



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 816 OF 2012

IN THE MATTER OF THE ESTATE OF MBITHI MBAI (DECEASED)

1. MAITHYA MBITHI
2. WATUKA MBITHI
3. NGAWE MBITHI
4. KYENGO MBITHI PETITIONERS

AND

WATUKA MBITHI APPLICANT

VERSUS

NGAWE MBITHI RESPONDENT

RULING

1. The Application dated 14/9/2012 is made under **section 48 Law of Succession Act and Rule 73 Probate and Administrative Rules** and seeks orders that:-
 1. “Spent).
 2. **THAT** an order of injunction against the Respondent, his agents and/or any other person claiming under him to restrain him from encroaching on, entering upon and/or in any other way interfering with the Applicant’s quiet enjoyment of his 5.44 acres piece of land within land parcel No. Makueni/Mubau/285 pending hearing and determination of the said application.
 3. **THAT** the O.C.S. Makueni Police Station, be ordered to ensure the Respondent’s compliance with the order made in 2 above.
 4. **THAT** costs of this application be in the cause.”
2. The application is supported by the affidavit of the Applicant, **Watuka Mbithi**, an affidavit by one **John Muli Nduva** and another affidavit by **Maithya Mbithi**. The thrust of the said affidavits is that the late **Mbithi Mbai** died intestate on 31/03/1973. The estate of the deceased to wit **L.P. No. Makueni/Mubau/285** was amicably subdivided amongst the surviving beneficiaries of the deceased. The Applicant’s complaint is that the Respondent had in the year 1994 agreed to buy the Applicant’s share for the sum of Kshs.70,500/= but the agreement failed as the Respondent only paid Kshs.18,800/= of the purchase price leaving a balance of Kshs.51,700/=. The Respondent was to be refunded the Kshs.18,800/= but instead the Respondent uprooted the boundary marks for the parcel of land allocated to the Applicant.
3. In opposition to the application, the Respondent swore a replying affidavit. According to the said affidavit, after the subdivision of the deceased’s land, each son was entitled to 5.44 acres. That the

three sons from the first house sold their shares to the Respondent, making the Respondent's share 21.77 acres. The Respondent averred that after entering into a sale agreement with the Applicant he paid the Applicant a total of Kshs.18,000/= then thereafter the Respondent refused to accept any further payments. However, the Respondent continued using the land and developed the same by digging trenches, cultivating the land and planting trees. The Respondent expressed his surprise at his name being reflected as a Petitioner herein, stating that he never consented to being a co-petitioner.

4. The application was canvassed by way of written submissions which I have considered.
5. It is common ground that the land the subject matter of these proceedings forms part of the estate of the late **Mbithi Mbai**. A grant of Letters of Administration is yet to be issued. However, it seems the beneficiaries of the deceased have sub-divided the land and distributed it amongst themselves, hence the tussle over the purported sale of part of the estate.
6. The Applicant claims to be the beneficial owner of a share of the parcel of land while the Respondent claims to have bought the same from the Applicant. The major difference in opinion is who caused the sale agreement to flop and who is the rightful occupier of the share allocated to the Appellant.
7. The land in question is part of the estate of the deceased. It is clear there are boundaries and each of the parties knows the portion of the land that they occupy. These are the boundaries that each of the parties ought to respect pending the issuance of the grant and confirmation of the same. The sale agreement was not honoured. The purported sale however amounts to intermeddling with the estate of the deceased. Consequently, the application has merits and succeeds in prayer No. 2. Prayer No. 3 is premature at this stage. Costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 6th day of March 2014.

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B. THURANIRA JADEN

JUDGE