



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**FAMILY APPEAL NO. E016 OF 2024**

**JACINTA KANARIO.....APPELLANT/APPLICANT**

**VERSUS**

**FRANCIS MBAYA MUKETHA.....1<sup>ST</sup> RESPONDENT**

**MARIA JOHN.....2<sup>ND</sup> RESPONDENT**

**FRIDAH MWENDWA.....3<sup>RD</sup> RESPONDENT**

**ELOSY GAICHUGI.....4<sup>TH</sup> RESPONDENT**

**SILAS KINYUA MUGAMBI.....5<sup>TH</sup> RESPONDENT**

**LAWRENCE KIRIMI MUGAMBI.....6<sup>TH</sup> RESPONDENT**

**SAMSON MURITHI MUIGAMBI.....7<sup>TH</sup>  
RESPONDENT**

**RULING**

1. By Chamber Summons under certificate of urgency dated 3/9/2024 pursuant to Section 47 of the Law of Succession Act, Rules 63 & 73 of the Probate & Administration Rules, Order 40 of the Civil Procedure Rules, the Applicant seeks:

1. *Spent*

2. *THAT preservative orders do issue restraining the Respondents either by themselves, their servants, or any other person acting from their authorization or control be restrained from dealing with estate by constructing permanent structures, selling the property, developing the said property, leasing out the said property to third parties or undertaking or continuing to carry out of any further development in the said property namely L.R ABOTHUGUCHI/KARIENE/4916, or otherwise contracting with third parties over land parcel number ABOTHUGUCHI/KARIENE/4916 pending the hearing and determination of this application.*

3. *THAT preservatory orders do issue restraining the Respondents either by themselves, their servants, or any other person acting from their authorization or control be restrained from dealing with estate by constructing permanent structures, selling the property, developing the said property, leasing out the said property to third parties or undertaking or continuing to carry out of any further development in the said property namely L.R ABOTHUGUCHI/KARIENE/4916, or otherwise contracting with third parties over land parcel number ABOTHUGUCHI/KARIENE/4916 pending the hearing and determination of this Appeal.*
  4. *THAT an order do issue to the Meru Land Registrar stopping any dealing with the register of all that parcel of land known as L.R ABOTHUGUCHI/KARIENE/4916 pending the hearing and determination of the Appeal.*
  5. *Costs of this application be in the Cause.*
2. The application is premised on the grounds on the face of it and supported by an affidavit sworn by the Applicant on even date. She avers that she was the petitioner in Meru Chief Magistrate's succession cause No. 312/2021 and the deceased herein was her father. Dissatisfied with the judgment of the court of 15/8/2024, she has appealed against it and she is now apprehensive that, in the intervening period, her brothers might dupe her elderly mother into transferring, alienating, leasing or subdividing her share. Her brothers have already fenced off the portion granted to her mother, in order to sell it, and unless the orders sought of preservation of **L.R ABOTHUGUCHI/KARIENE/4916 (henceforth called the suit property)** are issued, the appeal will be rendered nugatory.
  3. The Respondents opposed the application vide a replying affidavit sworn on 11/9/2024 by the 2<sup>nd</sup> Respondent. She avers that the application is bad in law as leave to join her, the 5<sup>th</sup> – 7<sup>th</sup> Respondents in these proceedings has not been sought. The deceased herein who was her husband, had prior to his death transferred to the 5<sup>th</sup> – 7<sup>th</sup> Respondents their respective shares of the estate and title deeds thereto issued. She was present when the deceased, during his lifetime transferred to the 1<sup>st</sup> Respondent his share of L.R No. ABOTHUGUCHI/KARIENE/3663. The suit property was shared between her and her 2 daughters and she is satisfied with that distribution. She lives harmoniously with her sons and the allegation that they want to dupe her in order to take her share is imaginary. She accuses the Applicant of trying to grab what

is not hers and failing to prove what portion of the suit property has been fenced off. In her view, the Applicant is keen on destabilizing the deceased family and the court should not aid her insatiable greed by granting the orders sought.

### **Submissions**

4. The Applicant did not file any submissions.
5. The Respondents cite ***Re Estate of Simon Kimendero (Deceased) [2020] eKLR and Millicent Mbatha Mulavu & another v Annah Ndunge Mulavu & 3 others (2018) eKLR***, where the court outlined the specific considerations for grant of a preservative and injunctive orders to preserve the estate of a deceased. They urge that the deceased had transferred some of his properties to the beneficiaries during his lifetime, and cite ***Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR***. They urge that there is a misjoinder of parties making the suit incurably defective, and cite ***Kingori v Chege & 3 Others [2002] 2 KLR 243, Civicon Limited v Kivuwatt Limited and 2 others (2015) eKLR and Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya (2014) eKLR***. They pray for the dismissal of the application with costs, as they have demonstrated that the Applicant is a vexatious litigant who does not deserve the orders sought.

### **Analysis and Determination**

6. Before delving into the merits of the case, the court wishes to preliminarily address the issue whether the alleged misjoinder of some of the Respondents has rendered the suit incurably defective.
7. Order 1 Rule 9 of the Civil Procedure Rules is expressly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit, as follows:
 

***“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”***
8. Suffice to state, Article 159 (2) (d) of the Constitution enjoins courts to administer justice without undue regard to procedural technicalities.
9. On the merits, the issue for determination is whether the Applicant has made out a case for grant of preservative orders.

**Determination**

10. The conditions to be fulfilled before a preservative order can be issued are threefold that –

*a) the suit property is estate property;*

*b) the applicant has an arguable case; and*

*c) the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant.*

I respectfully agree with the court in *re Estate of Simon Kimendero (Deceased)* [2020] eKLR).

11. The Applicant contends that unless the orders sought are granted, her brothers might trick her elderly mother, the 2<sup>nd</sup> Respondent herein to transfer, alienate, lease or subdivide her share, thus rendering the appeal nugatory.

12. In rejoinder, the 2<sup>nd</sup> Respondent has categorically refuted the allegations that her sons might dupe her into executing any documents in relation to the suit property. She has indeed affirmed that she lives harmoniously with her sons and pointed an accusing finger at the Applicant. The Court is not persuaded of the applicant's *locus standi* to litigate purportedly for the protection of the interest of her mother against the express wishes of the mother, not being her legal guardian or guardian *ad litem*.

13. The court finds that the Applicant has failed to prove that she has an arguable case which will be rendered nugatory if the preservative orders are denied. Invariably, it has not been shown that the suit property, which is undoubtedly estate property is at imminent risk of being wasted, alienated or sold by the Respondents to the detriment of the Applicant.

**ORDERS**

14. Accordingly, for the reasons set out above, the Court finds that application dated 3/9/2024 is without merit and it is dismissed.

15. There shall be no order as to costs.

*Order accordingly.*

**DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Mr. Karanja for the Applicant.

Mr. Munene Kirimi for the Respondent.