



In re Estate of the Late Mwirichia Nkungi (Deceased) (Miscellaneous Succession Cause E012 of 2022) [2023] KEHC 2605 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE E012 OF 2022**

**LW GITARI, J
MARCH 16, 2023**

BETWEEN

**ALBERT KATHUNI 1ST INTERESTED PARTY
JAMES MUGAMBI KATHUNI 2ND INTERESTED PARTY
MARGARET KAGENI NYAGA 3RD INTERESTED PARTY
CATHERINE MARUTA 4TH INTERESTED PARTY
JOYCE CIAMBUBA KATHUNI 5TH INTERESTED PARTY**

AND

**GACELINA IGOKI MWIRICHIA 1ST RESPONDENT
JULIUS MUTEKI RUGWETO 2ND RESPONDENT**

RULING

1. This matter relates to the estate of Mwirichia Nkungi (deceased) who died intestate on May 5, 1993. He was survived by the following beneficiaries as per the chief's letter dated 7/6/2016:
 1. Gacelina Igoki Mwirichia - Wife
 2. Julius Mutegi Regweto - son
 3. Agnes Muthoni Ileri - Daughter
 4. Rosemary Kainyu Murage - Daughter
 5. Edward Kirimi (Deceased) - Daughter
2. The 1st respondent herein petitioned for letters of administration intestate for the estate of Mwirichia Nkungi (deceased) in Chuka CMC Succession Cause No 252 of 2016 in her capacity as the wife of the



said deceased. The grant of letters of administration intestate was thereafter issued to the 1st respondent on December 11, 2017 and subsequently, she applied for confirmation of the grant vide a summons for confirmation of grant dated June 18, 2018. She indicated that the estate of the deceased comprised of land parcel No Karingani/Gitarene/202 (the “suit land”). The grant was confirmed on August 22, 2018 distributing the whole estate of the deceased to the 2nd respondent.

3. What is for determination in this ruling is the summons dated March 29, 2022 filed by the five applicants. The application is seeking inhibition orders to be issued against the suit land. In his affidavits in support of the summons for the revocation of grant, the 1st applicant deposed that the applicants are siblings of the deceased in this cause. That the 2nd respondent is the deceased’s foster child and he does not reside or make use of the suit land. Further, that the applicants have been residing and making use of the suit land even during the lifetime of the deceased. That they have made extensive developments on the suit land. According to the applicants, the 1st respondent commenced and prosecuted Chuka CMC Succession Cause No 252 of 2016 secretly and stealthily. They state that they are apprehensive that the 2nd respondent might dispose the suit land leaving them landless and destitute. The applicants contends that they are siblings of the deceased and consequently the arising trust thereof can be determined under P&A Cause without invoking ELC Jurisdiction. Their claim is that the deceased held the land in trust for his benefit and that of his siblings.
4. The respondents opposed the application vide the replying affidavit sworn by the 1st respondent on April 26, 2022. She deposed that the suit land does not form part of ancestral land as the same was allegedly acquired by the deceased from one Paustino Kigwa (also deceased). Further, that the deceased gave her the title deed of the suit land before his demise and told her that the same should be inherited by the deceased’s children in the event of his death. According to the 1st respondent, the applicants knew of the deceased’s wishes and are now in cahoots to defraud the estate.
5. The application was canvassed by way of written submissions. It was the applicants’ submission that the suit land was purchased by their common father, one Stanley Nkungi, from one Paustino Kigwa. They stated that the suit land was family land and that the name of the deceased herein was used to register the suit land because he was the first born son in the family. That by the time the deceased died, all the applicants were settled and entrenched on the suit land and that there is no time that the deceased herein required of the applicants to vacate the suit land. Further, that the deceased and the applicants all lived, occupied, and made use of the suit land in harmony. In addition, the applicants contend that their father and the mother, Stanley Nkungi and Beatrice Cianjoka respectively, who died on or around 1990 and 2005 respectively, both buried on the suit land. The applicants thus submitted that the inhibition orders sought herein should be issued to preserve and protect the suit land from any possible alienation.
6. In response, the respondents filed their submissions jointly. It was their submission that the applicants have not shown that they have good grounds to warrant the issuance of the orders sought herein. That copy of the green card produced does not substantiate the allegations by the applicants that the deceased was holding the suit land in trust for their family. According to them, the issue of the respondents living on the suit land and the issue of their parents being buried on the land are neither here or there as the same do not equate to ownership of the land. The respondents thus urged this court to dismiss the application.
7. I have considered the application, the affidavits in support and opposition of the application as well as the respective submissions by the parties. The main issue for determination is whether the applicants have laid a basis for the issuance by this Court of the inhibition orders sought.



8. Section 68(1) of the [Land Registration Act](#) provides that:

“(1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.”

9. The above provision gives this Court discretion to issue orders restraining dealings on land pending further orders by the court. The Section is meant to preserve the property from acts that would otherwise render a court order incapable of being executed and or to give an opportunity to hear and decide the matter. It is therefore necessary to preserve the status quo pending the hearing and determination of the issue before court.

10. In [Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation Limited \(Kenya\) & 6 others](#) [2015] eKLR F Gikonyo Judge held the view that orders of inhibition envisaged under section 68 of the Registration of [Land Act](#) are in the nature of prohibitory injunction and act to preserve the suit property just as an interlocutory injunction would do. He stated;

“Of great significance on the request for an order of inhibition is Section 68(1) of the [Land Registration Act](#) which reads as follows; The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge. The case of Japhet Kaimenyi M’ndatho v M’ndatho M’mbwiria [2012] eKLR dealt with the threshold for granting orders of inhibition in a pointed manner as follows;

I am content to refer to the decision by Okwengu, J (as she then was) in the case of Philip Mwangi Githinji v Grace Wakarima Githinji [2004] eKLR when she rendered herself inter alia; “An order of inhibition issued under section 128 of the Registered [Land Act](#) is akin to an order of prohibitory injunction for it restricts the registered owner and any other person from having their transaction regarding the land in question registered against the title. Before the court can issue such an order it must be satisfied that the person moving the court for such orders has good grounds for requesting such an inhibition, such grounds would normally be in the form of a sustainable claim over the suit land.”

11. The applicants are seeking injunctive orders as the orders envisaged under Section 68(1) (supra) are in essence prohibitory injunctions to restrict registration of any dealings on the title by the registered owner or any other person pending the occurrence of a particular event. The law on injunctions is well settled. Before the court can issue such an order it must be satisfied that the applicant has good grounds for seeking such an order.

Okwengu J (as she then was) stated in the case of Philip Mwangi (supra). This application is brought under Section 47 of the [Law of Succession Act](#). This section gives the court jurisdiction to issue such orders as may be necessary to meet the ends of justice. It follows that the substantive prayer is made under Section 68 of the [Land registration Act](#). The applicants seek to restrict dealing with the title and or to prevent the registration of any transactions or dealings in respect of a given parcel of land. The applicant has to satisfy this court that-

1. The suit property is at the risk of being disposed of, or alienated or transferred to his detriment unless, the preservatory orders of inhibition are issued.
2. That failure to grant the orders would render the applicant’s suit nugatory.



3. That the applicant has an arguable case. See *Joseph Mumita Kipees (suing as legal representative of the estate of Moses Kisento) v Nteri Merik Obo Kiaika & 2 Others*, [2014] eKLR
12. I am persuaded by the above decisions. The guiding principle is that for a court to issue inhibition orders it must be satisfied that the applicant has good ground to warrant the issuance of such orders. This is more so because like in other injunctive orders they preserve the property in dispute pending the determination of the issue in the suit.
13. I will now consider the grounds which applicants relies on in this application. The applicant contends that he has developed it extensively. He further deposes that he is apprehensive that the respondent who is a foster child of the deceased and who does not live on the land may most likely dispose the suit land and leave him destitute. This is based on further averment that of late he has seen persons curiously inspecting the suit land and he believes that they are potential buyers. He further states that the respondent is living in such luxury and may most likely have received a down payment.
14. Although these are mere allegations as the applicant has not annexed any tangible evidence to prove that the respondent is likely to dispose off the land, the respondents have not denied these allegations. The applicant has therefore demonstrated on a balance of probabilities that the land is at the risk of being disposed off. This also goes to address the second ground as failure to grant the order would render the applicant's suit nugatory.
15. Finally the court has to consider whether the applicant has an arguable case. I have considered the grounds relied on in the summons for revocation of grant. I find that the applicant has an arguable case. It is trite that an arguable case does not mean that it will succeed. It means that the applicant has demonstrated that he has a case that should be heard and determined on merits. The applicant has stated that he lives on the suit land and if it is disposed off before the determination of the summons he is likely to suffer prejudice and injustice. On the other hand the respondents are not likely to be prejudiced in any way as they are not in occupation of the suit land. Refusal to grant an order of inhibition at this stage will put the suit property at the risk of being alienated or being disposed off by the 2nd respondent who is the registered owner. If this happens, the suit would be rendered nugatory. I find that the applicant has demonstrated that he has good grounds for seeking the inhibitory orders. In the circumstances I am satisfied that the application has merits. I order as follows:
 1. The application is allowed as prayed.
 2. I order that an inhibition order do issue on Land Parcel No LR. Karingani/Gitareni/202 inhibiting any sub-division, sale, transfer, charge or mortgage pending the hearing and determination of the summons for revocation/annulment of the grant.
 3. Costs shall abide the outcome of the summons.

Dated, signed and delivered at Chuka this 16th day of March 2023.

L.W. GITARI

JUDGE

16/3/2023

The ruling has been read out in open court.

L.W. GITARI

JUDGE

16/3/2023

