



**Kimani & 2 others (Suing as the legal representatives and beneficiaries of the Estate of the late Paul Kimani Muna) v Njeri & 3 others (Environment and Land Judicial Review Case E002 of 2023) [2024] KEELC 5040 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5040 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2023**

**LN GACHERU, J**

**JUNE 27, 2024**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS  
AND IN THE MATTER OF THE LAND REGISTRATION ACT NO. 6 OF 2012  
AND IN THE MATTER OF THE LAND ACT NO. 3 OF 2012**

**BETWEEN**

**CHARLES MUNA KIMANI, NANCY NJERI AND MORINE WAKESHO  
(Suing as the legal representatives and beneficiaries of the  
ESTATE OF THE LATE PAUL KIMANI MUNA) ..... APPLICANT**

**AND**

**NANCY NJERI ..... RESPONDENT**

**AND**

**MORINE WAKESHO ..... 1<sup>ST</sup> DEFENDANT**

**BRIAN MUNA ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR MURANG'A COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Pursuant to leave to file for Judicial Review Orders granted on 26<sup>th</sup> September 2023, the Applicant herein Charles Muna Kimani, filed this Judicial Review Application vide a Notice of Motion Application dated 17<sup>th</sup> October, 2023, anchored on Sections 8 and 9 of the Law Reform Act and Order 53, Rules 3 and 4 of the Civil Procedure Rules, and sought for the following Orders:



- a. An order of prohibition, to bring to this Honourable Court to prohibit the Respondents, by themselves, their servants and/or agents from expunging, dealing and/or interfering with the land title number MURANG'A MUNICIPALITY BLOCK 11/171, MURANG'A MUNICIPALITY BLOCK 3/96 and LOC.19/GACHARAGEINI/571.
  - b. AN ORDER OF MANDAMUS to compel the 4<sup>th</sup> Respondent to produce title documents to the three (3) subject properties and to issue in the Register of Lands entries relating to the ownership of land known as MURANG'A MUNICIPALITY BLOCK 11/171, MURANG'A MUNICIPALITY BLOCK 3/96 and LOC.19/GACHARAGEINI/571.
  - c. AN ORDER OF MANDAMUS to compel the 4<sup>th</sup> Respondent to revert ownership of Land Reference numbers MURANG'A MUNICIPALITY BLOCK 11/171, MURANG'A MUNICIPALITY BLOCK 3/96 and LOC.19/GACHARAGEINI/571, from the current owners to the original legitimate owner being the late PAUL KIMANI MUNA.
  - d. AN ORDER OF MANDAMUS to compel the tenants that occupy MURANG'A MUNICIPALITY BLOCK 11/171, MURANG'A MUNICIPALITY BLOCK 3/96, and LOC.19/GACHARAGEINI/571, and all proceeds from the said properties be deposited with a Court appointed Real Estate Agent/Company who shall utilize the funds to offset the liabilities of the properties and related expenses pending the hearing and determination of the Application and suit.
  - e. AN ORDER OF CERTIORARI to quash previous approved transactions by the 4<sup>th</sup> Respondent and to remove the name of the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent from the three (3) titles namely MURANG'A MUNICIPALITY BLOCK 11/171, MURANG'A MUNICIPALITY BLOCK 3/96 and LOC.19/GACHARAGEINI/571, and have the ownership revert to the late PAUL KIMANI MUNA.
  - f. THAT the costs of this Judicial Review be provided for.
  - g. Any other Order that this Honourable Court may deem fit to grant.”
2. The Judicial Review is supported by the grounds set out on its face and the Supporting Affidavit of CHARLES MUNA KIMANI, sworn on the 17<sup>th</sup> October, 2023.
  3. The Applicant averred that he is the eldest son of the late PAUL KIMANI MUNA, who died on 26<sup>th</sup> October, 2021, and his legitimate wife RUTH WAITHERA KIMANI. He annexed a copy of the death certificate of PAUL KIMANI MUNA, marked “CMK-1” and a copy of a Limited Grant in respect of deceased’s estate dated 26<sup>th</sup> July, 2023 marked as “CMK-3”.
  4. The Applicant further averred that he is one of the co-administrator in respect of the estate of his late father alongside NANCY NJERI and MORINE WAKESHO, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein, respectively.
  5. He asserted that the 1<sup>st</sup> Respondent is an illegitimate wife, of his late father, and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as the purported illegitimate children of his father and the 1<sup>st</sup> Respondent. Further, that he is co-administrator of his late father’s estate alongside the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, whom he characterized as the prime beneficiaries of the illegalities committed by his late father; namely by causing the illegal transfer of MURANG'A MUNICIPALITY BLOCK 11/171; MURANG'A MUNICIPALITY BLOCK 3/96; and, LOC.19/GACHARAGEINI/571, (the suit properties) thereby, disintitling and disinheriting the family of the deceased’s legitimate wife and her six children.



6. He contended that his father contracted a civil marriage with his mother RUTH WAITHERA KIMANI on 7<sup>th</sup> April, 1984, and annexed a copy of the marriage certificate bearing serial number 504608, attesting to the aforesaid civil marriage.
7. It was his further contention that the aforesaid marriage was blessed with six children including the Applicant, and others being;
  - i. ESTHER WANJIKU KIMANI;
  - ii. PURITY MUTHONI KIMANI;
  - iii. ELIZABETH NYAIKABA KIMANI;
  - iv. CAROLINE NYAMBURA KIMANI; and,
  - v. JAMES NJAGI KIMANI.
8. He also contended that sometimes in year 2002, his late father and mother fell out of favor with one another and as a result, his father threatened to dispose of the assets acquired jointly with his first wife (the Applicant's mother) during the course of their marriage. Subsequently, the Applicant's mother placed a caution in respect of land parcels numbers MURANG'A MUNICIPALITY BLOCK 11/171, and LOC.19/GACHARAGEINI/571. Copies of the Green Cards in respect of the aforesaid parcels of land denoting the cautions placed on them were annexed to his Supporting Affidavit dated 17<sup>th</sup> October 2023, and marked "CMK-5".
9. The Applicant also stated that the 4<sup>th</sup> Respondent caused the illegal removal of the lawful restrictions placed on the suit properties by RUTH WAITHERA KIMANI, without her knowledge and illegally transferred two of the suit properties to the late Paul Kimani Muna, NANCY NJERI and ROSE WAKIO, thereby, causing great prejudice to the family of the majority of the deceased's beneficiaries.
10. It was his allegations that on 5<sup>th</sup> February 2003, the deceased caused the removal of the restriction placed on LOC.19/GACHARAGEINI/571, and the following day on 6<sup>th</sup> February, 2003, caused the aforesaid parcel of land to be registered jointly in the names of the deceased and one ROSE WAKIO KIMANI, the mother to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
11. It was further contended that on 27<sup>th</sup> June, 2002, the deceased colluded with the 4<sup>th</sup> Respondent to remove the restriction placed on MURANG'A MUNICIPALITY BLOCK 11/171, by the Applicant's mother.
12. Further, that upon the death of ROSE WAKIO on 18<sup>th</sup> June, 2012, the deceased acting in concert with the 4<sup>th</sup> Respondent caused another illegal transfer of MURANG'A MUNICIPALITY BLOCK 11/171, and registration in the names of the deceased and NANCY NJERI, the 1<sup>st</sup> Respondent herein. He contended that his mother RUTH WAITHERA KIMANI, was not notified of the removal of the restriction placed on land parcel numbers MURANG'A MUNICIPALITY BLOCK 11/171, and LOC.19/GACHARAGEINI/571.
13. He annexed a copy of the Green Card in respect of land parcel number MURANG'A MUNICIPALITY BLOCK 3/96, which he claimed showed the illegal transfer of the same effected on 21<sup>st</sup> November, 2013, jointly by PAUL KIMANI MUNA and BRIAN MUNA. It was his contention that even if the foregoing transfer was not illegal, the 3<sup>rd</sup> Respondent has refused to acknowledge that land parcel number MURANG'A MUNICIPALITY BLOCK 3/96, was owned jointly by PAUL KIMANI MUNA and himself by excluding the beneficiaries of the late PAUL KIMANI MUNA, from receiving any share of the proceeds of MURANG'A MUNICIPALITY BLOCK 3/96.



14. The Applicant also averred that MURANG'A MUNICIPALITY BLOCK 3/96, was used to secure a loan for the amount of Kshs.45,000,000/- owed to Equity Bank as per the entries dated 29<sup>th</sup> April 2014, and 17<sup>th</sup> February, 2015 on the Green Card thereof; However, the 3<sup>rd</sup> Respondent is not repaying the aforesaid loan thereby, exposing that property to the risk of loss.
15. Further, the Applicant contended that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the exclusive beneficiaries of the suit properties from which they collect rental proceeds running into millions of shillings, while locking out other beneficiaries of the deceased the late PAUL KIMANI MUNA. He added that the 1<sup>st</sup> Respondent on his own motion issued a letter directing all the tenants occupying MURANG'A MUNICIPALITY BLOCK 11/171, to channel their rental payments to Mentor Sacco Society Limited Account Number 5000010772. He annexed a document marked "CMK-7" which is a copy of a letter from Mentor Sacco Society Limited dated 18<sup>th</sup> September, 2023, and a text (SMS) message from one of the concerned tenants as proof of the foregoing averments.
16. He urged the Court to find and hold that the process of removal of the restrictions placed on the suit properties by the deceased's legitimate wife RUTH WAITHERA KIMANI, did not adhere to due process and that the court should annul the entries made after the removal of the registration of the aforesaid restrictions.
17. Consequently, the Applicant implored the Court to grant the Orders sought so that the majority of the beneficiaries of the estate of the deceased do not lose out the entire estate belonging to their late father and to preserve the deceased's estate from further wastage.
18. This Judicial Review Application is opposed by the Respondents herein. The 1<sup>st</sup> Respondent Nancy Njeri filed her Replying Affidavit on 23<sup>rd</sup> November, 2023, and averred that she contracted a customary marriage with the deceased, the late PAUL KIMANI MUNA in the year 1974 under the Kikuyu customary law.
19. To her, the present Application is a non-starter for being framed as a Judicial Review Application, whereas it does not seek the review of a decision by any administrative body/ bodies.
20. She claimed that the reliefs sought by the Applicant through the current Application are not available, as they have been overtaken by events pursuant to the provisions of the Limitation of Actions Act. Further, that pursuant to the provisions of Order 53 Rule 1 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act, Orders for prohibition and Certiorari, can only be made within 6 months from the date of the decision of the administrative body in question.
21. The 1<sup>st</sup> Respondent further averred that the properties wherein she is jointly registered as the owner/ proprietor alongside her late husband are subject to the provisions of Section 91 of the Land Act 2012, on joint tenancy, meaning that where one of the tenants in a joint tenancy dies, the interest of the land is vested on the surviving tenant.
22. It was her claim that in year 2010, following the demise of the deceased's third wife, she relocated with the deceased from land parcel number LOC.19/GACHARAGEINI/1715, and settled on land parcel no. MURANG'A MUNICIPALITY BLOCK 11/171, which is registered in her name jointly with the deceased.
23. Further, that the Applicant's mother filed a suit against the deceased at the High Court in Nyeri in year 2002, whereby, she was seeking a 50 % share of the suit properties, but the aforesaid suit was disallowed by the Court.



24. She annexed an Affidavit sworn by PAUL KIMANI MUNA dated 18<sup>th</sup> October 2002, and marked as “NNK3” wherein the deceased stated that he was married to three (3) wives including the 1<sup>st</sup> Respondent who was his second wife and with whom he sired two children namely;
- i. CATHERINE MUTHONI KIMANI
  - ii. KENNETH MWANGI KIMANI.
25. Further, that the deceased stated in the same affidavit that he purchased the three suit properties without any contribution from his first wife (the Applicant’s mother), and therefore the Applicant’s mother was motivated by malice in laying claim to the suit properties through the suit filed before the High Court in Nyeri and intended to disinherit her co-wives. In the same affidavit, the deceased had deposed that the Applicant’s mother neglected to inform the Court that her children were adults as at year 2002, and the recipients of other properties from their father.
26. She alleged that the Applicant is a beneficiary of other properties from his late father, therefore, is not entitled to the properties registered in her name. Further, that the deceased caused the suit properties to be registered in his name jointly with the beneficiaries from his 2<sup>nd</sup> and 3<sup>rd</sup> wives in order to protect the latter’s interest from interference from the family of the Applicant’s mother.
27. The deponent refuted the Applicant’s claim of illegality pertaining to the registration of the suit properties in her name and in the names of beneficiaries belonging to the deceased’s third wife.
28. It was her further contention that prior to year 2002, the deceased was the registered proprietor of the three suit properties and LOC.11/MARAGI/1688;LOC.11/MARAGI/2022;LOC.19/ GACHARAGEINI/1715; LOC.11/MARAGI/1701; LOC.11/MARAGI/ 1702 and KIINE/ SAGANA/1370 all of which were the subject of restrictions placed by the Applicant’s mother, but which restrictions were later removed, as the deceased was able to demonstrate that the Applicant’s mother was not his sole wife.
29. She claimed that the restrictions placed on land parcel nos. MURANG’A MUNICIPALITY BLOCK 11/171, and LOC.19/ GACHARAGEINI/571, were removed following the resolution of the dispute that had led to the placing of the aforesaid restrictions, and the same is evidenced by the letter from the District Officer, which was registered on the Green Card on 27<sup>th</sup> June 2002.
30. She refuted the Applicant’s claims of fraud regarding the process through which she became the registered holder of the certificate of lease in respect of land parcel No. MURANG’A MUNICIPALITY BLOCK 11/171, jointly with the deceased. She stated that upon the death of the deceased’s third wife ROSE WAKIO on 18<sup>th</sup> June, 2012, the deceased applied to the land registry for a new certificate of lease, with himself and the 1<sup>st</sup> Respondent as the new lease holders, in respect of the land parcel, which application was allowed and a certificate of lease issued on 11<sup>th</sup> November, 2012.
31. It was her claim that the deceased had charged all three suit properties to secure several loans at various times prior to his demise, and that at the time of his death, there was an outstanding charge on MURANG’A MUNICIPALITY BLOCK 11/171, of Kshs.12,000,000/= another existing charge and a further charge on MUNICIPALITY BLOCK III/96 of Kshs. 35,000,000/- resulting in a total charge of Kshs.48,000,000/-.
32. The 1<sup>st</sup> Respondent also averred that the Applicant has not come to Court with clean hands as he has been interfering with the collecting of rental payments in respect of land parcel number MURANG’A MUNICIPALITY BLOCK 11/171, whereby, he caused the collection account number 1000364363



- held at KENYA WOMEN FINANCE TRUST( KWFT) , to be frozen which led the 1<sup>st</sup> Respondent to direct the tenants of the aforesaid plot to pay monthly rent in her account with MENTOR SACCO.
33. She further stated that she uses her account with MENTOR SACCO to settle the charge of Kshs.48,000,000/- whereby she pays a total of Ksh.350,000/- every month to EQUITY BANK LTD. That she uses the same account for other payments including: Ksh.25,000/- to the Kenya Revenue Authority; Kshs.60,693/- to settle water bills; Kshs.40,358 for electricity bills; Kshs.24,000/- for security services; and, Ksh.60,000/- for the 1<sup>st</sup> Respondent's monthly rental costs.
  34. She asserted her right as the registered proprietor of land parcel No. MURANG'A MUNICIPALITY BLOCK 11/171, to open a rental collecting account in respect of the same plot. She accused the Applicant of providing the Court with an incomplete list of the deceased's beneficiaries which did not include the deceased's second and third wives and their families.
  35. It was her allegations that the Applicant is intermeddling with the estate of the deceased by moving to court seeking letters of administration intestate in Succession Cause No. E040 (High Court at Murang'a) without the consent of his co-administrators and the beneficiaries of the deceased's estate.
  36. The 4<sup>th</sup> Respondent also opposed this Judicial Review Application through Grounds of Objection filed on 14<sup>th</sup> December 2023, wherein it was contended that there exists a dispute regarding the ownership of the suit properties, which requires that oral and/or documentary evidence be adduced, which renders the mechanism of a Judicial Review Application inappropriate to address the foregoing dispute.
  37. The 4<sup>th</sup> Respondent further stated that the question of cancellation of title to land requires investigations as the manner of acquisition of the titles whose cancellation is sought and Judicial Review proceedings would not be suitable for that purpose.
  38. It was further stated that those properties which the deceased had transferred during his lifetime do not form part of his estate and the Applicant is not entitled to such properties on grounds that he is a dependent.
  39. The 4<sup>th</sup> Respondent further added that Judicial Review is concerned with the decision-making process by an administrative body and the current Application does not disclose the decision whose process it has put under challenge. The Court was implored to dismiss the instant Judicial Review Application as it is mischievous and amounts to an abuse of the due process of the Court.
  40. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly filed their Grounds of Opposition on 8<sup>th</sup> March, 2024, and contended that the Applicant lacks the requisite locus standi to commence the present Judicial Review Application on behalf of the estate of the deceased, as no Grant has been granted to the administrators of the estate of the deceased allowing them to sue on behalf of the said estate.
  41. They further stated that the Orders sought in the current Application require a full hearing and are thus, incapable of resolution through a Judicial Review Application. Further, that the Orders sought in the present Application are not capable of being issued as against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, as the Application does not disclose any cause of action against them. They urged the Court to dismiss the instant Judicial Review with costs, as it is misconceived, unnecessary and a waste of judicial time.
  42. This Judicial Review was canvassed through written submissions.



## **Applicant's Submissions**

43. The Applicant filed his written submissions on 26<sup>th</sup> April, 2024, through the Law Firm of NJENGA MAINA & COMPANY ADVOCATES.
44. It was submitted that the applicant had been granted leave by the Court to file this substantive Judicial Review and thus the objection by the 1<sup>st</sup> Respondent was without basis. He further submitted that the assertion made by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents that the current Application raises issues which need to be proven through evidence, witness testimony and cross-examination and are therefore not suited for a Judicial Review Application is not correct. It was his submissions that nothing prevents the Respondents from filing Affidavits in response to the instant Application, seeking leave for the makers of such Affidavits to be subjected to cross-examination.
45. Further, that the 4<sup>th</sup> Respondent is a Public officer who abused her office to the detriment of the estate of the deceased, and the prayers sought by the Applicant against the 4<sup>th</sup> Respondent can only be obtained through a Judicial Review Application. He added that his prayer that the Court rescind the actions of the 4<sup>th</sup> Respondent who is an administrative officer cannot be sought in any other way except through Judicial Review. He reiterated that he has presented sufficient evidence before the Court to show grave illegality regarding interference with the ownership of assets belonging to the estate of the deceased, and with the involvement of the 4<sup>th</sup> Respondent.
46. The Applicant also submitted that the 4<sup>th</sup> Respondent should have filed a Replying Affidavit in response to the current Application, explaining to the Court the process surrounding the removal of the restrictions placed on MURANG'A MUNICIPALITY BLOCK 11/171, and LOC.19/ GACHARAGEINI/571, without the consent of RUTH WAITHERA KIMANI, who had lodged the same restrictions. He also denied the 1<sup>st</sup> Respondent's claim that the deceased and RUTH WAITHERA KIMANI resolved their dispute over the preceding two properties and asserted that RUTH WAITHERA KIMANI, never authorized the District Officer to write to the Land Registrar to lift the restriction, and that the aforesaid letter authored by the District Officer probably does not exist, and the restrictions were removed following collusion between the deceased and the Lands Registrar.
47. The Applicant disputed the 1<sup>st</sup> Respondent's claim that she contracted a marriage with the deceased, and he denied the existence of any suit dated the year 2002, wherein the Court directed that the restrictions placed on MURANG'A MUNICIPALITY BLOCK 11/171, and LOC.19/ GACHARAGEINI/571, by his mother RUTH WAITHERA KIMANI, be removed, as claimed by the 1<sup>st</sup> Respondent in her Replying Affidavit. Further, that no Judgment or decree was annexed by the 1<sup>st</sup> Respondent to demonstrate the existence of such a suit.
48. Reliance was placed on the holding of the Court in the cases of Republic V District Lands Tribunal Mukurweini & 2 others ex parte Esther Kirigo Wanjohi [2017] eKLR; and, [\*Kenya National Examinations Council V Republic ex parte Geoffrey Gathenji Njoroge & others Civil Appeal No. 266 of 1996\*](#), concerning the conditions that need to be established before the Court can issue an order of certiorari.
49. It was also submitted that the 4<sup>th</sup> Respondent breached the rules of natural justice and Section 45 of the [\*Law of Succession Act\*](#) (CAP 160), in intermeddling the deceased's estate as he authorized the transfer of ownership in respect of land parcel nos. MURANG'A MUNICIPALITY BLOCK 11/171, and LOC.19/ GACHARAGEINI/ 571, without the issuance of a grant in respect of the estate of ROSE WAKIO KIMANI, who was registered jointly with the deceased as the proprietors.



50. Furthermore, the Applicant refuted the 1<sup>st</sup> Respondent's argument that she assumed ownership of land parcel No. MURANG'A MUNICIPALITY BLOCK 11/171, pursuant to the provisions of Section 91(4) of the Land Act on joint tenancy. Similarly, he submitted that the ownership of LOC.19/ GACHARAGEINI/571, by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents is tainted with illegality because there was no Grant issued in favour of the estate of ROSE WAKIO KIMANI, who was joint owner of the property.
51. Further, it was submitted that the 4<sup>th</sup> Respondent is the custodian of the correspondence file and the Green Card in respect of the suit properties which obviates the need for a prolonged trial, and long delays to resolve raised in the subject Application. He added that to settle the issues under contention herein, what is required is for the 4<sup>th</sup> Respondent to submit a sworn Affidavit before the Court which would enable the Court to make a finding as to whether the records in question reveal any fraudulent dealings.
52. It was further submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are opposed to the inclusion of the three suit properties in Succession Cause No. E040 of 2021, which suit is active before the Court as they continue to derive benefits from the aforesaid properties, and this Court is the only avenue that can Order for those properties to be placed before the Succession Court for consideration. Further, that only the 4<sup>th</sup> Respondent is well-placed to explain to the court the circumstances surrounding the transfer of MURANG'A MUNICIPALITY BLOCK 3/96, executed on 21<sup>st</sup> November, 2013, in favour of the deceased and BRIAN MUNA.
53. That the three suit properties generate monthly income amount to Kshs.800,000/- which is received by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents exclusively, and the 1<sup>st</sup> Respondent failed to present evidence in support of her claims that the proceeds from the rental income in respect of MURANG'A MUNICIPALITY BLOCK 11/171, are currently being deployed to clear loans.
54. He reiterated that he possesses the requisite authority to commence the present proceedings by virtue of a limited grant of letters of administration dated 26<sup>th</sup> July, 2023, marked as annexure "CMK-2" whereby, he is named as one of the administrators of the estate of the deceased. Further, that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein are his co-administrators and the direct beneficiaries of the illegalities carried out in regard to the three suit properties; therefore, it is not possible for his co-administrators to join him in originating the current suit.
55. He submitted that the Court needs to compel the 4<sup>th</sup> Respondent to explain the process through which the restrictions placed by the Applicant's mother RUTH WAITHERA KIMANI on land parcel nos. MURANG'A MUNICIPALITY BLOCK 11/171, and LOC.10/ GACHARAGEINI/571, were removed taking to account the fact that the deceased a Councilor and, therefore, a person of influence in the present-day Murang'a County. The Applicant urged the court to compel the 4<sup>th</sup> Respondent to explain how the transfers of ownership of MURANG'A MUNICIPALITY BLOCK 11/171, and LOC.19/GACHARAGEINI/571, were executed in the absence of a confirmed grant in respect of the estate of ROSE WAKIO KIMANI, a joint owner of the two parcels.
56. Penultimately, the Applicant submitted that his annexure "CMK-6" demonstrates that MURANG'A MUNICIPALITY BLOCK 11/171, ought to form part of the estate of the deceased because it was placed under the joint ownership of the deceased and the 3<sup>rd</sup> Respondent. Further, that seven (7) beneficiaries of the estate of the deceased, who comprise the majority, have been excluded from the rightful benefits due to them by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.



## 1<sup>st</sup> Respondent's Submissions

57. The 1<sup>st</sup> Respondent filed her written submissions dated 22<sup>nd</sup> April, 2024 through the Law Firm of IRUNGU MWANGI, NG'ANG'A T.T. & CO. ADVOCATES, and submitted that the current Application does not meet the criteria required in Judicial Review proceedings, and the Court's jurisdiction was not properly invoked by the Applicant. It was further submitted that the suit is time-barred and fails to raise a reasonable cause of action.
58. The 1<sup>st</sup> Respondent argued that the three suit properties do not form part of the estate of the deceased, as they were held under joint tenancy during the lifetime of the deceased and therefore, subject to the doctrine of survivorship. She added that upon death of the deceased, she assumed ownership of MURANG'A MUNICIPALITY BLOCK 11/171, being surviving joint owner; while, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acquired ownership in respect of MURANG'A MUNICIPALITY BLOCK 11/171, and LOC/19/GACHARAGEINI/ 571, by virtue of their capacity as the surviving joint owners.
59. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not file any written submissions. The court has considered the pleadings herein and the annexures thereto and the written submissions, and finds the issues for determination are as follows;
- i. Does the Applicant possess the requisite capacity to commence the current Application?
  - ii. Is the Application time-barred pursuant to the provisions of Order 53 Rule 2 of the Civil Procedure Rules read together with Section 9 (3) of the *Law Reform Act*?
  - iii. Does the Application raise issues capable of determination through Judicial Review proceedings?

### **i. Does the Applicant possess the requisite capacity to commence the current Application?**

60. The Applicant argued and submitted that his co-administrators who are the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein have no interest in commencing the present suit as they are beneficiaries of the decisions which he has challenged through this Judicial Review. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the Applicant requires their consent to file the subject Application.
61. In Misc. Civil Application No 103B of 2013 Republic vs Nairobi City Council, the Court stated as follows:
- “The capacity to litigate any suit on behalf of the estate of the deceased inheres in the administrators duly appointed by the court. They act jointly at all times....one administrator out of the other lacks capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate”.
- On that issue, I find that the Plaintiff lacks capacity to file suit on behalf of the estate of the deceased in the absence of his co-administrator, Richard Wainaina Muhindi”.
62. Further in the case of *Re Estate of Makokha Idris (2019) eKLR*, the court stated as follows concerning the position of administrators:
- “It must be stated that even though there are four administrators in places in law there is only one administration or representation to the estate of the deceased. The four administrators hold one grant, which appoints all four of them as administrators. None of them holds a grant which makes them the sole administrators of the estate. Since there is only one



administration, and not four, it behooves the four administrators to act as one with regard to managing the estate of the deceased. Responsibilities and duties must be shared. They must agree on the management of the assets. They must take a common stand on the expenses of administration and on the settlement of liabilities and debts and other outgoings. It should not be the business of one or a section of the administrators to make decisions on behalf of the estate, that falls upon all four of them... The powers conferred on administrators by section 82 of the *Law of Succession Act* are exercisable by all the four administrators named in the grant, and all the duties imposed on administrators by section 83 of the Act fall on all four the administrators. The four cannot purport to act singly or solely, unless, of course, there has been delegation of responsibility.”

63. The import of the foregoing decision is that in a situation where there exist joint administrators, one administrator alone cannot bind the estate of the deceased or file suit alone on behalf of the estate of the deceased.

64. Further, In the case of Julian Adoyo Ongunga & another vs Francis Kiberenge Bondeva (suing as the administrator of the Estate of Fanuel Evans Amudavi, Deceased) 2016 eKLR, the Court held:

“... the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

65. In view of the foregoing, the Court holds and finds that the Applicant lacks the requisite authority to file the subject Application due to the lack of consent by his co-administrators.

**ii). Is the Application time-barred pursuant to the provisions of Order 53 Rule 2 of the Civil Procedure Rules as read together with Section 9 (3) of the *Law Reform Act*?**

66. Section 9 (3) of the *Law Reform Act* (Cap 26 Laws of Kenya), states as follows:

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

67. Order 53 rule 2 of the Civil Procedure Rules, 2010 provides as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to



appeal and the time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

68. In the case of *Chabari v District Land and Adjudication Officer Meru South Maara District & 3 others*, the Court referenced the decision of the Court of Appeal case in *Wilson Osolo v John Ojiambo Ochola & Another* [1996] eKLR where it was held thus;

“It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from Section 9(3) of the *Law Reform Act*. Whilst the time limited for doing something under the civil procedure rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case the *Law Reform Act*.” There is no provision for extension of time to apply for such leave in the *Limitation of Actions Act* (Cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.”

69. Similarly, in the case of the case of *Republic v Chairman Amagoro Land Dispute Tribunal & Another Ex-parte Paul Mafwabi Wanyama* [2014] eKLR the Court held that:

“The judicial review proceedings before the learned judge, which have given rise to this appeal were therefore special in nature and the learned judge erred in importing provisions of the *Civil Procedure Act* and rules to proceedings governed by the said provisions of the *Law Reform Act* and Order 53 Civil Procedure Rules. We agreed with learned counsel for the appellant that the learned judge erred in extending time which he had no jurisdiction to do.”

70. Addressing itself to the issue of the powers available to the Court to extend the time for the filing of a suit, the Court in the case of *Chabari v District Land and Adjudication Officer Meru South Maara District & 3 others*, held as follows:

“...by dint of the provisions of Order 50 Rule 5 of the Civil Procedure Rules, 2010, the court has power to enlarge time, where there is limited time provided for doing any act or taking any proceedings under the rules. Following this provision, it may be arguable that time may be enlarged to make application for Judicial Review outside the 6 months’ limitation period. However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provision set out in Section 9(3) of the *Law Reform Act* (above), and it is trite law that rules made under statute, cannot override a statutory provision. The *Law Reform Act* itself has no provision for extension of time. I have seen no law, which can entitle me to enlarge time for the filing of an application for certiorari outside the 6-month limitation period.”

71. Further, the Court in the case of *Chabari v District Land and Adjudication Officer Meru South Maara District & 3 others*, held that that statutory provisions of limitation of time do not fall within the domain of technical rule of procedure, but form part of substantive law and, therefore, fall outside the ambit of Article 159 (2) (d) of *the Constitution*.

72. The decisions made by the 4<sup>th</sup> Respondent which the Applicant has implored the Court to rescind were undertaken on the following dates: 6<sup>th</sup> February 2002; 27<sup>th</sup> June, 2002; and, 12<sup>th</sup> June, 2012. The subject Application was filed before the Court on 19<sup>th</sup> October, 2023. It is clear that the current Application was lodged more than six (6) months after the 4<sup>th</sup> Respondent made the decisions which are under challenge in the current Application.



73. Given that the decisions sought to be challenged were made over 10 years ago, this court holds and finds that it lacks jurisdiction to grant the Orders sought by the Applicant herein due to the lapse of time between the making of the decisions by the 4<sup>th</sup> Respondent and the filing of the current Judicial Review Application, which way exceeds the statutory six (6) months. It is the further holding of the Court that it lacks jurisdiction not extend the time for the filing of Judicial Review Applications pursuant to the wording of Order 53 Rule 2 of the Civil Procedure Rules as read together with Section 9 (3) of the [Law Reform Act](#).

**iii). Does the Application raise issues capable of determination through Judicial Review proceedings?**

74. The nature of Judicial Review proceedings was set out in the case of *Pastoli v Kabale District Local Government Council & Others* (2008) 2 EA 300 ,where the court held;

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

75. Similarly, in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR, the Court of Appeal stated;

“Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.....The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision”.

76. In this instant Judicial Review Application, the Applicant has alleged collusion and fraud perpetrated by the deceased in conjunction with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, and with the connivance of the 4<sup>th</sup> Respondent which is a public office. It is clear that the Applicant’s allegations of fraud and intermeddling with the estate of the deceased extend to other persons who are not public officers, namely the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as well as the deceased.



77. The Court holds and finds that Judicial Review proceedings are not the appropriate setting to test the claims of fraud and collusion raised by the Applicant herein requiring that witness testimony be adduced and subjected cross-examination.
78. Having carefully considered the issues as above, this court finds and holds that the instant Notice of Motion Application dated 17<sup>th</sup> October, 2023, does not meet the criteria for a proper Judicial Review or the threshold for grant of prerogative orders falling under the Judicial Review purview.
79. For the above reasons, the court finds and holds that the instant Application is not merited and the same is dismissed entirely with costs to the Respondents herein.

It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JUNE, 2024.**

**L. GACHERU**

**JUDGE**

Delivered online in the presence of:

Mr Mwangi for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

N/A for the Applicant

N/A for the 1<sup>st</sup> Respondent

N/A for the 4<sup>th</sup> Respondent

Joel Njonjo - Court Assistant

**L. GACHERU**

**JUDGE**

**27/06/2024**

