



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**SUCCESSION CAUSE NO. 04 OF 2020**

**IN THE MATTER OF THE ESTATE OF JOSEPH MURIITHI GITHINJI alias**

**JOSEPH M. GITHINJI alias JOSEPH MUREITHI GITHINJI (DECEASED)**

**JAMES GAKOBO MURIITHI.....APPLICANT**

**VERSUS**

**GLADYS MUTHONI MURIITHI.....1<sup>ST</sup> RESPONDENT**

**ANTHONY GITHINJI MURIITHI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By certificate of urgency dated 18<sup>th</sup> February, 2021 the Applicant seeks the orders:

*i. That the transfer of motor vehicle Reg. No. KAY 772M deceased's name to Gladys Muthoni Muriithi, and its further transfer from Gladys Muthoni Muriithi to Joseph Muriithi Karimi, and from Joseph Muriithi Karimi to James Leleito Chepkuto be declared null and void, and the motor vehicle to revert to the name of the deceased to form part of the estate.*

*ii. That there be delivery of vacant possession of L.R. Bahati/Kabatini Block 1/6395 by the person(s) occupying it under the authority of Gladys Muthoni Muriithi and Anthony Githinji Muriithi, and in default, eviction order be issued to be executed by a court bailiff with the OCS Bahati Police Station providing security.*

*iii. That Gladys Muthoni Muriithi and Anthony Githinji Muriithi be ordered to furnish a statement of rent collected in L.R. Bahati/Kabatini Block 1/6395, and the same be filed in court and served upon the Applicant.*

*iv. That there be delivery of vacant possession of Uns. Residential Plot No. Nyahururu A by the person(s) occupying it under the authority of Gladys Muthoni Muriithi and Anthony Githinji Muriithi, and in default, eviction order be issued to be executed by a court bailiff with the OCS Nyahururu Police Station providing security.*

*v. That Gladys Muthoni Muriithi and Anthony Githinji Muriithi be ordered to furnish a statement of rent collected in Uns. Residential Plot No. Nyahururu A, and the same be filed in court and served upon the Applicant.*

*vi. That the transfer of L.R. Nyandarua/Oljoro Orok Salient/10837 from the deceased's name to Gladys Muthoni Muriithi be declared null and void, and the parcel of land to revert to the name of the deceased to form part of the estate.*

*vii. That Gladys Muthoni Muriithi be ordered to furnish a statement of the amount paid to her by Ketraco on account of the way leave over L.R. Ndaragwa/Kianjogu Blcok 1/25.*

*viii. That there be delivery of vacant possession of L.R. Ndaragwa/Kianjogu Block 1/25 by the persons occupying portions in it under the authority of Gladys Muthoni Muriithi and Anthony Githinji Muriithi, and in default, eviction order be issued to be executed by a court bailiff with the OCS Ndaragwa Police Station providing security.*

2. Same is supported by grounds in affidavit of **James Gakobo Muriithi** sworn on 18/02/2021 and his supplementary affidavit sworn on 10/09/2021.

3. The Respondents **Gladys Muthoni Muriithi and Anthony Githinji Muriithi** swore replying affidavit on 4<sup>th</sup> August, 2021 to oppose application.

4. The parties were directed to canvass application via written submissions.

**APPLICANT'S SUBMISSIONS:**

5. The Applicant has sought for nullification of transfers of motor vehicle Reg. No. KAY 772M after the death of the deceased. It is not in dispute that at the time of his death, the deceased was the registered proprietor of the said motor vehicle. The 1<sup>st</sup> Respondent has expressly admitted that she transferred the said motor vehicle from deceased to her name after the death of the deceased.

6. The 1<sup>st</sup> Respondent lacked legal capacity to effect transfer of the said motor vehicle before the institution and conclusion of succession cause for the deceased's estate. It is thus evident that the 1<sup>st</sup> Respondent intermeddled with the estate.

7. It is evident that after transferring the said motor vehicle to her name, the 1<sup>st</sup> Respondent then transferred it to a third party. The 1<sup>st</sup> Respondent did not attach any document that would suggest that the said transfer had a consideration attached to it.

8. The obvious presumption under such circumstances is that the 1<sup>st</sup> Respondent transferred the said motor vehicle to a third party with the intention of keeping it away from the other beneficiaries of the estate.

9. It is thus submitted that the said motor vehicle is still under the management and control of the 1<sup>st</sup> Respondent, and as such she should be ordered to make it form part of the deceased's estate.

10. It is not in dispute that the 1<sup>st</sup> Respondent has her matrimonial home in **L.R. Nyandarua/Oljoro Orok Salient/108337**, which is in Oljoro Orok Sub County in Nyandarua County. The parcel **L.R. Bahati/Kabatini Block 1/6395** is located in Bahati Sub County in Nakuru County. The deceased had settled in **L.R. Bahati/Kabatini Block 1/6395** before he died, and as deponed by the Applicant, all the members of his family used to pay him a visit in the said premise. The deceased had settled all his families in different parcels of land, and none of them used to stay with him in **L.R. Bahati/Kabatini Block 1/6395**.

11. Taking into account the contents of the foregoing paragraph, it is misleading for the 1<sup>st</sup> Respondent to allege that after the death of the deceased, she continued residing and possessing **L.R. Bahati/Kabatini Block 1/6395**. It is submitted that the status quo before the death of the deceased was that the 1<sup>st</sup> Respondent used to occupy and possess for her own benefit and use **L.R. Nyandarua/Oljoro Orok Salient/10837**. It is thus contended that the 1<sup>st</sup> Respondent should retain **L.R. Nyandarua/Oljoro Orok Salient/10837**.

12. The Applicant has deponed that after the death of the deceased, the Respondent jointly and severally leased **L.R. Bahati/Kabatini Block 1/6395** to a stranger. It is this stranger that the Applicant wants evicted from the said premises, as he/she is a stranger to the estate and was not granted the said lease by legally appointed administrators of the estate.

13. It is quite obvious that the said lease must have had a consideration in the form of rents. The Applicant wants the Respondent to account for the rent collected from **L.R. Bahati/Kabatini Block 1/6395**, as it should form part of the estate.

14. It is not in dispute that at the time of his death the deceased was the allottee of **Uns. Residential Plot No. Nyahururu A.** in the P&A form that was filed by the Respondents while petitioning for the estate, they did indicate the said plot as forming part of the estate. The P&A form does not have any information that would suggest that the deceased had sold the said plot to a third party, who ought to have appeared as a creditor to the estate.

15. In their P&A 5, the Respondents indicated that the estate had liabilities worth Kshs.4,000,000/-, which was owed to 3 individuals. The P&A form indicate the names of the said 3 individuals against an estimate value of liabilities of Kshs.4,000,000/.

16. Nowhere did the Respondent tag the said 3 individuals with specific properties of the deceased. It is thus evident that the said 3 individuals were probably owed monetary compensation by the estate. It is contended that the said monetary compensations will be subjected to judicial determination as to their validity.

17. It is the Applicant's case that the purported acknowledgment for sale of the said plot is a forgery. It is evident from its contents that the amount in figure for the purchase price does not tally with the amount in words. In addition, the said document has not been witnessed.

18. It is worth noting that the said acknowledgment for sale surfaced for the first time after the current summons was filed. It is thus submitted that it has been prepared with the case in mind. In view of the foregoing, it is submitted that the said plot forms part of the estate, and for the sake of protecting and preserving it, its current occupier should be evicted.

19. The occupier of the said plot was given the authority to use it by the Respondents, and it is quite obvious that there is consideration in the form of rents that the Respondents have been collecting. The Applicant wants the Respondents to account for the rents collected from the said plot.

20. It is not in dispute that at the time of his death, the deceased was the registered proprietor of **L.R. Nyandarua/Oljoro Orok Salient/10837**. It equally not in dispute that the 1<sup>st</sup> Respondent transferred the said parcel of land after the death of the deceased. The said transfer was not sanctioned by any legal by any legal authority under the **Law of Succession Act**.

21. It is submitted that the 1<sup>st</sup> Respondent lacked the legal basis of causing the said parcel of land to be transferred to her. The said transfer was thus fraudulent, null and void, and the court is urged to declare as such, and find that the said parcel of land forms part of the estate regardless of its current registered proprietor.

22. The Applicant has deponed that there were proceeds realized after giving Ketraco way leave to erect power lines in **L.R. Nyandarua/Kianjogu Block 1/25**, a fact that has not been denied by the Respondents. It is the Applicant's case that Respondents received the said proceeds, and as such they should be directed to tender an account of the amount received.

23. It argued that the said proceeds are for the benefit of all the beneficiaries of the estate, and as such the Respondents do not have superior rights over appropriation of the said proceeds.

24. In view of the undisputed fact that there is a power line erected in the said parcel of land, of Respondents should be ordered to give the circumstances and terms of engagement they entered into with Ketraco.

25. The Applicant contends that there are strangers occupying and using portions of landing **L.R. Nyandarua/Kianjogu Block 1/25**, a fact has not been denied by the Respondents. It is not in dispute that the deceased had not sold any portions of land in the said parcel of land, and as such the strangers to the estate who are using and occupying the land are trespassers, and they should be evicted.

26. The said eviction should be carried out under the supervision of the OCS Ndaragwa Police Station. The invasion of the said parcel of land by strangers amounts to intermeddling with the estate, which has been orchestrated under the watchful eyes of the Respondents.

27. It is thus submitted that the said intermeddling should be stopped, and the said parcel of land be preserved for the benefit of all the beneficiaries of the estate. Of concern is that the said parcel of land is still registered in the name of the deceased, and as such no one can claim to have acquired any recognizable rights and interests over it, without following the due process.

28. The court is urged to do find that the current summons have merits, and proceed to grant the prayers sought, and in doing so, the court invited to be guided by the following decisions.

- In *Re Estate of Makokha Idris Khasabuli (deceased) [2019] eKLR.*
- *Rogers Mwanzia & Another v Musyoka Ngoty & Another [206] eKLR.*
- *Re the Estate of Major Hundson Wafula (deceased) [2005] eKLR.*
- *In Veronica Njoki Wakagoto (deceased) [2013] eKLR* the court held:

*“The effect of [Section 45] .....is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”*

29. See also case of *In Re Estate of M'Ngarithi M'Miriti [2017] eKLR.*

#### **RESPONDENTS' SUBMISSIONS:**

30. From the onset, it is clear beyond peradventure that all the orders sought for by the Applicant in his application are orders that would require the parties to be interrogated through oral evidence and cross – examination to ascertain the truthfulness of the allegations and counter allegations contained in their affidavits.

31. The issues raised are weighty calling the court to make orders for cancellation of title deeds and logbook, revocation of transfers, eviction of parties e.t.c. through an interlocutory application.

32. The orders sought are final in nature and/or amount to a mandatory injunction at an interlocutory stage of the suit.

33. In the case of *Airland Tour's Travellers Ltd v National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002* the court held as follows:

*“In an interlocutory application, the court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or different provisions of the law.”*

34. The case of *John Foro Njenga v Francis Kamande Wanjiku [2017] eKLR.*

35. In the case of *Edwin Kamau Muniu v BBK Ltd Nairobi HCCC No. 1118 of 2002* as reported in the case of *INM v FM,* the court held that:

*“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial*

*finality. All the court is entitled at that stage is whether the Applicant is entitled to an injunction sought on the usual criteria....”*

36. The Respondents in paragraphs 6, 7, 8 and 9 have explained how the vehicle was acquired and that although the logbook was initially registered in the name of the deceased as the head of the family, the same was later on transferred by the deceased to the 1<sup>st</sup> Respondent during his lifetime after she completed repaying a loan which she had acquired with the logbook thereof as a security.

37. The Respondents confirmed that the vehicle was always under the control and use of the 1<sup>st</sup> Respondent and the reason why the vehicle was not listed in the P&A 5 form as forming part of the assets of the deceased herein.

38. The Applicant is seeking for cancellation of the logbook for Joseph Muriithi Kariuki and James Leleito Chepkuto who are not parties to this cause and who were not enjoined as interested parties in the application and issuing such orders shall be condemning the said persons unheard. This shall violate their rights under **Article 50 of the Constitution**.

39. Although it was alleged that the Respondents have leased out the said property to strangers, no evidence in form of a lease agreement, letter from the Area Chief or a confirmation from the alleged tenants was tendered to support the false allegations. The Respondents have in their replying affidavit confirmed that the said property is under the custody of the 1<sup>st</sup> Respondent and which was the case even before the deceased's demise.

40. The Applicant has sought for eviction of occupants of all the properties which are under the custody of the 1<sup>st</sup> Respondent not forgetting that he too and his mother and siblings are occupying a property registered to the deceased. One is left wondering whether all the beneficiaries should thus vacate from all the properties registered to the deceased and move into rental houses until the succession cause is heard and determined.

41. **Eviction over UNS Residential Plot No. Nyahururu A;** The Respondents in their replying affidavit have confirmed that the said plot was sold by the deceased prior to his demise to one Isaac Waruingi Ndirangu on the 10<sup>th</sup> September, 1997 and the buyer took immediate possession of the plot pending transfer.

42. **In the P&A 5 form** filed in court on the 13<sup>th</sup> July, 2018, the said Isaac Waruingi Ndirangu is listed as a liability to the estate and it is only fair and just that the issue of his purchase be determined after a full hearing to enable the said person defend his interest instead of having him evicted at the interlocutory stage. The creditor was not cited as a Respondent in the present application to enable him defend his rights.

43. No evidence was tabled to confirm that the Respondents are collecting rent from the said person who had occupied the plot for 18 years before the deceased's demise. He has developed the plot all over the years as evident in the photographs by the Applicant and evicting him at this stage shall not serve justice. A copy of a letter by the deceased confirming the sale was marked as an annexure.

44. **Cancellation of the title deed issued to Gladys Muriithi for L.R. No. Nyandarua/Oljoro Orok Saliient/1037.** An order for cancellation of a title deed cannot be granted at an interlocutory stage before parties are granted a chance to adduce evidence.

45. It is not in dispute that the said property holds the 1<sup>st</sup> Respondent's matrimonial home and it was transferred to her by the deceased during his life time but she delayed in collecting a title deed. It will be prudent for the District Land Registrar to be called as a witness to produce the presentation book to confirm when the forms were executed and when they were presented for registration at the registry.

46. The said property was not listed as part of the deceased's estate in the P&A 5 form and the Applicant did not raise an objection. The prayer for cancellation is brought in bad faith and a witch hunt and it is prayed for the issue to be listed as an issue for determination in the main cause. Parties have not made proposals on the mode of distribution of the estate.

47. The court should be cognizant of the fact that sometimes a transferor of a property may die before the transfer takes effect and that property cannot form part of the transferor's free estate for purposes of a succession cause as the transferor had already transferred his/her interest to the transferee absolutely.

48. **Statements from Ketraco on L.R. Ndaragwa/Kianjogu Block 1/85 and eviction of the occupants.** The Applicant has not tabled any evidence before this court to prove that the Respondents received payments from Ketraco. There is no proof of sale of the said land or leasing out to tenants.

49. The photographs marked as annexure JGMS do not comply with the provisions of the **Evidence Act Section 65 and 78A** on production of electronic and digital evidence. There is no affidavit sworn indicating the authenticity or otherwise of the photographs and the manner the photographs were taken.

50. In the case of ***Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 2 Others EP No. 2 of 2013.***

51. Finally, the Applicant appears to be on a fishing expedition for evidence to be relied on in the main suit as his allegations are speculative with no supportive evidence, noting that he was not in good terms with the deceased and thus had no knowledge on how the deceased used to run and manage his affairs.

## **ANALYSIS**

52. What is before the court is Interlocutory proceedings which applicant seeks determination of the rights of the parties rather than deal with

parties issues the interval between the commencement of the action and its final determination before the court delivers the final Judgment.

53. The main purposes of interlocutory applications or rather their main functions is to ensure that the matter proceeds expeditiously and properly to trial. " party usually takes interlocutory proceedings to apply to the court for an extension of time for submitting certain documents, seek directions from the court regarding the conduct of the case, compel the other party to comply with the rules of the court or the courts directions or apply to the court to grant such interim relief or remedy e.g. an interim payment compensation or injunction as may be just or convenient. Some of the interlocutory applications are such as;

*i. Application for extension of time*

*ii. for complying with certain directions under the rules of court or a court order. Oor example, the plaintiff may apply +with substantial reasons? to extend the deadline for filing a reply to a defence. b.*

*iii. Application for further and better particulars of the other partys pleadings.*

*iv. Application for striking out a particular pleading or part of the pleading of the other party*

54. The court does not approve of the misuse of interlocutory procedure, which only wastes time and money.

55. The issues raised in instant application are weighty calling the court to make orders for cancellation of title deeds and logbook, revocation of transfers, eviction of parties e.t.c. through an interlocutory application.

56. The orders sought are final in nature and/or amount to a mandatory injunction at an interlocutory stage of the suit.

57. In the case of *Airland Tour's Travellers Ltd v National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002* the court held as follows:

***"In an interlocutory application, the court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or different provisions of the law."***

58. See also the case of *John Foro Njenga v Francis Kamande Wanjiku [2017] eKLR.*

59. In the case of *Edwin Kamau Muniu v BBK Ltd Nairobi HCCC No. 1118 of 2002* as reported in the case of INM v FM, the court held that:

***"In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial finality. All the court is entitled at that stage is whether the Applicant is entitled to an injunction sought on the usual criteria...."***

60. Thus the court finds that the court can only maintain the status quo such that the subject parcels of land and motor vehicle should not be transferred any more pending hearing and determination on the issues herein via viva voce evidence.

61. The will entertain parties address to court on the way forward on viva voce evidence and extent it will cover to dispose the matter in finality.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER, 2021.**

.....

**CHARLES KARIUKI**

**JUDGE**