

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2359 OF 2005

JOHN MBUGUA KIMARI.....1ST APPLICANT

NJUGUNA KIMARI.....2ND APPLICANT

V E R S U S

JAMES NJOROGE KIMARI.....RESPONDENT

R U L I N G

1. Before court is an application dated 30th May, 2018 that seeks for orders that; James Njoroge Kimari the respondent and one Joseph Gathii Kimari by themselves, their agents, servants, representatives; employees or associates do demolish illegal structures constructed and/or erected on the way-leave on plot **No. Dagoretti/Kangemi/480**; that the O.C.S. Kabete Police Station do oversee the demolition; and the said respondents be prohibited and/or restrained from undertaking any further construction on the way-leave, or in any way alienating, intermeddling and or dealing with the estate.

2. The application is predicated on the grounds that the applicants are administrators of the estate which is yet to be distributed; that the respondents have illegally put structures on the road and constructed a toilet that has interfered with the sewer system; the said construction has blocked the road leading to the applicants' homes, and further no approvals nor architectural plans of the said structures were approved by relevant authorities. The supporting affidavit of the applicants reiterates the grounds above in support of the application.

3. The 1st Respondent James Njoroge Kimari denied the allegations by way of a replying affidavit dated 25th June, 2018 wherein he deposed that the construction subject matter commenced way back before the death of his mother, further that construction work was halted altogether awaiting the outcome of the case.

4. The 2nd respondent did not file a response to the application despite adequate service and an adjournment to allow him respond.

5. Having considered the application, the supporting affidavit, the response by the 1st respondent and submissions made, the issues are; whether to restrain and/or prohibit the respondents from continuing with further construction on **No. Dagoretti/Kangemi/480**; and whether to order the respondents to demolish the alleged illegal structures.

6. The substance suit is part heard and one of the issues in the protest by Joseph Gathii Kimari named in this application is in regard to the way leave and proposed subdivision of the property subject matter.

7. Considering the issues raised in the protest and the averments of the 1st respondent which was not responded to by the applicant I decline to grant prayer 2 of the application for now, as to do so will be to pre-empt the outcome of the protest.

8. I am inclined to grant Prayer 4 pending final determination of the protest in order to preserve the estate.

Costs in the cause.

SIGNED DATED and DELIVERED in open court this 20th day of September, 2018.

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ALI-ARONI

JUDGE