



**Macharia & another v Kimemia (Miscellaneous Civil Case E027 of 2022)
[2023] KEHC 26575 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL CASE E027 OF 2022
CM KARIUKI, J
DECEMBER 15, 2023**

**ARISING FROM, THE ORIGINAL RECORDS DELIVERED IN CAUSE NO. E131
OF 2022 IN THE SENIOR PRINCIPAL MAGISTRATES COURT AT ENGINEER
UNDER GAZETTE NOTICE NO. 13689 DATED 4TH DAY OF NOVEMBER 2022**

AND

IN THE MATTER OF ARTICLE 27(1) AND 40 OF THE CONSTITUTION OF KENYA 2010

AND

**UNDER THE PROVISIONS OF SECTIONS 78 AND 79 OF THE LAND
REGISTRATION ACT NO. 12 OF 2012 AND SECTION OF THE LAW OF SUCCESSION**

BETWEEN

ROBERT NJOROGE MACHARIA 1ST APPLICANT

DANIEL WAKABA 2ND APPLICANT

AND

MARY WACHUKA KIMEMIA RESPONDENT

RULING

1. The applications for hearing are Notice of Motion dated 20/12/2022, which was amended and dated 16/2/2023 seeking orders;
 - i. That this Honourable Court be pleased to Certify this application as Urgent and the same to be heard on a priority basis.
 - ii. That the honorable Court be pleased to issue an Interim /conservatory Order of Stay of Proceedings in the Succession Cause No. E131 of 2022 at the Chief Magistrate Court at



Engineer and a Stay of Execution of the Order (s) issued at the Chief Magistrates Court at Engineer pending hearing and determination of this application.

- iii. That this Honourable Court to be pleased to vacate the order issued by the Chief Magistrates Court at Engineer touching on grant of letter of administration to The Respondent as Gazetted under Gazette Notice No. 13689 on the 4 November 2022 since the same without the participation of the 1st and 2nd applicants who were excluded from the proceedings in contravention of section 35 (4), (f) section 38 and 45(1) of the *Law of Succession Act*.
 - iv. That this Honourable Court to be pleased to declare that the 1st and 2nd applicants Constitutional rights as envisioned in article 27(1) and 40 the Applicants right to inheritance has been grossly violated by the respondent and the Respondent be refrained or barred from undertaking or conducting any transaction in respect to the said parcel of land; LR No. Nyandarua/South Kinangop/666.
 - v. That the Honourable Court to be pleased to issue a directive/order barring the Respondent from initiating Succession Cause or proceeding with any Succession Cause that may be ongoing to the detriment/exclusion of the 1st and 2nd applicants.
 - vi. That this Honourable Court be pleased to issue any other appropriate order, declaration, or relief that it may deem fit and just.
2. It was supported by affidavits of Robert Njoroge Macharia, sworn on 20/12/2022 and 16/2/2023, and Daniel Wakaba affidavit.
 3. In response, the respondent filed a notice of motion dated 15/1/2023 to strike out/dismiss the instant matter; grounds in the notice of motion support the same.
 - a. A substantive succession cause exists at the Engineer Senior Principal Magistrate's Court, namely, Succession Cause Number E131 of 2022, concerning the deceased's estate herein.
 - b. That the Respondent/Applicant herein has been appointed administratrix of the deceased's estate.
 - c. That the Applicants/Respondents herein are aware of the proceedings in the said succession cause at the Engineer Senior Principal Magistrate's Court.
 - d. That the Applicants/Respondents herein are, therefore, vexatious litigants.
 - e. That the proceedings herein are an abuse of this honorable court.
 4. Also, by supporting the Affidavit of Mary Wachuka Kimemia sworn on 16/1/2023.
 5. Parties were directed to canvass applications via submissions.
 6. By Respondent in an application dated 20/12/2022.
 7. The application is supported by the annexed Affidavit of the 1st Applicant, namely Robert Njoroge Macharia, and its annexures.
 8. The thrust of the application seems to be their dissatisfaction with their sister, the Respondent herein being appointed administratrix of the estate of the deceased herein, who was their mother.
 9. The Applicants have confused the whole idea of administering the deceased's estate with ownership of the property constituting the said estate.



10. The Respondent has opposed the application through her Replying Affidavit sworn on 30 January 2023 and filed in Court on February 2023.
11. In paragraph 4 of her said Affidavit, she has deponed that the 1st Applicant-whom the family had appointed alongside herself to apply for a grant of representation to the estate of the deceased herein-was cited to accept or refuse the said grant, but he never bothered to enter an appearance.
12. As a consequence of the foregoing, the Respondent proceeded to institute the Engineer Senior Principal Magistrate's Court Succession Cause Number El 31 of 2022, through which she has now obtained a grant of letters of administration intestate.

Analysis

13. The application is brought under the wrong sections of the law. Order 40 Rules 1 (a), 2, 3, and 9 of the Civil Procedure Rules, under which the application is expressed to be brought, is not applicable in this cause. The Applicants have not demonstrated any wrongdoing on the part of the Respondent to warrant an interlocutory injunction. They have not proved that the Respondent is in actual occupation and/or use of Land Parcel Number Nyandarua/South Kinangop/666 to their detriment.
14. Moreover, sections 76, 77, and 78 of the *Land Registration Act* (No. 3 of 2012) deal with restrictions, Notices and effects of Restrictions, and Removal and variation of Restrictions, respectively. The same are not applicable in this matter since they are under the purview of a Land Registrar.
15. The Applicants have accused the Engineer Senior Principal Magistrate's Court of unilaterally issuing a Kenya Gazette 'Notice No. 13689, yet it is not in his province to publish Kenya Gazette Notices.
16. The Applicants have also not demonstrated which of their constitutional rights have been violated.

Conclusion

17. The application is based on whimsical and misapprehended points of law and fact.
18. If the Applicants felt that they had any grievances against the Respondent, the least they should have done would have been to challenge the grant made to her in the aforesaid Engineer Senior Principal Magistrate's Court Succession Cause Number E131 of 2022.
19. Applicant submissions in respect of application dated 16/1/2023
20. Though the Applicants/Respondents were duly served with copies of the said application on 1 February 2023, they did not file any replies.
21. The application is, therefore, unopposed. Their counsel, Mr. Odhiambo, had indicated that he would file the necessary papers but never did so.
22. The position of the Applicant herein remains unchanged. Should the Respondents feel that they are aggrieved with the Applicant being appointed administratrix of the estate of the deceased herein, they should move the Engineer Senior Principal Magistrate's Court appropriately.
23. Otherwise, these proceedings are ill-conceived, inept, spurious, incompetent, and an abuse of the process of this Honourable Court.
24. The applicants in the main applications dated 20/12/2022 never filed submissions.



Issues, Analysis and Determination

25. After perusal of the pleadings, proceedings, and submissions, I find the issue is whether the application is competent. If the above is positive, does it have merit and costs?
26. The foundation of the instant application and its basis is anchored on the alleged breach of the provisions of articles 27 and 40 of *the Constitution* of Kenya.
27. Where a breach or a violation occurred or was threatened, *the Constitution* in article 22 conferred on every person the right to institute proceedings in Court to seek redress. Only the High Court had original jurisdiction and was the trial court where cases on the Bill of Rights were commenced. The procedure for moving the Court is set out in mandatory terms by *The Constitution* of Kenya (Protection of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013, commonly known as Mutunga Rules 2013.
28. The procedure is as follows: Rule 4. (1) Where any right or fundamental freedom provided in *the Constitution* is allegedly denied, violated, infringed, or threatened, a person so affected or likely to be affected may apply to the High Court under these rules. Rule 10. (1) An application under rule 4 shall be made through a petition as set out in Form A in the Schedule with such alterations as may be necessary.
29. The instant application does not comply with the above rules, but it is just filed as a miscellaneous civil application in place of a constitutional petition. This holding is enough to dispose of the instant matter.
30. Thus, the Court makes them orders;
 - i. The application is struck out for being incompetent.
 - ii. Any interim orders order issued is vacated.
 - iii. Costs to the Respondent

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 15TH DAY OF DECEMBER 2023

C KARIUKI

JUDGE

