



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1440 OF 2000

IN THE MATTER OF THE ESTATE OF SEBASTIAN KARANJA MACHARIA (DECEASED)

FRANCIS MACHARIA KARANJA.....1ST APPLICANT
MARION WANGUI KARANJA.....2ND APPLICANT
CECILIA WANJIRU KARANJA.....3RD APPLICANT
ANN WANJIRA KARANJA.....4TH APPLICANT
JANE NJERI KARANJA.....5TH APPLICANT
JOSEPH MWANGI KARANJA.....6TH APPLICANT
DANIEL NGANGA KARANJA.....7TH APPLICANT

VERSUS

VIRGINIA MUTHONI KARANJA.....1ST RESPONDENT
WILSON M. KARIUKI T/A WISKAM AGENCY AUCTIONEER...2ND RESPONDENT
OCS GITHUNGURI POLICE STATION.....3RD RESPONDENT

RULING

1. The deceased Sebastian Karanja Macharia died testate on 26th April 2000. The executor of his Will was Joseph David Muturi who petitioned for the grant of probate. The grant was issued on 5th September 2000. It has not been confirmed.
2. The deceased left two houses: the house of Marion Wangui Karanja (2nd applicant) that had 10 children and the house of Virginia Muthoni Karanja (the 1st respondent) that had two children. The deceased and the 2nd applicant divorced in 1984.
3. The estate comprised LR Githunguri/Gathangari/724, LR Githunguri/Gathangari/758, LR Githunguri/Gathangari/756, Plot No. 77 Rongai Market in Limuru and vehicle registration number KKQ 463 M/Benz.
4. On 23rd July 2001 Francis Macharia Karanja (1st applicant), from the 1st house, applied under **section 26** of the **Law of Succession Act (Cap. 160)** for reasonable provision to be made to the members of the 1st house of the deceased. The 1st respondent and the executor opposed the application. In a judgment delivered on 14th November 2001 the application was dismissed.
5. The deceased's 1st house was aggrieved by the decision. On 25th November 2011 they filed an appeal in the Court of Appeal. In the appeal, they filed a notice of motion dated 5th December 2013 seeking an injunction to restrain the 1st respondent from disposing, transferring or interfering with the estate of the deceased pending the hearing and determination of the appeal. On 17th March 2015, in the

presence of Mrs. Wambugu for the appellants and M/s Maina holding brief for Mr Chege for the respondent, the Court of Appeal ordered as follows:-

“1. That the *status quo* prevailing as at the date of this Ruling in the register in respect of Plot No. L.R. Githunguri/Gathangari/1758 be maintained until the main appeal is heard and determined.

2. That the *status quo* in respect of possession/occupation of the said property be preserved.

3.....

4.....”

6. Before this court, the 1st respondent on 19th November 2013 filed an application seeking the confirmation of the grant issued to the executor. She filed another application on the same date 19th November 2013 seeking, among other things, to restrain the applicants from interfering with her quiet and peaceful possession and occupation of L.R. Githunguri/Gathangari/758 and the applicants be evicted from the suit land from which they had evicted her. Both applications were heard on 15th April 2015, and a ruling delivered on 5th February 2016. The application for confirmation was dismissed and the one for injunction allowed until the estate had been distributed.

7. On 18th April 2016 the 1st respondent applied to have M/s Wiskam Agencies, Auctioneers, be authorised to return her into physical possession and occupation of LR Githunguri/Githangari/758. Her case was that she had been forcefully evicted from the premises on 13th November 2013 by the applicants and that was why on 19th November 2013, through application dated 18th November 2013, she had applied that they be evicted from the parcel. On 21st November 2013 the application had been certified urgent and an interim orders granted ordering her return to the suit land, and the OCS Githunguri Police Station was to supervise the exercise. According to the 1st respondent, the OCS was unable to remove the applicants and return her to the suit land. That is why on 18th April 2016 she applied to have the Auctioneers carry out the exercise. The orders were granted *ex parte* on 20th April 2016.

8. On 3rd May 2019 the applicants filed the present application seeking the setting aside and/or vacation of the orders issued on 20th April 2016 which had led to the violent eviction of the 2nd applicant from the suit premises and the extensive damage of her property. This had been done by the Auctioneers (2nd respondent) and the OCS Githunguri Police Station (3rd respondent). It was sought that the respondents be cited for contempt and be punished and that they be ordered to pay damages for the illegal demolition and destruction.

9. The 1st respondent filed a replying affidavit to oppose the application. Her case was that she was unaware of the Court of Appeal orders; that she had become aware of the same when she was served with the present application. She stated that she had read that at the Court of Appeal she had been represented by M/s Amina holding brief or Mr Chege of Chege Wainaina & Co. Advocates. However, she stated, Chege Wainaina & Co. Advocates were at the time no longer on record for her. She had changed her advocates to M/s Morara Ngisa & Co. Advocates, and later to M/s Ngata Kamau & Co. Advocates. She was not aware that an appeal had been filed in the matter, and that what had happened was in the furtherance of a court order. The applicants did not file a further affidavit.

10. It is not in dispute that the *experte* orders of 20th April 2016 were contrary to the orders of 17th March 2015 that the Court of Appeal had given in respect of the suit property. This court is subordinate to the Court of Appeal, and is bound by the orders of the Court of Appeal. It is clear that this court was not made aware that the Court of Appeal had issued restraining and *status quo* orders over the same property. This court has now become aware of the Court of Appeal orders of 17th March 2015. It is bound to vacate its orders. Whether or not the 1st respondent was aware of the orders of the Court of Appeal would not change the fact that this court cannot give orders that would run contrary to what has been said by the higher court.

11. But is it true that the 1st respondent did not know that the applicants had filed an appeal, that the orders had been granted? First, the orders were given in the presence of advocates acting for her. Although she says the advocates were no longer on record for her, she did not care to annex any notice of change of advocates. Secondly, there is no evidence of complaint against either M/s Maina or Mr Chege for purporting to act for her when they had no instructions. I find that the respondent was aware that the Court of Appeal had given orders against interference with the *status quo* in respect of the property until the appeal was heard and determined.

12. The 2nd and 3rd respondents were acting on orders that the 1st respondent had obtained from this court. They cannot be said to have acted unlawfully. There is no evidence that they were aware of the Court of Appeal orders, or any other process in the cause beyond the orders. They are absolved.

13. I find that the 1st respondent deliberately misled this court into issuing the orders of 20th April 2016 which caused the eviction of the 2nd applicant from LR Githunguri/Gathangari/758 on 1st March 2019 and the destruction of her property. The applicants are at liberty to sue her for the unlawful eviction and the destruction of the property.

14. In the meantime, the orders issued by this court on 20th April 2016 are hereby set aside and/or vacated.

15. The orders issued on 20th April 2016 were further to the orders that had been issued on 21st November 2013. This was before the Court of Appeal orders of 17th March 2015. Of course, those orders (which had not been effected) cannot be implemented given the orders of the Court of Appeal which have to remain in place until the appeal has been heard and determined.

16. Costs of this application shall be paid by the 1st respondent.

DATED and DELIVERED at NAIROBI this 23RD OCTOBER 2019.

A.O. MUCHELULE

JUDGE