



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 175 OF 2018

MUTUA NGANGI KAINGA (Suing as the legal representative
of the deceased **NGANGI KAINGA KIVYA**).....**PLAINTIFF**

VERSUS

MWANZIA NZOU**DEFENDANT**

RULING

1. In the Application dated 25th September, 2018, the Plaintiff is seeking for the following orders:

a. That pending the hearing and final determination of the suit herein, the Defendant himself, or his servants, agents, representatives, employees, or whosoever else acting on the Defendant's behalf, instructions and/or directions be restrained from constructing and/or developing or in any manner whatsoever working on any portion of land parcel title number Mutonguni/Mithini/1545.

b. That costs of this Application be awarded to the Plaintiff/Applicant.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the administrator of the Estate of Ngangi Kainga (*deceased*); that the deceased was the owner of land known as Mutonguni/Mithini/1545; that the Defendant is not a beneficiary of the Estate of the late Ngangi Kainga and that the Defendant is unlawfully developing the suit land.

3. In reply, the Defendant deponed that the late Ngangi sub-divided the suit land amongst his sons; that one of the deceased son's, Geoffrey Masila Ngangi, sold him a portion of the suit land vide an Agreement dated 19th July, 2007 and that his son has been cultivating the land since the year 2007.

4. It is the Defendant's deposition that this suit was filed prematurely because the Estate of the deceased has not been distributed.

5. The Plaintiff's advocate submitted that if there was any sale between the Defendant and the Interested Party, then the alleged sale amounted to an illegality under the provisions of Section 45 of the Law of Succession Act; that the Estate of the late Ngangi has not been distributed and that under the Law of Succession, no immovable properties is to be sold before confirmation of the grant.

6. The Defendant has admitted in his Affidavit that the suit land is registered in the name of the late Ngangi Kainga Kivya. The Defendant has further admitted that he purchased the suit land from one Geoffrey Masila vide an Agreement dated 19th July, 2007.

7. The Letters of Administration annexed on the Plaintiff's Affidavit shows that the late Ngangi Kainga died on 22nd November, 1992. Although the Letters of Administration in Kitui Principal Magistrate's Succession Cause No. 121 of 2010 were issued on 1st March, 2011, the Estate of the late Ngangi Kainga has never been distributed to date.

8. The Law of Succession Act prohibits intermeddling in the Estate of a deceased person until his Estate has been distributed. Section 45(1) of the Act provides as follows:

"45 (1) 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."

9. On the other hand, Section 45(2) provides that a person who contravenes the provision of the Section shall be guilty of an offence and

shall be answerable to the rightful executor or administrator to the extent of the assets with which he had intermeddled.

10. That being the law, the sale of the suit land by one of the beneficiaries of the late Ngangi amounts to intermeddling with the Estate of the late Ngangi. Until the said Estate is legally distributed, and a Certificate of Confirmation issued by the court, the Plaintiff cannot, prima facie, claim that he is entitled to the suit land. Consequently, I find that the Plaintiff has established a prima facie case with chances of success.

11. For those reasons, I allow the Application dated 25th September, 2018 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE