IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 386 OF 2010

IN THE MATTER OF THE ESTATE OF **JOSEPH MUTHINI KIBWAA** (**DECEASED)**

ROSE SYOMBUA MUTHINI…….1ST PETITIONER/APPLICANT

FREDRICK MWEU KIBWAA……2ND PETITIONER/APPLICANT

VERSUS

PATRICK MULILI KALUVA…….RESPONDENT

RULING

1. The application dated **19th May, 2011** is brought pursuant to the provisions of **Section 45(1)** and **47** of the **Law** of **Succession Act** and **Rule 73** of the **Probate** and **Administration Rules.**
2. The applicant seeks an order restraining the respondent from intermeddling and/or interfering with the land **Number Athi River Block 5/162** which is part of the deceased's estate.
3. The application is supported by an affidavit deponed by the 1st applicant who avers that she visited the parcel of land which is part of the estate of the deceased in **March, 2011** only to find the respondent creating a fence around it and carrying out other acts of wanton destruction. Further, she stateS that the actions of the respondent are illegal, unjustifiable and a violation of the law.
4. No replying affidavit was filed by the respondent but it is submitted that the respondent purchased the parcel of land from **Alice Syovata Muthini** who had a grant of Letters of Administration in respect of the deceased having obtained the same in **Succession Cause No. 124** of **2010** on the **15th April, 2010.** This sale was transacted on **15th October, 2009.**
5. What has been established in this case is that the deceased entered into a legal marriage with **Alice Syovata.** Their marriage was celebrated under the **Marriage Act, Cap 150** of the **Laws** of **Kenya** on the **28th** day of **December, 1991. Alice Syovata** is said to be deceased. It is submitted by counsel for the applicant that the **deceased** and **Alice Syovata** were legally divorced but no proof of the divorce whether *nisi* or *absolute* was annexed as alleged. There is hence no proof of divorce as alleged.
6. Letters of Administration were issued to **Alice Syovata Muthini** on the **15th October, 2010**. One of the properties listed is **Athi River/Athi River Block 5/162.** The applicant in this case was issued with Letters of Administration intestate jointly with another to represent the Estate of the deceased on the **22nd October 2010.** This was irregular. It is also important to note that Parcel **No. Athi River/Athi River Block 5/162** is not listed as one of the assets of the deceased in this cause. What appears is **Mavoko Town Block 5/162.**
7. Further, it is important to note that there is a sale agreement dated **15th October, 2009** made between **Alice Syovata and Patrick Mulili Kaluva.** At the time of disposing off **Athi**

River/Athi River Block 5/162. She had not obtained LetterS of Administration.

8. **Section 45** of the **Law of Succession Act** provides that:-

> ***"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 person, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person…"***

9. **Alice Syokau** who had no letters of administration had no capacity to dispose off the property of the deceased. The 1st respondent is estopped by the above mentioned provision of Law from intermeddling with estate of the deceased. He cannot purport to deal with the Estate until the Grant issued in **Succession Cause No. 124** of **2010** is confirmed.
10. With respect to the current Succession Cause the applicant was aware of the existence of the first household but decided to institute it without obtaining consent from the deceased's first family.
11. **Section 76(e)** of the **Law of Succession Act** provides thus:

> "***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested part or of its own motion-***
>
> ***e) That the grant has become useless and inoperative through subsequent circumstances."***

12. **Succession Cause No. 124** of **2010** was instituted before the instant case (***Succession Cause No. 386 of 2010).*** A temporary Grant of Letters of Administration was issued in **Succession Cause No. 124** of **2010** on **15th October 2010.** The one in the instant suit was issued on the **22nd October, 2010;** prevailing circumstances would call upon this court to revoke one of the grants. With the existence of the first grant issued, the second one cannot operate. In the circumstances I do revoke the grant issued in the instant Succession Cause.
13. Beneficiaries of the estate of the deceased are directed to pursue the issue of **Succession** of the deceased in **Succession Cause No. 124** of **2010.**
14. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **12TH** day of **JUNE, 2014.**

L.N. MUTENDE

JUDGE