land.

As for his sisters, the respondent has deposed that they are all married including the applicant herein but who stays on land parcel **L.R. No. Muhito/Gaturia/1116** which is also part of the deceased's estate.

In the second replying affidavit, the respondent's sister Jane Wangu Wanyaga has supported the depositions of his brother and reiterated that the application by the applicant is an attempt to dispossess the respondent of the land that was given to him by their deceased father.

The final replying affidavit was also sworn by the respondent's and the applicant's sister only reiterating what her brother and sister, Jane Wangu Wanyaga stated in their respective affidavits.

At the hearing of the application counsel for the applicant did not state anything more than what his client had deposed in her affidavit; he, however, conceded that the administratrix of the estate **Sabina Gathuthi Wahogo** was deceased and that an application for her substitution had been filed though not served upon the rest of the parties.

The respondent's counsel took up the issue of the administration of the deceased's estate and submitted that the applicant had sworn a false affidavit to the extent that she had sworn that she is the administratrix of the estate when she was not. The grant, according to counsel was inoperative by virtue of the demise of the administratrix.

Counsel also submitted that though the applicant had sworn that Lucy Wamuyu was being harassed, she did not indicate in her affidavit how she got the information of this alleged harassment.

I understood the respondent's counsel's submissions to be that there is no way he could be said to have intermeddled in the deceased's estate by his continued use of the land he has always lived on even prior to the deceased's demise.

In my view, the applicant's application raises two issues; first, whether the respondent has intermeddled with the estate and second whether he is in breach of the orders issued on 20th May, 2014 or 22nd May, 2014.

The respondent's contentions that he has always lived on land parcel **No. Muhito/Muyu/443** prior to and after the deceased's demise were not controverted. There is evidence that as early as 13th March, 1991, the deceased allowed him to construct a permanent house on that particular parcel. He stated, and there was no evidence to the contrary that he constructed the house and it is in that house that he has been

living together with his family.

As for the cutting of nappier grass, he stated, and again his depositions were not denied, that he has been cultivating the nappier grass all the while besides growing coffee on the same farm. There was no answer also for his contentions that Lucy Wamuyu who is alleged to have been subjected to constant harassment by the respondent was herself either living or utilising parcel **LR. No. Muhito/Gaturia/1116** which is one of the assets that comprise the deceased's estate.

In answer to the first issue, I can say that the applicant has not provided any or any sufficient proof that the respondent has intermeddled with deceased's estate as understood under **section 45(1)** of the Law of Succession Act; in the absence of such evidence no basis has been established to invoke **section 45 (2)(a)** and subject the respondent to penal consequences of intermeddling with a deceased's person free property.

On the question of disobedience of the court order, the record shows that on 19th May, 2014 the administratrix, Sabina Muthoni Gathuthi (deceased), filed an application basically seeking injunctive orders against the respondent restraining him from dealing with the parcel of land known as **No. Muhito/Muyu/443** in various diverse ways. The applicant was the deceased's widow and the respondent's mother. Curiously, the application is stated to be dated 20th May, 2014 yet it was filed and received at the registry on 19th May, 2014.

Nevertheless, on 20th May, 2014, the court granted **ex parte** injunction against the respondent pending the hearing of the parties *inter partes*. However, when the application came up for hearing on 22nd July, 2014, the court was informed that the applicant had died and therefore the application could not proceed for hearing. The court stood over the application generally and also made an order to the effect that the *status quo* be maintained.

Subsequently, the applicant herein made an application to be substituted in the succession proceedings in place of Sabina Muthoni Gathuthi. As at the time of hearing the application, the subject of this ruling, the application for substitution had not been heard; counsel for the applicant informed the court that it had not even been served.

Despite the fact that the application for substitution of the administratrix had not been disposed of, the applicant in the instant application still proceeded on the presumption that she was the administratrix of the deceased's estate; at least that is how she described herself in the affidavit in support of her application.

The fact of the matter is that the applicant is neither the administratrix of the deceased's estate nor has she been substituted in this cause in place of **Sabina Gathuthi Muthoni**. It would, in my view, be inappropriate to proceed and deal with the respondent on the wrong presumption that the applicant is either the administratrix of the deceased's estate or that she is the substitute in the application out of which the order of 20th May, 2014 was made.

In any event, if any order is alleged to have been breached, then the alleged contemnor is subject to contempt of court proceedings and not proceedings in the nature of the application filed by the applicant.

I would for the foregoing reasons find that this application lacks any merit and I hereby dismiss it with no orders as to costs.

Dated, signed and delivered in open court this 2nd day of October, 2015

Ngaah Jairus

JUDGE