



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Charles Nyakiti Nyabanga (Deceased) (Probate & Administration  
627 of 2014) [2023] KEHC 2328 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2328 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
PROBATE & ADMINISTRATION 627 OF 2014**

**KW KIARIE, J**

**MARCH 21, 2023**

**IN THE MATTER OF THE ESTATE OF CHARLES NYAKITI NYABANGA DECEASED**

**BETWEEN**

**DANIEL GOR OLOO ..... APPLICANT**

**AND**

**RICHARD OCHIENG ONDIEK ..... RESPONDENT**

**RULING**

1. There are two applications in this matter. On 29<sup>th</sup> November 2022 directions were taken to dispose both by way of written submissions. The first application is dated 2<sup>nd</sup> August 2022. Daniel Gor Oloo moved the court by way of Notice of Motion sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 45 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* & Article 40 of *the Constitution* of Kenya. The applicant is seeking the following orders:
  - a. That this application be certified urgent and be heard ex parte in the first instance.
  - b. That pending the hearing and determination of this application, this honorable court be pleased to stay the execution of orders issued by this honorable court on 26<sup>th</sup> day of July 2022.
  - c. Pending the hearing and determination of this application, this honorable court be pleased to review and/or set aside the orders issued on 26<sup>th</sup> day of July 2022
  - d. Costs of this application be provided for.
2. The applicant stated his grounds as follows:
  - a. That I have been barred from accessing my homestead despite placing a caveat dated 19/2/2020 in Succession Cause No.627 of 2014 (in the matter of the estate of Nyakiti Nyabanga, also



known as William Nyakiti Nyabanga (deceased)) in which nothing was to be done in the above named estate without notice to me.

- b. That if this application is granted no party to the suit would be prejudiced to suffer injustice.
3. The application was opposed on the following grounds:
- a. That the applicant unceasing interference with the succession process, for instance forging the signature of beneficiaries in the consent to confirmation of Grant and consent to the mode of distribution of the Estate dated 18<sup>th</sup> September, 2017 filed in this honorable court, he further prepared an affidavit in support of summons purported to have been signed by our disabled and ailing brother Charles Otieno Nyakiti, annexed and marked as “RO-1” and “RO-2” are copies of the said documents and photographs of our ailing brother respectively.
  - b. That the applicant had a well-crafted plan to defraud the family of the property by transferring the same to his name but the same was thwarted by our quick action to file an objection before the grant was confirmed.
  - c. That the applicant knowing the condition of our ailing brother and with the sole purpose of defrauding the Estate processed all the required documents for filing succession cause in his name ((Charles Otieno Nyabanga).
  - d. That the applicant filed at Oyugis Senior Resident Magistrates court a Succession Cause No.107/2011 without the knowledge of the beneficiaries making him the administrator of the property under gazette Notice No.13013 vol. CXIII NO.102 published on the 14<sup>th</sup> of October, 2011 as shown in annexure marked “RO-3”.
4. The second application is dated 25<sup>th</sup> November 2022 and Richard Ochieng Ondiek is the applicant. It was brought by way of Notice of Motion. It was brought under sections 3 and 3A of the [Civil Procedure Act](#) & Order 51 Rule 1 of the Civil Procedure Rules. He is seeking the following orders:
- a. That this application be certified as urgent and be heard ex parte in the 1<sup>st</sup> instance in respect to prayers below.
  - b. That the respondent be punished for contempt by committal to civil jail for a period not exceeding six (6) months for blatant contempt of the court orders dated 14<sup>th</sup> of January 2022.
  - c. That this honourable court do order that the contemnor herein to be permanently barred from setting foot in the said property during and after the completion of the succession process.
  - d. That this honourable court put tough measures should contemnor persist the disobedient of court order.
  - e. That the costs of this application be provided for.
5. The application is premised on the following grounds:
- a. That this honorable court issued an order on the 25<sup>th</sup> day of July 2022 against the respondent which provided that:
    - i. That the respondent should not enter L.R. Karachuonyo/Kanyaluo/Kamenya/107.
    - ii. That the respondent deliberately skipped the court despite being served to attend court on the 25<sup>th</sup> of July 2022 as shown in the annexures marked “ORO 1” the call logs showing several phone calls attempts he made to the court process server who served him in the morning of the date the matter was heard.



- iii. That the respondent disobeyed this honorable court order and continued staying in the parcel of land L.R. Karachuonyo/Kanyaluo/Kamenya/107 even after being served with the order restricting him from entering the land, as shown in the annexures marked “ORO 2” auto dated photos taken on different dates from the day he received the ORDER to the last ones taken on the 12<sup>th</sup> November 2022 where he was taken walking in the compound with the gates open and his vehicle make Toyota double cabin pickup registration number KCS 041Q parked in front of the compound which is illegal subdivision 1788 of the many illegal subdivisions from Karachuonyo/Kanyaluo/Kamenya/107.
  - iv. That the respondent filed an application under certificate lying to the court that court that he’s locked out of the home while in contempt already since he has never missed entering the place at will undeterred together with his family members.
- b. That the respondent had personal knowledge of the order dated 25<sup>th</sup> July 2022.
  - c. That the Respondent has violated the said court orders by continuing to stay at the deceased land despite the order issued by this honorable court on the 25<sup>th</sup> July 2022.
  - d. That the respondent has therefore blatantly violated and disobeyed a lawful court order of which he had fully knowledge.
  - e. That the respondent persists in the disobedience of the order of this honorable court and unless compelled through contempt proceedings, will continue in their disobedience.
  - f. That court orders are issued to be complied with and a party who disobeys such an order does so at his own risk. Disobedience of valid court order is a gross violation of *the constitution* and an erosion of Judicial Authority. The court cannot pay a blind attention on such impunity and indifference.
6. Equally this application was opposed and the respondent relied on the following grounds:
- a. That the application is made in bad faith.
  - b. That the applicant has approached the court with unclean hands.
7. Rule 63 of the Probate and Administration Rules provides:
- (1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
  - (2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.
8. In the case of *Priscilla Vugutsa Kamaliki vs. Mary Runyanyi Ochieng* [2016] eKLR Judge Nekoye Sitati said the following:
- The first issue for this Court to determine is whether the instant application is properly before the Court. The application is expressed to be brought under Section 1A, 1B, 3, 3A and 63 (e) of the *Civil*



Procedure Act Order 40 Rule 4 and Order 51 Rule 1 of the Civil Procedure Rules. It is worth noting that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. A look at Rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought are not some of the provisions imported into the Law of Succession Act. What this means therefore is that the instant application is incompetent for want of form and is therefore fit for striking out.

9. In the instant case, both applications are premised under legal provisions which have not been imported into the Law of Succession Act. This therefore means that both applications cannot stand. I accordingly strike out both applications. Each party to bear own costs.
10. I have noted that the administrators were expected to render accounts on 6<sup>th</sup> December 2021. This has not been done. I am directing that they do so within 30 days of this ruling and failure to do so, the grant shall be automatically be revoked.
11. I am further directing that no other application shall be filed until the accounts have been rendered except with the leave of the court.

**DELIVERED AND SIGNED AT HOMA BAY THIS 21<sup>ST</sup> DAY OF MARCH, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

