



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. E013 OF 2020**

**PATRICK KAGAI KIARIE.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**GEORGE MIGUE KIARIE.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**AGNES WANJIRU KIARIE (through her court appointed guardians)**

**MONICAH WANJA KIGURU & PETER KAMAU WANJIRU.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**SALIM ABDU MWANIKI KIARIE.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**MICHAEL KAHURANI KIARIE.....DEFENDANT/RESPONDENT**

**AND**

**DAVID KIARIE KAHURANI .....NECESSARY PARTY**

**RULING**

1. The notice of motion dated 19<sup>th</sup> March 2021 by the plaintiff is brought under sections 3A and 63e of the Civil Procedure Act Cap 21 and Order 40 rule 1,2 and 4 of the Civil Procedure Rules 2010. The application seeks the following orders:

**i. ,(ii), & (iii) Spent.**

**iv)** The defendant/respondent be ordered to produce to court all documents including title deeds belonging to the necessary party herein.

**v)** Pending hearing of the main suit herein an interlocutory injunction be issued restraining the defendant/respondent from exercising the authority granted by the General power of attorney issued by the necessary party herein.

**vi)** That an order of inhibition be issued restraining the defendant/respondent from using the said General power of attorney to appreciate or dispose any property belonging to the necessary party herein.

**vii)** Costs of this application be granted to the plaintiffs/applicants.

2. The application is premised on the following grounds:

a. That the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs/applicants are the sons of the Necessary party herein.

b. That the defendant/respondent is the brother to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs/applicants and a son to the Necessary party.

c. That the 3<sup>rd</sup> plaintiffs/applicants (next friends) are the court appointed Joint Mangers and Guardians of Agnes Wanjiru Kiarie who

is their mother (a daughter to David Kiarie Kahurani the necessary party herein.

d. That the necessary party David Kahurani is blessed with nine issues:-

1. Francis Kibue Kiarie
2. Joseph Karungu Kiarie
3. Michael Kahurani Kiarie
4. Agnes Wanjiru Kiarie (Mentally impaired)
5. Salim Abdul Mwaniki Kiarie
6. Leah Wairimu Kiarie
7. Lucy Njeri Kiarie
8. Patrick Kagai Kiarie
9. George Migue Kiarie

e. That the 1<sup>st</sup> plaintiff/applicant Patrick Kagai Kiarie was provided with a General Power of Attorney issued by the necessary party herein to the defendant/respondent herein.

f. That the plaintiffs/applicants are not convinced that the necessary party herein was aware of the nature and the legal consequences of the document he was signing or was coerced into signing the said General Power of Attorney.

g. That the averment contained in paragraph seven herein is informed by the fact that the necessary party herein is of an advanced age of more than eighty (80) years old.

h. That the plaintiffs/applicants are not convinced that the necessary party herein who is their father could have signed a document with such serious ramifications like a General Power of Attorney without consulting or informing his immediate beneficiaries.

i. That the necessary party herein has been directly and indirectly supporting Agnes Wanjiru Kiarie and Leah Wairimu Kiarie who are both mentally impaired.

j. That the aforementioned daughters of the necessary party herein live on a property registered as Dagorretti/Waithaka /T152 together with George Migue Kiarie the 2<sup>nd</sup> plaintiff/applicant herein and the necessary party herein.

k. That further to paragraph 11 herein instant the 4<sup>th</sup> plaintiff/applicant herein Salim Abdu Mwaniki Kiarie lives on the property registered as Dagorretti/Ruithimitu/342

l. That both properties mentioned in paragraph 11 and 12 herein instant are registered in the name of the necessary party herein David Kiarie Kahurani.

m. That further to the paragraph 11 and 12 herein above the necessary party is the registered owner of the following properties:-

- i. DAGORETTI/WAITHAKA/T152
- ii. DAGORETTI/RUITHIMITY/1152
- iii. KAKUZI/KIRIMI/BLOCK/11118
- iv. KWALE/MABOKONI/1820
- v. DAGORETTI/RUITHIMITU/1342
- vi. KAJIADO/NTASHART/6283
- vii. KAJIADO/NTASHART/6282
- viii. KAJIADO/NTASHART/6284
- ix. KAJIADO/NTASHART/6867

n. That the plaintiff/applicants are apprehensive that if the defendant/respondent is not restrained from utilizing the General Power of Attorney herein he is likely to transfer the aforementioned properties to himself or a third party to the detriment of the other beneficiaries of the interested party herein

o. That it would be in the interest of justice for this application to be allowed.

3. The application is supported by four (4) affidavits sworn by all the plaintiff/applicants dated 19<sup>th</sup> March 2021. The defendant filed a replying affidavit sworn on 6<sup>th</sup> August 2020. The Necessary party who is the father of the plaintiff/applicants and defendant/respondent filed a replying affidavit sworn on 6<sup>th</sup> August 2020. He swore a further supporting affidavit on 10<sup>th</sup> August 2020. He again swore a further affidavit on 12<sup>th</sup> August 2020.

4. A preliminary objection (P.O) was raised by the plaintiffs and the same was heard by Justice Serگون. The honourable Judge vide a Ruling dated 23<sup>rd</sup> September 2020 found the further affidavit sworn on 12<sup>th</sup> August 2020 to be improperly before the court and had it expunged from the record. He further found the further supporting affidavit sworn on 10<sup>th</sup> August 2020 to be in conflict with the replying affidavit. He said he restrained himself from striking it out and found it of necessity to have the issue resolved by the deponent being cross examined.

5. After the said ruling the parties next appeared before me on 10<sup>th</sup> June 2021. None of the counsel appearing mentioned anything about the need to cross examine the Necessary party as per Judge Serگون's direction. All they said was that both of them had filed submissions to the application dated 29<sup>th</sup> June 2020 and that Justice Serگون had dealt with the P.O.

6. As I got to write the Ruling I noticed the contradiction in the affidavits sworn by the Necessary party on 6<sup>th</sup> and 10<sup>th</sup> August 2020. I also read Justice Serگون's Ruling of 23<sup>rd</sup> September 2020 and noted the failure to have the Necessary party cross examined. My observation is that the application is not ready for Ruling until the Necessary party is cross examined as ordered by the court. Its only through the cross examination that the court will be able to resolve the contradiction in the two affidavits sworn by him.

7. I therefore set aside the order of 21<sup>st</sup> July 2021 setting the matter for Ruling on 28<sup>th</sup> October 2021. I direct that the parties take a date for hearing when the Necessary party will undergo cross examination. It is only after that is done that a Ruling date can be taken. The matter to be fixed for hearing before any Judge in the Division as I am proceeding on transfer. Orders accordingly

**DELIVERED ONLINE, SIGNED AND DATED THIS 8<sup>TH</sup> DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. ONG'UDI**

**JUDGE**