



**Araka (Suing as the administrator of the Estate of Paul Matundura Makarios) v Mouti & 4 others (Environment & Land Case E168 of 2023) [2023] KEELC 21558 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21558 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E168 OF 2023  
MD MWANGI, J  
NOVEMBER 14, 2023**

**BETWEEN**

**PRISCILLA NYANGWESO ARAKA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF PAUL MATUNDURA MAKARIOS) ..... PLAINTIFF**

**AND**

**VERONICAH MONGINA MOUTI ..... 1<sup>ST</sup> DEFENDANT  
KHALI ABDI ..... 2<sup>ND</sup> DEFENDANT  
MOHAMMED SHIDIYE ..... 3<sup>RD</sup> DEFENDANT  
FATUMAZAHRA IBRAHIM ..... 4<sup>TH</sup> DEFENDANT  
ABDIKHEIR A. DUBO ..... 5<sup>TH</sup> DEFENDANT**

*(In respect of the Plaintiff's application seeking orders of eviction and an order restraining the Defendants from trespassing into the suit property)*

**RULING**

**Background**

1. The Plaintiff seeks an eviction order against the Defendants herein pending hearing and determination of this suit. She further prays for restraining orders to bar the Defendants from trespassing into the suit property pending hearing and determination of the suit.
2. The basis of the Plaintiff's application is that the suit property belonged to the Late Paul Matundura Makarios. She is the lawfully appointed administrator of the Estate of the deceased who was also her husband. She asserts that the Respondents have no right whatsoever to occupy the suit property.



Despite notice to vacate the suit premises however, the Defendants have refused to vacate hence the application before the Court.

3. The Plaintiff in the Supporting Affidavit, deposed on 3rd May, 2023 attached the grant of Letters of Administration confirming her as the administrator of the estate of the deceased who died on 13th June, 2012. She deposes further that the grant was confirmed to her on 27th June, 2022. Amongst the deceased's properties listed in the certificate of grant is the suit property.
4. The Plaintiff alleges that the 1st Respondent had been masquerading as a wife of the deceased and since his death has continually intermeddled with his estate and attempted to appropriate it by leasing the suit property to unsuspecting tenants. She accuses the 1st Defendant further of abrogating herself the ownership of the suit property and severally attempting to transfer and alienate it by filing Petitions for grant of Letters of Administration, the first one in Kisii High Court and a second one at the Nairobi High Court without the consent of the lawful beneficiaries of the estate of the deceased.
5. The Plaintiff avers that the 1st Respondent has not surprisingly contested the issuance and confirmation of the grant of letters of administration in the estate of the deceased to herself. She therefore proceeded to issue a notice in terms of Section 152F of the *Land Act* to the Defendants but they have failed to comply by vacating the suit premises.

#### **Response by the Defendants/Respondents**

6. The Defendants responded to the Plaintiff's application by way of a Replying Affidavit sworn by the 1st Defendant, Veronicah Mongina Mouti.
7. In the said Replying Affidavit, the deponent deposes that she is a widow of the deceased, Paul Matundura Makarios and a beneficiary of his estate. She asserts that they were married and lived together for over 20 years whereby they were blessed with 3 issues. She attached copies of their birth certificates.
8. The Deponent on her part accused the Plaintiff of fraudulently obtaining Letters of Administration in the estate of the deceased in total disregard of the other beneficiaries. She alleged that her 3 children are all in school and are dependent on the rent from the suit property, while the Plaintiff, collects rent from all the other properties belonging to the estate of their deceased husband.
9. The 1st Respondent asserts that the original title of the suit property is actually with her Advocate and has never been lost at any one time as alleged by the Plaintiff.
10. The 1st Respondent avers that she filed for revocation of the grant issued to the Plaintiff on learning about it. She attached copies of the summons for revocation dated 4th May, 2023.
11. The 1st, 2nd, 4th and 5th Plaintiffs are tenants on the suit premises and therefore have nothing to do with the estate of the deceased.

#### **Cross-examination of the Plaintiff**

12. The Advocate for the Defendants applied for leave to cross-examine the Plaintiff in regard to the averments in her affidavit. She was cross-examined on 19th June, 2023.
13. In brief, the Plaintiff confirmed that she resides in the United States of America and was last in Kenya in the month of August 2022. She signed her supporting Affidavit online and did not therefore appear before the Commissioner for Oaths physically.



14. The Plaintiff denied that the 1st Defendant was her co-wife. She asserted that she had been introduced to 1<sup>st</sup> Defendant by her late husband as a house-girl before he passed on. She had allegedly been hired to take care of their Kisii home. She was not aware that the 1st Defendant was introduced as a wife during the funeral of her husband. She further denied that her late husband had children with the 1st Defendant.
15. The Plaintiff admitted that the 1st Defendant had been collecting rent from the suit premises for many years.

### **Court's Directions**

16. The court directed that the Plaintiff's application be canvassed by way of written submissions. Both parties complied and the court has had the opportunity to read the submissions which now form part of the record of this court.

### **Issues for Determination**

17. Having carefully considered the application by the Plaintiff, the response by the Respondents as well as the submissions filed by the parties, I am of the considered view that the only issue for determination is whether the Plaintiff is entitled to the orders sought at this stage.

### **Analysis and Determination**

18. The Plaintiff's application is brought under the provisions of Order 40 rule 1 and Order 50 rule 1 of the Civil Procedure Rules, Sections 152A, 152B, 152E and 152F of the Land Act and Sections 3 and 3A of the Civil Procedure Act.
19. Order 40 of the Civil Procedure Rules deals with 'temporary injunctions and interlocutory orders.'
20. In the old English case of *Gilbert v Eden* (1878) 9 ChD, Cotton LJ defined interlocutory applications as those applications;  

“which do not decide the rights of Parties, but are made for purposes of keeping things in status quo till the rights (of parties) can be decided or for purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.”
21. The objective of an interlocutory application is to protect the Plaintiff against injury by violation of his legal right which he could not be adequately compensated in damages recoverable in the action if the matters in dispute were resolved in his favour at the trial. Gicheru JA in Rockland Kenya Limited v Elliot White Miller (1994) eKLR, held that at that stage, it is not the function of the court to attempt to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend on to decide difficult questions of law which call for detailed argument and mature considerations. Such matters are to be dealt with at the trial.
22. Ringera J (as he then was) in Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi (Milimani HCCC 1234 of 2002) concurred with the holding of Gicheru J.A. and affirmed that in an interlocutory application, the court is not required to make any conclusive or definitive findings of facts or law on the basis of contradictory affidavit evidence or disputed propositions of law.



23. The Plaintiff in this case though framing her application as an interlocutory application seeks orders of eviction of the Defendants from the suit property. This is for all intents and purposes, a final order. She has also sought it in her Plaint. It is an order which can only be granted after a full trial.
24. The order to restrain the Defendant from trespassing into the suit property as framed, if granted, is tantamount to an eviction order. From her own admission during cross-examination, the Plaintiff stated that the 1st Defendant has been collecting rent from the suit premises for 'many years'. It is clear that the 1st Defendant has been in possession of the suit property, as the Plaintiff put it, for many years.
25. The Plaintiff's application is an invitation to this court to conclusively determine the dispute between her and the 1st Defendant. I decline the invitation. Certainly not at this interlocutory stage before hearing the evidence of the parties.
26. Considering that this suit is still at its preliminary stage, I will say no more in order not to prejudice or embarrass its hearing.
27. The upshot is that the Plaintiffs application dated 3rd May, 2023 is dismissed with costs to the Defendants.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2023**

**M. D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Chumo holding brief for Mr. Manwa for the Plaintiff/Applicant

No appearance for the Defendants/Respondents

Yvette: Court Assistant.

**M. D. MWANGI**

**JUDGE**

