



REPUBLIC OF KENYA



**Mapelu v Naeku (Environment & Land Case E008 of 2021)
[2022] KEHC 3320 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
ENVIRONMENT & LAND CASE E008 OF 2021**

**F GIKONYO, J
JUNE 30, 2022**

BETWEEN

EDWIN TURERE MAPELU APPLICANT

AND

IRENE SEEMA NAEKU RESPONDENT

RULING

[1] Before me is Summons dated 21/10/2021 seeking the following orders: -

- i. Spent
- ii. That the respondent be restrained from collecting rent from L.R. No. Narok/ cismara/oleleshwa/3954 and Plot No. 12 Narok Township pending hearing and determination of this cause.
- iii. That this honourable court be pleased to appoint Intouch Commercial Agencies to forth with collect rent from L.R. No. Narok Township and manage the said property.
- iv. That this honourable court by please to make all such further orders and / or directions as it may deem fit.
- v. That costs of this application be borne by the respondent.

[2] The application is based on the grounds set out in the face of the application and the supporting affidavit sworn by Edwin Turere Mapelu on 21/10/2021.

[3] The respondent opposed to the application vide replying affidavit sworn by the respondent on 29/11/2021.



- [4] The respondent also filed an objection and answer to the said petition on 29/11/2021. The respondent alongside Alex Lenkai Mapelu, Timothy Mapelu and Charity Naeku Mapelu the 2nd, 3rd and 4th objectors.
- [5] The application was canvassed by way of written submissions.

The Applicant's Submissions.

- [6] The applicant submitted that since the respondent herein refused to take out letters of administration on behalf of the deceased's estate, she does not have the authority in whatever manner deal with the properties of the deceased including L.R. No. Narok/cismara/oleleshwa/3954 And Plot No. 12 Narok Township and her collection of rent from the said properties and using the income for her personal gain to the exclusion of other beneficiaries' amounts to intermeddling as explained.
- [7] The applicant submitted that land parcel Block 3/89 Narok Town Also Known As L.R. Narok Township /100 does not form part of the deceased estate. The parcel of land was allocated to the petitioner in the year 2007 by the town council of Narok upon successful application and a title deed was issued to the same effect.
- [8] The applicant has relied on the following authorities;
- i. [*Benson Mutuma Muriungi v C.E.O. Kenya Police Sacco & Another*](#) [2016] eKLR.
 - ii. Section 45 of the [*Law of Succession Act*](#).

Respondent's Submissions.

- [9] The respondent submitted that the deceased died testate leaving a will dated 10/04/2014 that named the applicant as co-executor therefore the petition and the proceedings herein are defective, nullity and the application is not made in good faith; it amounts to abuse of the court process.
- [10] The respondent submitted that the application is premature res judicata (Narok High Court Succession Cause no. 26 of 2018([*in the matter of the estate of Mary Siano James Alias Mary Siano Zakayo*](#))).
- [11] The respondents submitted that the appellant should not be granted leave to adduce additional/ evidence as the same does not amount to compelling evidence.
- [12] The respondent relied on the following authorities
- i. Section 6, 53(a), 59 and 60 of the [*Law Of Succession Act*](#).
 - ii. [*In Re Estate of Mary Siano James*](#) [2017] eKLR.
 - iii. [*Mumbua Musyoki & 6 Others v Mbenya Musyoki*](#) [2016] eKLR.
 - iv. Chief Magistrate's Court at Narok Citation No 6 of 2020([*In The Matter of the Estate of Mary Siano James Alias Mary Siano Zakayo*](#)).
 - v. Rule 73 of the [*Probate and Administration Rules*](#).
 - vi. [*In Re Estate of the Late Kyengo Kiilu Ngungi \(Deceased\)*](#) [2019] eKLR.



Analysis And Determination

Issues

13. I have considered the application, the supporting affidavit, and the replying affidavit, the answer to petition for grant, written submissions made and the relevant provisions of the Law. I find two issues arise for my consideration;
- i. Whether this matter is res judicata.
 - ii. Whether the application has merit.

Res judicata

[14] *In re Estate of Mary Siano James* [2019] eKLR the applicant applied vide summons dated 29/8/2018 for the following orders from this court.

- i. All rental income in respect of plot No. Narok Township/12 and any other income related to the estate of the deceased be deposited in the account held by the deceased at Equity bank, pending the grant of letters of administration in respect of the estate.
- ii. The last will of the late Mary Siano James alias Mary Siano Zakayo be declared invalid.
- iii. An order that the estate of the deceased be administered intestate.
- iv. Costs of the application be ordered to be costs in cause.

[15] The court (Bwonwong'a J) addressed the issue of whether or not the applicant is entitled to the orders sought as follows;

The applicant seeks a preservative order in respect of plot No. Narok Township/12 in which the respondents are named as its beneficiaries in the will. The respondents in turn, in their replying affidavit have deponed that the applicant in addition to being the executor of that will is also a beneficiary of plot No. 100 in Narok Township. The main issue for consideration is whether the will is valid or not. If it is valid, the respondents who are named as beneficiaries of plot No. Narok Township/12 cannot be said to be intermeddling in the estate. It therefore follows that the issue of the validity of the will has to be resolved first by way of oral evidence. The validity of the will has not been determined. In the circumstances, I find that the application by the applicant is premature.

[16] The learned judge further addressed the issue of validity of the will herein as follows;

“I have already pronounced myself as regards the validity or otherwise of the will. It therefore follows that this issue is moot.”

17. Bwonwonga J heard the parties and dealt with all the concerns by the parties herein. His decision was dispositive of the issues being raised herein. Doubtless, as long as the validity of the will has not been resolved, the executor cannot seek orders which would offend the doctrine of relation back and his obligation under the will.



18. In the circumstances, it is an abuse of court process to repackage similar facts and circumstances to found a 'new' cause of action and 'suit'.
19. Again, this application is a sort of appeal on the decision of this court (Bwonwonga J). Without much ado, it is clear this application is fit for dismissal.

Conclusion and orders.

20. For the foregone reasons, the summons dated October 21, 2021 is an abuse of process of the court; lacks merit; and is dismissed with no order as to costs as the matter involves family members. The parties should, however, pursue proceedings on validity of will herein. The other file being NAROK HC SUCC. NO. 26 OF 2018 to be mentioned with this file on October 12, 2022. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION,

THIS 30TH DAY OF JUNE, 2022

F. GIKONYO M.

JUDGE

