



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS).**  
**SUCCESSION CAUSE NO. 320 OF 2003.**

**IN THE MATTER OF THE ESTATE OF RITHO MAHIRA (DECEASED)**

**RULING.**

The Applicant who is also an objector filed a Chamber Summons dated 3rd December, 2003 under a certificate of urgency. The matter was certified as urgent and was set down for hearing on 10/12/2003 interparties.

The summons is brought under the provisions of order 39 rules S.3A of the Civil Procedure Act and all enabling provisions of the law. The applicant seeks for orders that the 2nd respondent (Lucy Nyambura Ritho) by herself, sons servants agents be restrained by way of injunction from carrying out any works, or erecting any structures, disposing, alienating, registering any dealings or in any manner dealing with the applicant's interest in Dagoretti/Kangemi/5 pending the application dated 24/2/2003.

The application is supported by the affidavit of the applicant who has detailed the reasons for the application on the grounds as follows: -

- 1) She has filed an objection, proceedings and directions were given and the application seeking for the revocation of the grant and a redistribution is scheduled for hearing on 18/2/2004.
- 2) The 2nd Respondent's sons namely George Hiro and James Ng'ang'a are putting up permanent structures on the suit premises.
- 3) The applicant is a beneficiary of the deceased estate and she was not provided for alongside other beneficiaries.
- 4) Unless the restraining order is issued, the applicant contends that her application for revocation shall be rendered worthless.
- 5) The applicant has also attached a letter from the Public Trustee, directing the beneficiaries and the Respondent that there should be no construction in the pendency of the application of revocation.

The second respondent as well as James Ng'ang'a Ritho, George Hiro have all objected to the application, and filed notices of preliminary objection seeking that the application be struck out as being incurably defective and for offending the provisions of the law. James Nganga has also filed a Replying Affidavit sworn on 9th December, 2003. He contends that the deceased estate was wholly and fully distributed by the court, when the grant was confirmed. He was allocated the same parcel that he was occupying whereby he had put up permanent developments. Counsel for Respondent also submitted that this court has no jurisdiction to adjudicate on issues brought under order 39 of the Civil Procedure Act. The law of Succession is specific and indicates the provisions that can be invoked under the Civil Procedure and order 39 is not among them.

Secondly, the affidavit sworn by the Applicant is thumb printed and there is no indication which thumb- print was used to print and thus is against the provisions of the statutory declarations Act.

Thirdly, the application is defective as it names Lucy Nyambura Ritho as the 2nd Respondent but the prayers are directed towards George Hiro and James Nganga. There are no allegations against the named Respondents.

I have carefully evaluated all the submissions, the application dated 3/12/2003, the supporting affidavit and the replying affidavit filed herein. I agree with counsel for the respondents that there are no prayers directed towards the named Respondents, which are the Public Trustees and Lucy Nyambura Ritho.

According to the supporting Affidavit and the grounds of the application, the intended wrongdoers are George Hiro and James Nganga who are not named as parties and yet the orders were directed to them and indeed if the orders were granted they were the ones who would have been affected.

On the above basis above, I would strike the application dated 3/12/2003 as being incompetent. Counsel for the Respondent also submitted that this Honourable court has no jurisdiction to entertain an application brought under order 39 of the Civil Procedure. I agree with Counsel that the application under order 39 of the Civil Procedure Rule is not amongst the provisions of Civil Procedure that are envisaged under 4 Rule 63(1) of the P&A Rules. However this court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process and in its exercise of its jurisdiction in respect of the powers under section 47 of the Act, such orders as may be expedient can be granted. But as stated earlier for reasons recorded, I find the application dated 3/12/2003 defective and the same is struck out as incompetent with costs to the respondents.

Orders Accordingly.

Ruling read and signed on 16/1/2004

**M. KOOME**

**16/1/2004**