



**Nyamai v Nyamai (Environment & Land Miscellaneous Case
E002 of 2023) [2024] KEELC 1641 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1641 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND MISCELLANEOUS CASE E002 OF 2023**

NA MATHEKA, J

MARCH 20, 2024

BETWEEN

DANIEL KATUMO NYAMAI PLAINTIFF

AND

ANNA NDINDA NYAMAI DEFENDANT

RULING

1. The application is dated 4th August 2023 and is brought under Sections 1A & 1B, 3, 3A and 63 of the [Civil Procedure Act](#) Order 40 rule 1 and 2, of the [Civil Procedure Rules](#), Cap 21 laws of Kenya seeking the following orders;
 - a. That this Application be certified as urgent and its service be dispensed within the instance
 - b. That this Honourable Court be pleased to issue a permanent Injunction/evicting restraining the Defendant/Respondent by herself, agents, servants, workmen and any other person whomsoever and whatsoever from entering, living, alienating, selling and or interfering in any way with suit premises known as Plot No. 2639NI/MN, Ham Estate Phase II, Changamwe pending the inter-parties hearing and determination of this Application and or suit.
 - c. That the court does make/issue orders as it deems expedient as the contingent and exigencies may warrant to meet the ends of justice.
 - d. That costs of the application be provided for.
2. It is based on grounds that the Plaintiff/'s/Applicant's father Onesmus Nyamai Kyengo died on 7th November, 2008 and left a will dated 5th May 2004 where he enlisted all the beneficiaries and Executor being the Plaintiff herein. That in the 2209 the Plaintiff/Applicant filed Succession Cause No. 107 of 2009 the Administrator of the Estate of one Onesmus Nyamai Kyengo-deceased enable him to administer the said Estate accordingly. . That the Estate consisted Properties Plot No. 2639NI/



MN, Hamisi Estate Changamwe, among others where the Defendant resides to date. That the Defendant/Respondent and her a son Japheth Mwendwa Nyamai deceased were not included in the will or at all. That the Plaintiff/Applicant has been issued with a Certificate of confirmation of grant. He is desirous to administer the Estate accordingly. That the Plaintiff/Applicant states that the Defendant/Respondent is residing Plot No. 2639/VI/MN, Hamisi Estate Changamwe illegally and or intermeddling; the deceased's property That Defendant/Respondent to be evicted from the suit premises forthwith for is intermeddling and or wasting away the Estate. while she is not a beneficiary. That the Defendant/Respondent has tried in many occasions to object the issuance of letters to the Plaintiff/Applicant before she is included In the Estate heir, which has not yielded any fruit. That the High Court in its wise decision through a Ruling delivered on 14th June 2023 reached a conclusion that she should not be included as heirs/beneficiaries of the Estate. That it is fair just and equitable in the circumstances of this case the Defendant/Respondents be evicted from the suit premises to pave way for the beneficiaries to take possession.

3. The Respondent stated that she is the widow of Onesmus Nyamai Kyengo (deceased) and the Applicant is my step son. (Annexed and marked ANNI and ANN2 are photographs of the family. That her late husband Onesmus Nyamai Kyengo before his death did not write a will dated 5th May, 2004 as alleged by the applicant. That the alleged will dated 5th May, 2004 is under investigation and is a fraud. That once the DCI are through with investigation the certificate of confirmation and the grant will be null and void and the applicant will go to jail for forgery. That she is living in her matrimonial house on Plot No. 2639/VI/MN Hamisi Estate Changamwe. She has lived in the said house since 1960's with her late husband who is the registered owner. That she cannot be evicted from the matrimonial house because of a grant issued through a fraudulent will. That the court not to issue orders of eviction without full hearing of the suit and the final determination in regard to revocation of the grant.
4. This court has considered the application and the submissions therein. The Applicant stated in his submissions that the respondent has refused to vacate and hand over vacant possession of the suit property as she is not the beneficiary of the deceased estate hence he wants her evicted by this court. He has also filed a plaint in the Chief Magistrate's court seeking similar orders. Courts have time and again taken the position that substantive orders cannot be issued in Miscellaneous Applications. This is the position that was adopted in *Witmore Investment Limited v County Government of Kirinyaga & 3 Others* (2016) eKLR where the court held that;

“So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”

5. Similarly in *Nairobi West Hospital Limited v Joseph Kariha & Another* (2018)eKLR it was held that;

“.....In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the *Civil Procedure Rules* will reveal that suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral sclorsis and still admitted in the Intensive Care Unit of the applicant's hospital is strenuously opposed....Consequently, the preliminary objection is upheld and this suit is ordered struck out.”



6. I concur with the submissions by the respondent that the matter would require full hearing before such substantive orders can be given. For the foregoing reasons, I find this application lacks merit and I dismiss it with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF MARCH 2024.

N.A. MATHEKA

JUDGE

