



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 372 OF 2012

IN THE MATTER OF THE ESTATE OF EDWARD MUTUKU MWANDO alias MUTUKU MWANDO (DECEASED)

1.PATRICK MUASYA MUTUKU

2.BONIFACE MUTALU MUTUKU APPLICANT/APPLICANTS

VERSUS

PATRICK NDAVI MUTISYA INTERMEDDLER/RESPONDENT

R U L I N G

The application dated 19/5/2012 is brought under **section 45 (1) and 47 of the Law of Succession Act**, and **Rule 73 of the Probate and Administration Rules**.

The application seeks orders that the Respondent, **Patrick Ndavi Mutisya**, be restrained from in any way intermeddling and/or interfering with the land parcel **Mwala/Myanyani/523** which is part of the estate hereof.

The Applicant in his supporting affidavit sworn on 19/5/2012 has described himself as the 1st Petitioner herein. It is averred that the deceased was the registered proprietor of land parcel **No. Mwala/Myanyani/523**. The Applicants complaint is that the Respondent is putting up a permanent house on the said parcel of land.

The Respondent filed the grounds of opposition herein dated 28/5/2012. The application is opposed on the following grounds:-

- 1. THAT the applicant has no *locus standi* to file this proceeding.**
- 2. THAT the affidavit supporting the application is fatally defective.**
- 3. THAT the application is incompetent and an abuse of this court's process.**

The Respondent also filed a Notice of Preliminary Objection dated 21/6/12 on the grounds that the application for petition offends the mandatory provisions of the **Law of Succession Act** as no certificate of thumb print is annexed to the affidavit in support thereof.

The Respondent also swore a replying affidavit on 6/8/2012 in opposition to the application. The Respondent's case is that he has purchased a portion of the land in question from one **Penninah Mutuku Mwando** who is one of the wives to the deceased. That the land in question was subdivided between all the family members. The Respondent further stated that he paid the full purchase price for the portion of the land that he purchased, took possession of the same and commenced the

construction of a permanent house.

The application dated 7/11/2012 is brought under **section 45 (1)** and 47 of the **Law of Succession Act**, and **rule 73** of the **Probate and Administration Rules**.

The application seeks orders that **Succession Cause No. 372 of 2012** be struck out.

The application is supported by the affidavit in support sworn by the Applicant, **Patrick Ndavi Mutisya** on 7/11/2012. The background facts according to the said affidavit is that the Applicant purchased land parcel No. **Mwala/Myanyani/523** from **Penninah Mutuku Mwando**, one of the wives of the deceased herein. The rest of the facts are as set out in the replying affidavit sworn on 6/8/2012.

According to the Applicant, the Respondent has no *locus standi* to file the succession cause herein. That the affidavit in support of the petition is defective as there is no certificate of the thumb prints.

The Petitioners raised a Preliminary Objection dated 8/11/12 terming the application dated 7/11/2012 incompetent.

The two applications and the two Preliminary Objections were heard simultaneously. The Applications and the Preliminary Objections were canvassed by way of written submissions which I have duly considered.

It is not in dispute that the land the subject matter of this petition is registered in the name of the deceased. It is also clear that no grant of letters of administration has been issued in the estate of the deceased, **Edward Mutuku Mwando**. It therefore follows that no widow of the deceased or any other person for that matter had the capacity to enter into a sale agreement in respect of the suit land. The property of the deceased was protected by **section 45 (1) of the Law of Succession Act (Cap 160 Laws of Kenya)** which provides as follows:-

“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.”

The Respondent, **Patrick Ndavi Mutisya** is therefore an intermeddler in the estate of the deceased. The said **Patrick Ndavi Mutisya** is not one of the survivors (beneficiaries) of the deceased. He has no *locus standi* to apply for the striking out of the petition herein. Contrary to what is raised in the Preliminary Objection dated 19/5/2012, there is no thumb print on the affidavit in support sworn on 19/5/2012. Although the application dated 7/11/2012 has raised the same issue of the thumb prints on the affidavit in support of the petition and also stated that the Petitioners have no *locus standi* to file the succession cause herein, that is a matter between the beneficiaries of the estate of the deceased herein. Being an ‘outsider’/intermeddler, the said **Patrick Ndavi Mutisya** has no *locus standi* to raise the said issues. I therefore agree with the submissions by the Petitioners that the application dated 7/11/2012 is incompetent. Consequently, the application dated 7/11/2012 and the Preliminary Objection dated 21/6/2013 are hereby dismissed with costs to the Petitioners. The application dated 19/5/2012 and the Preliminary Objection dated 8/11/2012 are allowed with costs to the Petitioners.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 4th day of July 2013.

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B. THURANIRA JADEN

JUDGE