



In re Estate of Dominic Kihuri Kibira alias Domeniko Kihuri s/o Kibira alias Kihuri s/o Kibira (Deceased) (Succession Cause 126 of 2002) [2025] KEHC 15062 (KLR) (22 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 126 OF 2002
DKN MAGARE, J
OCTOBER 22, 2025
IN THE MATTER OF THE ESTATE OF DOMINIC KIHURI
KIBIRA ALIAS DOMENIKO KIHURI S/O KIBIRA ALIAS KIHURI
S/O KIBIRA (DECEASED)**

BETWEEN

**JOHN GITONGA KIHURI (DCD) REPRESENTED BY LOISE WAMAHIGA
GITONGA (WIDOW) 1ST APPLICANT
GEOFFREY MUGO KIHURI 2ND APPLICANT
JAMES MUTAHI KIHURI (DCD) REPRESENTED BY MARGARET NJERI
WANYIRI 3RD APPLICANT**

AND

**STEPHEN KIBIRA KIHURI KAGWANJA 1ST RESPONDENT
THERESA NJERI KIBIRA WIDOW TO STEPHEN KIBIRA KIHURI
(DCD) 2ND RESPONDENT
STEPHEN KIBIRA WAMBUI (NEPHEW) 3RD RESPONDENT**

RULING

1. This is an irregular, bizarre and unconventional manner of conducting proceedings. It is indeed, stranger than fiction. The conduct of the parties appears not only careless but also suggestive of attempts at procedural manipulation, bordering on subterfuge, and intended to undermine the course of justice. Such conduct is regrettable and undermines the integrity of the judicial process. The court must guard against turning its process into an arena of procedural gamesmanship. It is anathema to good order and symptomatic of subterfuge and skullduggery that abound in our courts, meant to obfuscate all issues in controversy with a view to mire the waters and delay dispensation of justice.



2. The applicants filed an application dated 18.05.2023. The respondents filed grounds of opposition thereto dated 31.05.2023. Parties agreed to file submissions on the merit of the grounds of opposition. In the said grounds, they basically argue the merit of the application dated 18.05.2023. What is strange is that parties had the audacity to file acres of pages on the grounds of opposition.
3. It is certainly not edifying for counsel to found a course of action on grounds of opposition or a preliminary objection, independent of the application filed by the parties. Such a procedure is without argument based on infinitas nullitatis. Such proceedings are ipso facto a nullity and cannot be salvaged. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) regarding a nullity gave the following remarks:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
4. The basis of grounds of opposition is in the realm of civil procedure which provide for applications to be responded to through three methods. Order 51, Rule 14 of the Civil Procedure Rules provides for the procedure of filing grounds of opposition to application in High Court, as follows:
 - (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
 - (a) a notice of preliminary objection; and/or;
 - (b) replying affidavit; and/or
 - (c) a statement of grounds of opposition;
5. There is no provision of law where the court can deal with only grounds and leave the application unattended. Such a procedure violates the very tenets of natural justice, as a party served is entitled to be heard, otherwise the principle of audi alterum partem will be of no or little use. A party raising grounds of opposition has no burden of proof. Section 107-109 of the *Evidence Act* provides as follows:

107.

 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
6. The grounds of opposition can only be considered when the application dated 18.05.2023 is being heard. If the court is precluded from decision, it decides the application not the grounds. There is no procedure for determining grounds of opposition. I therefore decline the invitation to hear arguments



on grounds of opposition separately. The court shall hear the application together with all responses. There are also other applications on record. The court shall hear all of them and close the file.

7. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
8. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

9. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.
10. In essence, there is nothing left to determine in this matter. The parties abandoned the substantive issues in controversy and instead engaged in sideshows. Consequently, each party shall bear its own costs. By their conduct, they have occasioned unnecessary adjournments, and each party shall bear Kshs. 1,000/= as court adjournment fees payable before the next hearing date.
11. The court shall hereinafter issue directions on the hearing of the remaining applications on record. It is my sincere hope that none of the parties will file any other application before determining the ones filed.



Determination

12. The court makes the following orders:

- a. I decline the invitation to hear arguments on grounds of opposition separately.
- b. The court shall hear the application together with all responses. There are also other applications on record.
- c. The Court shall hereinafter issue directions on the hearing of the remaining applications on record.
- d. Each party to bear Ksh. 1,000/= as court adjournment fees.
- e. Each party to bear their own costs.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF OCTOBER, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Maina for the Applicants

Muchangi for the Respondents

Court Assistant - Michael

M. D. KIZITO, J.

