



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. E013 OF 2020

PATRICK KAGAI KIARIE.....1ST PLAINTIFF/APPLICANT

GEORGE MIGUE KIARIE.....2ND PLAINTIFF/APPLICANT

AGNES WANJIRU KIARIE (through her appointed

Guardians MONICA WANJA KIGURU &

PETER KAMAU WANJIRU3RD PLAINTIFF/APPLICANT

SALIM ABDU MWANIKI KIARIE.....4TH PLAINTIFF/APPLICANT

-VERSUS-

MICHAEL KAHURANI KIARIE.....DEFENDANT/ RESPONDENT

DAVID KIARIE KAHURANI.....NECESSARY PARTY

RULING

1) Patrick Kagai Kiarie, George Migue Kiarie, Agnes Wanjiru Kiarie and Salim Abdu Mwaniki Kiarie, being the 1st, 2nd, 3rd and 4th plaintiffs respectively, took out the motion dated 29th June 2020 whereof they sought for the following orders inter alia:

i. This application be certified as urgent and be heard ex-parte in the 1st instance.

ii. Pending hearing of this application a temporary injunction be issued restraining the defendant/respondent from exercising the powers purportedly issued to him by the necessary party herein vide the General Power of Attorney executed by the defendant/respondent and the interested party on the 20th day of January 2020.

iii. This application and ex-parte orders be served on the defendant/respondent and be heard inter-partes on such a date and such time as this honourable court may direct prior to any other pending applications/proceedings.

iv. The defendant/respondent be ordered to produce to court all documents including title deeds belonging to the necessary party herein.

v. Pending hearing of the main suit herein an interlocutory injunction be issued restraining the defendant /respondent from exercising the authority granted by the general power of attorney issued by the necessary party herein.

vi. That an order of inhibition be issued restraining the defendant/respondent from using the said general power of attorney to appropriate or dispose any property belonging to the necessary party herein.

vii. Costs of this application be granted to the plaintiffs/ applicants.

2) The motion is supported by the joint affidavit of Monica Wanja Kiguru and Peter Kamau Wanjiru and those sworn by George Migue Kiarie and Salim Abdu Mwaniki Kiarie. When served, Michael Kahurani Kiarie and David Kiarie Kahurani, the defendant and the necessary party respectively each filed a replying affidavit to oppose the motion.

3) When the motion came up for interpartes hearing, Mr. Mutuma, learned advocate for the defendant and interested party raised a

preliminary objection against the plaintiff filing the affidavit sworn by David Kiarie Kahurani in support of their case. It is the submission of the defendant that the plaintiffs together with their advocate picked the necessary Party from his home in Dagoreti and forced him to swear the affidavit dated 10th August 2020. It is pointed out that the necessary party filed a complaint with the police alleging that he was coerced to swear and file the aforesaid affidavit.

4) Mr. Mutuma also accused his colleague, the plaintiff's advocate, of breaching Rule 96 of the Law Society of Kenya Code of Conduct by representing two opposing sides. It was also pointed out that in the motion, it is alleged that the necessary party is incapable of managing his affairs but it is strange on how he can now swear an affidavit.

5) Mr. Njoroge, learned advocate for the plaintiffs opposed the defendant's preliminary objection arguing that the parties to this dispute are members of the same family therefore the necessary party cannot be regarded as an adverse party in this matter.

6) The learned advocate further argued that the defendant's advocate has also put himself in a difficult position by representing both the defendant and the necessary party. He also pointed out that the alleged complaint made to the police has not been availed to this court hence it remains as a mere allegation.

7) I have considered the arguments put forward over the preliminary objection. It is not in dispute that the necessary party filed two affidavits. The first affidavit is the replying affidavit he swore on 6th August 2020 filed to oppose the motion dated 29th June 2020. In paragraph 6 of the aforesaid affidavit, the necessary party averred as follows:

“That I willingly and without any form of coercion or undue influence gave my power of attorney to my son Michael Kahurani Kiarie who is my first born son.”

8) In paragraph 18 of the same affidavit, the necessary party also deponed:

“18. That it is I who will be prejudiced highly if the said power of attorney is revoked since I will then be forced to perform some of the duties which I have assigned the defendant to perform yet some of those duties are too cumbersome and tasking for my age.”

9) The second affidavit the necessary party swore is the further supporting affidavit sworn on 10th August 2020 and filed by the plaintiffs in support of the motion. In paragraph 6 of the aforesaid affidavit the necessary party averred:

“6. That I do not remember having signed the supporting affidavit dated 6th August 2020.”

10) In paragraph 7 he further deponed:

“7. That I sometimes forget past deeds but if I signed, it was not properly explained to me what the dispute at had was and that the general power of attorney was the subject.”

11) In paragraph 10 he also averred:

“10. That I request that the general power of attorney be revoked if it gives so much power and that I wish to involve all my children when my intentions will be recorded in their presence.”

12) It is clear from the above excerpts that the necessary party has made on oath two contradictory positions in this matter. The question is whether or not this court should strike out the further supporting affidavit.

13) The defendant's learned advocate submitted from the bar that the necessary party had filed a complaint with the police over his abduction and coercion to execute the further supporting affidavit. There is no tangible evidence to establish the allegation. However, the critical issue is that the necessary party has taken two conflicting positions in this dispute. On one part he swore an affidavit in support of the defendant while on the other part he swore an affidavit in support of the plaintiffs.

14) In a twist of events, the necessary party also swore a further affidavit dated 12th August 2020 in which he denounced the further supporting affidavit he swore on 10th August 2020. He urged this court to have the same expunged from record. There is no evidence that the necessary party sought for leave to file the further affidavit sworn on 12th August 2020. The same is improperly before this court hence the same is hereby ordered struck out *suo moto*.

15) The plaintiff raised an important point which is to the effect that the dispute involves family members. The central figure in this dispute is the necessary party. His evidence in the matter is very crucial to the determination of this dispute. This court has agonized whether it is appropriate at this stage to strike out the necessary party's further supporting affidavit. There is no doubt the same contradicts the replying affidavit. The only way to resolve the contradiction is to subject the deponent to cross-examination. When taking into account such conflicting affidavit evidence the court will consider the weight and reliability of the same. I think the justice of this matter militates against an order striking out the aforesaid affidavit.

16) In the end, I decline to strike out the necessary party's further supporting affidavit and instead dismiss the preliminary objection and direct the motion dated 29.6.2020 to proceed to hearing on its merits.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 23rd day of September, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Respondent