



**Karani v Muriithi (Civil Appeal 28 of 2022) [2024] KEHC 2575 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2575 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL 28 OF 2022  
RM MWONGO, J  
MARCH 13, 2024**

**BETWEEN**

**GEOFFREY KIURA KARANI ..... APPLICANT**

**AND**

**G. NAHASHON MURIITHI ..... RESPONDENT**

**RULING**

1. This application concerns the succession to the estate of the late Mureu Rukenya in CM Succ No 34 of 1993. The grant in that succession matter was confirmed on 26/5/2021, and distribution commenced. The applicant filed an application for revocation of grant which was struck out on 30/3/2022. Hence the applicant filed the present appeal
2. The applicant's present notice of motion dated 2<sup>nd</sup> November, 2022 seeking the following orders:
  1. Spent.
  2. That this honourable court be pleased to grant an inhibition/prohibition and/or preservative order of this Honourable court against registration of any transfer, charge, lease or any dealing in land parcel numbers Mwerua/Gitaku/2047; Mwerua/Gitaku/2048; Mwerua/Gitaku/2049; Mwerua/Gitaku/2050; Mwerua/Gitaku/2051; Mwerua/Gitaku/20562; Mwerua/Gitaku/2053; Mwerua/Gitaku/2054; Mwerua/Gitaku/2055; and Mwerua/Gitaku/2056 ( Hereinafter referred to as the said Parcels of Land) pending hearing and determination of this application.
  3. That this honourable court be pleased to grant an inhibition/prohibition and/or preservative order of this Honourable court against registration of any transfer, charge, lease or any dealing in the said Parcels of Land pending hearing and determination of Kerugoya HCCA No.28 of 2022.



4. That the respondent herein, his servants, agents and or anybody acting through him be restrained from trespassing, selling, sub-dividing transferring and or committing any act of waste on the said Parcels of Land until the Appeal in Kerugoya HCCA No.28 of 2022 is heard and determined.
  5. That costs be provided for.
3. The application is based on the following grounds:
- i. That the deceased's estate to which these proceedings relate was an Uncle to both the Applicant and the Respondent.
  - ii. That letters of administration for the estate of Mureu Rukenya were issued one Jason Karuiru Kagoiya.
  - iii. That Jason Karuiru Kagoiya died before the said grant could be confirmed.
  - iv. That the respondent herein, applied to be substituted in place of Jason Karuiru Kagoiya.
  - v. That upon substitution, the respondent herein applied for confirmation of the grant issued Jason Karuiru Kagoiya.
  - vi. That the grant was confirmed on 26.5.2021 and the estate was distributed amongst some selective beneficiaries of the deceased and leaving out the Applicant and other beneficiaries with no shares and which confirmation was done secretly and fraudulently.
  - vii. That the respondent secretly and fraudulently applied for the confirmed grant dated 26.5.2021 and distributing the estate of the deceased comprised on L.R Mwerua/Gitaku/424 to some selective beneficiaries and totally disinheriting the applicant and other lawful beneficiaries.
  - viii. That after finalising the succession cause, the land was jointly registered in the names of the Respondent and other beneficiaries who have already subdivided the same and two resultant titles issued being the said Parcels of Land.
  - ix. That Applicant filed an application for revocation or annulment of grant which application was struck out on 30<sup>th</sup> March 2022.
  - x. That being aggrieved by the Court's ruling on the application for revocation or annulment of grant, the Applicant filed an appeal being Kerugoya HCCA No.28 of 2022.
  - xi. That the applicant is apprehensive that the registered owner is at an advanced stage in disposing off the property to third parties as he has seen strangers visit the properties with the respondents.
4. The applicant filed a supporting affidavit dated 2<sup>nd</sup> November, 2022 to support his averments.
5. The respondent filed grounds of opposition dated 9<sup>th</sup> November, 2022 and put forth the following grounds:
1. That the application is incompetent and bad in law.
  2. That the respondent doesn't own the properties cited in the application and therefore we shall be praying that the owners of the properties be enjoined.
  3. That no searches or title deeds have been attached to proof ownership or if the parcels of land cited do exist.



6. In response, the respondent deposed a replying affidavit on 20<sup>th</sup> March, 2023 the main averments of which are:
- i. That is application is a repetition of a similar application filed at the lower court dated 1/8/2022 that was dismissed.
  - ii. That again the applicant filed another similar application- at the High Court dated 18/7/2022 that again was dismissed.
  - iii. That, this issue is *res judicata* and if the applicant was not satisfied with the two similar application that were dismissed then the only recourse he has is to appeal but not file the current application.
  - iv. That the applicant is seeking an order for inhibition /prohibition and /or preservatory orders of this court against registration of any transfer, charge, lease or any other dealings in L.R Mwerua/Gitaku/2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055 and 2056 but fails to attach Official Searches to proof ownership or proof if at all the parcels do exist.
  - v. That the Grant was issued in the year 1993 and as it stands the estate of the deceased has already been distributed to the beneficiaries who have already sold out to other parties.
7. The applicant deposed to a further Supporting affidavit dated 13<sup>th</sup> April, 2023 with the following major averments:
- i. That the applications dated 1<sup>st</sup> August, 2022 and 18<sup>th</sup> July, 2022 which the Respondent herein contends to have been dismissed were withdrawn by the Applicant vide the Notices of Withdrawal dated 21<sup>st</sup> September, 2022 and 31<sup>st</sup> October, 2022 respectively, and therefore the instant application is not *res judicata* as the foregoing applications were not determined substantively.
  - ii. That the suggestion that the Applicant ought to appeal against the dismissal of the applications is misleading and smacks of perjury by the Respondent as it is without doubt that the said application were withdrawn.
  - iii. That further to the foregoing, the applications were entirely with respect to title number Mwerua/Gitaku/424 and not the resultant titles out of the subdivisions thereof, as is in the instant application.
  - iv. That the respondent herein is misleading this Honourable Court with the aim to ostensibly prejudice the Applicant herein.
  - v. That the assertion that the there is need to produce official searches in respect of the titles listed in the application dated 2nd November 2022 is uncalled for. The crux of this instant application is not to ascertain the ownership of the said titles but for injunctive orders to be issued pending the hearing and determination of this appeal.
  - vi. That the roots of the issues herein emanate from Kerugoya succession cause 34 of 1993 which was not conducted procedurally and in accordance with the law and therefore should be rendered nugatory and as a result, the applicant herein as preferred appeal.



## **Applicant's Submissions**

### **Whether the applicants have met the threshold for grant of inhibition/ prohibition and preservatory orders sought**

8. The applicant submits that the threshold to be met when these kinds of orders are sought differs in measure from ordinary interlocutory injunctions. The applicant cites this as being the position in *re Estate of Simon Kimendero (Deceased)*[2020] eKLR where it was held that three things have to be established to meet the threshold for a preservatory order in respect of estate property, viz that: 1) The applicant has an arguable case; 2) The property is estate property; and, 3),The property is likely to be dissipated or wasted away.

### **Arguable case**

9. The applicant also cited the case of *African Banking Corporation Limited v Netsatar Limited & 6 Others Nairobi Milimani* HCC No.299 of 2009 (UR) which was cited with approval in the case of *re Estate of Simon Kimendero, supra*. There the court observed with regard to an arguable case, that:

“One which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.” (Emphasis added)

10. The subject properties herein are as a result of subdivision of the property of the deceased comprised of L.R Mwerua/Gitaku/424 which the Applicant herein together with other lawful beneficiaries were disinherited.
11. In this case, it is clear from the application that these proceedings relate to the estate of the uncle of both the Applicant and the Respondent herein. Both the Applicant and the Respondent are thus lawful beneficiaries of the estate of the deceased even though the estate of the deceased was distributed selectively among some beneficiaries to the exclusion and detriment of the Applicant herein.

### **The Property is Estate Property**

12. In the present case, the Applicant and the Respondent are related to the deceased person in one way or another. It is also clear that the subject Properties herein are estate property as demonstrated above.

### **Likelihood of Dissipation**

13. The applicant submit that the subject properties are now at an imminent risk being of being sold, leased, or charged. Therefore, it is likely the estate property may be dissipated. Such happening would not only injure the Applicant but the estate too.
14. In light of the facts in the case, we submit that a preservatory order is merited. The Respondent has continuously leased and or sold portions of the estate to third parties which will render the estate of the deceased wasted and difficult to remove such third parties from the estate upon hearing and determination of the appeal.
15. Any prejudice to the Respondent is greatly outweighed by the need to have the properties preserved pending the hearing and determination of the appeal.



16. Rule 73 of the *Probate and Administration Rules* provides that:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

17. It is clear that this Honourable Court is clothed with wide powers to do what is necessary to ensure that the ends of justice are met. This position finds support in: *Millicent Mbatha Mulavu & another v Annah Ndunge Mulavu & 3 others* [2018] eKLR, cited with approval *In re Estate of Kitur Chepsungulgei*, where the court affirmed that the High Court has powers to issue injunctions for purposes of preserving the estate of a deceased person.

### **Respondent’s Submissions**

18. There are no submissions on record.

### **Issues for Determination**

19. The issue for determination is whether the application discloses circumstances that show that the threshold for grant of preservatory orders has been achieved.

### **Analysis and Determination**

20. The applicant’s substantive claim is that this honourable court be pleased to grant an inhibition/prohibition and/or preservatory order of this Honourable court against registration of any transfer, charge, lease or any dealing in land parcel numbers Mwerua/Gitaku/2047 Mwerua/Gitaku/2048, Mwerua/Gitaku/2049 Mwerua/Gitaku/2050 Mwerua/Gitaku/2051 Mwerua/Gitaku/20562 Mwerua/Gitaku/2053, Mwerua/Gitaku/2054 Mwerua/Gitaku/2055 And Mwerua/Gitaku/2056, pending hearing and determination of Kerugoya HCCA No.28 of 2022.

21. The applicant deposed that the respondent secretly and fraudulently applied for the confirmed grant dated 26.5.2021 and distributed the estate of the deceased comprised on L.R Mwerua/Gitaku/424 to some selective beneficiaries and totally disinheriting the applicant and other lawful beneficiaries.

22. The applicant filed an application for revocation or annulment of grant which application was struck out on 30<sup>th</sup> March, 2022. That being aggrieved by the Court’s ruling on the application for revocation or annulment of grant, the Applicant filed an appeal being Kerugoya HCCA No.28 of 2022.

### **Whether the Applicants Have Met the Threshold for Grant of Inhibition/Prohibition and Preservatory Orders Sought**

23. According to the applicant the threshold to be met when these kinds of orders are sought differs in measure from ordinary interlocutory injunctions. This was the position *In re Estate of Simon Kimendero (Deceased)*[2020] eKLR where the learned judge stated as follows:-

“....Of specific significance to preservatory order in respect of estate property is that:

- a, The applicant has an arguable case;
- b, The property is estate property; and
- c, The property is likely to be dissipated or wasted away...”



## Arguable Case

24. The subject properties herein are as a result of subdivision of the property of the deceased comprised of L.R Mwerua/Gitaku/424 which the Applicant herein together with other lawful beneficiaries were disinherited.
25. The applicant deposed that he has an arguable appeal as the same goes to the root of the succession proceedings appealed from. The same were conducted fraudulently and by concealment of material facts.
26. The respondent argued that this issue is *res judicata* and if the applicant was not satisfied with the two similar application that were dismissed then the only recourse he has is to appeal but not file the current application.
27. In *Sammy Mwangi Kiriethi & 2 Others v Kenya Commercial Bank* [2020] eKLR it was held:

“In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court’s interrogation on the one hand and the courts invitation to the opposite party to respond thereto.”
28. The applicant filed an appeal for being aggrieved by the Court’s ruling on the application for revocation or annulment of grant dated 14<sup>th</sup> October, 2021. He argues that the grant was obtained fraudulently and by concealment of material facts by the respondent.

## Whether the Property is Likely to be Dissipated or Wasted Away

29. The applicant submits that the subject properties are now at an imminent risk being of being sold, leased, or charged by the respondent and other beneficiaries. Therefore, it is likely the estate property may be dissipated. It will prejudice both the applicant and the estate.
30. The respondent deposed that the grant was issued in the year 1993 and as it stands the estate of the deceased has already been distributed to the beneficiaries who have already sold out to other parties.
31. However, the grant was confirmed on 26<sup>th</sup> May, 2021 and the estate was distributed among the beneficiaries. The applicant is apprehensive that the beneficiaries are about to sell their shares of the suit property to third parties.
32. Rule 73 of the *Probate and Administration Rules* grants the courts over-arching discretionary powers to make orders, where it provides that:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. ”
33. Thus, the grant of preservative orders of inhibition are one of the tools that the court can grant in cases that so merit them to preserve the suit property and prevent dealings with the same pending the hearing and determination of the appeal.
34. This position finds support in *Millicent Mbatha Mulavu & another v Annah Ndunge Mulavu & 3 others* [2018] eKLR where the court affirmed that the High Court has powers to issue injunctions for purposes of preserving the estate of a deceased person.



### **Conclusions and Disposition**

35. From the foregoing discussion, this court has power in appropriate cases to grant preservative orders.
36. In the circumstances here, I have found that the applicant has demonstrated that the threshold for grant of such orders has been met. I am prepared to grant the said orders
37. Accordingly, I find that the application succeeds, and the prayers sought in prayers 2, 3 and 4 of the notice of motion application dated 2<sup>nd</sup> November, 2022 are hereby granted.
38. Orders accordingly.

**DATED AT KERUGOYA THIS 13<sup>TH</sup> DAY OF MARCH, 2024**

**R MWONGO**

.....

**JUDGE**

Delivered in the presence of:

1. Miss Muya - holding brief for Ms. Achieng for Applicant
2. Makaazi - for Respondent
3. Court Assistant - Murage

