



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

MISCELLANEOUS APPLICATION NO. E006 OF 2022

IN THE MATTER OF THE ESTATE OF JOHN PETER MACHARIA (DECEASED)

MWANGI MACHARIA.....1ST APPLICANT

MAINA MACHARIA.....2ND APPLICANT

MICHAEL MACHARIA.....3RD APPLICANT

JACK MACHARIA.....4TH APPLICANT

WAMBUA MACHARIA.....5TH APPLICANT

VERSUS

MWIKALI KUNGU Alias MWIKALI MACHARIA.....RESPONDENT

R U L I N G

1. Before this court is an application dated 26th January, 2022 brought by way of Notice of Motion seeking the following Orders namely: -

i. Spent

ii. Spent

iii. That in the alternative pending inter-parties hearing of this application and determination of the intended appeal, this Hon. Court be pleased to issue conservatory Orders maintaining status quo and restraining the Respondent their agents, legal representatives and/or assigns from evicting, interfering with the applicant's quiet possession, occupation use and dealing in Kunda Kindu and Florida 2 bars pending determination of this application (sic).

iv. That this Hon. Court be pleased to issue any Order it deems fit and just in the circumstances.

2. The grounds upon which this application is based are listed as follows: -

a) That the applicants are lawful beneficiaries/children to the deceased.

- b) That the Respondent is not a wife or an administratrix to the estate.*
- c) That on 19.08.2021 the trial court allowed the application dated 31.08.2021 as if unopposed when the applicants were always desirous to oppose.*
- d) That the Orders issued on 19.01.2021 operates to disinherit the applicants and permits intermeddling on the estate of the deceased by a stranger.*
- e) That the Orders made by the trial court are highly prejudicial.*
- f) That the trial court elevated procedural issues over substance leading to miscarriage of justice.*
- g) That the applicants delay in filing a response to the application was inevitable, inordinate, and reasonable.*
- h) That the intended appeal raises weighty and arguable issues with high probability of success.*
- i) That the respondents stand to suffer no prejudice. If this application is allowed*
- j) That this court has unfettered inherent discretion to grant the orders sought.*
- k) That the Respondent is in the process of executing the orders and the applicants are apprehensive of being evicted and destruction of their property.*

3. The applicant has supported this application with a joint affidavit sworn on 26.01.2022 by Peter Mwangi Macharia and Michael Macharia who have majorly reiterated the above grounds.

4. They have averred that the subject application dated 31.08.2021 was filed by the respondent on 17.09.2021 and that the application was allowed in the first instance.

5. That their Counsel was unable to file grounds as they had sought for time to pursue an investigation be carried out by Director of Criminal Investigation Kibwezi over forgery claims on Death Certificate and birth certificates.

6. That the trial court granted them time until 19.01.2022 but their Counsel was unable to file response because of the e-filing system was down on 18.01.2022 because of power failure.

7. They fault the trial court for not giving them a chance to file response when the delay was in good faith and could not have prejudiced the respondent.

8. That the Respondent is not a wife of the deceased or a beneficiary of the estate of the deceased.

9. That they stand risk of being evicted from a place of work and deny them source of income.

10. That there is no succession cause pending and the Orders granted in Lower court are pre-emptive in nature.

11. That they have been running Kunda Kindu and Florida 2 bars and allowing the Respondent exclusive use would be disinheriting them.

12. In their written submissions through learned counsel P. Wasolo & Co. Advocate, the applicants claim that the claim by the Respondent that she was a spouse to the deceased is being disputed because the respondent is not administratrix.

13. They contend that the respondent had no capacity to obtain the orders from the trial court.

14. They claim that they have been running businesses in Kunda Kindu and Florida 2 and that the Respondent has not demonstrated what loss will be occasioned if status quo is maintained.

15. The applicants in a twist have also contended that they run Kunda Kindu while the Respondent runs Florida 2 and that it is hard to determine how the business were running prior to the demise of the deceased. According to them the issue can be resolved through oral hearing.

16. They claim that the issues raised in this application can only be determined in the main cause which to them is not in the lower court. The applicants have however not explained where the orders sought to be challenged emanated from if not from a succession cause.

17. They claim the order issued on 19.01.2022 is pre-emptive and lacks substratum.

18. They contend that this court should make orders to protect the estate as it has powers and discretion to do so.

19. The respondent on the other hand has opposed this application vide her replying affidavit sworn on 5.02.2022. She claims that this application is an afterthought and lacks in merit.

20. She avers that she filed a *Succession Cause No. E 023 of 2021 at Mutomo Law Courts* where she sought restraining orders against the applicants to stop them from dealing or interfering with the estate of deceased especially the matrimonial house at Ikutha and business premises known as Florida Bar 2 and Kunda Kindu.

21. The respondent claims that her application and court order in the lower court was served on the applicants on 24.09.2021 and that the application came up for hearing on 5.10.2021 when the applicants counsel sought for time to file a response which was granted.

According to her the subject application was fixed for hearing on 27/10/2021 when the applicants having not responded sought for more time which was given up to 1.12.2021 when the applicant failed yet again to file any response. She avers that the applicants sought for more time and that they trial court granted them more 14 days.

22. The Respondent avers that on 19.01.2022 when the matter came up, the applicants had not complied and that their attempt to get more time was denied. She faults the applicants excuse that there was no electricity and that the system was down terming the claims as false.

23. The respondent avers that she is a surviving spouse to the deceased having married him in 1994 and that they were blessed with two children. She has exhibited a copy of an affidavit of marriage and birth certificate of their children as proof of her relationship with the deceased. She further relies on a letter from Area Chief which she has exhibited in her replying affidavit.

24. She claims that the DCIO Kibwezi has never summoned her on any investigation being carried out and terms the applicants' allegation about ongoing investigations as untrue.

25. The respondent has faulted the applicant for disobeying court orders by continuing to operate Kunda Kindu bar contrary to the restraining orders. She has however not stated why she has not applied to punish them for contempt.

26. The Respondent has through written submissions by Counsel, the asserted that the applicants reside in Kibwezi-Makueni County while the estate is situated in Kitui County. She submits that she used to run the business concerns in Ikutha Area and that upon the demise of the deceased, the applicant forcefully sought to remove her from the business.

27. She claims that the issue of whether or not she is a beneficiary will be determined in the succession cause pending in the trial

court.

28. She denies the claims that she is out to disinherit or destroy/waste the estate of the deceased person claiming that no evidence was placed before this court. She contends that the applicants do not deserve the Orders sought and relies on *Charles Wahome Gethi -versus- Angela Wairimu Gethi [2008] eKLR*.

29. This court has considered this application and the response made. This is an application brought under *Order 10 Rule 7, Order 40 Rule 6&7 and Order 51 Rule 1 of the Civil Procedure Rules* and *Sections 1A and 3A and 3 of the Civil Procedure Act*. The said Rules and Sections of the law cited do not apply in succession matters as clearly stipulated under *Rule 63 of Probate and Administration Rules*. Succession matters have special rules and procedures well spelt out in Law of Successions Act and while there are exemptions clearly spelt out, in general *Civil Procedure Rules* do not apply.

Application from the onset is technically premised on the wrong footing but an application cannot fail just because of citing the wrong provisions of the law or omission to cite any provision. The provisions of *Article 159 (2) (d)* is clear on that.

30. But that is not the only anomaly in this application. The substantive *prayer (3)* is unclear as to whether the orders sought are pegged on the pendency of intended appeal or the determination of this this application. The applicants appear to have got mixed up when drafting their application through Counsel. This court also notes that the prayer (3) is sought as an alternative prayer and not the main prayer and when one checks the other prayer (2) the same is premised on the pendency of this application which is a bit convoluted given the arguments presented by the applicants.

31. What is more significant is that while the applicants fault the respondent's application dated 31.08.2021 for lacking substratum, their own application now before me evidently lacks in that aspect in a profound way because the applicants claim to have been aggrieved by the decision by the lower court to deny them a chance to oppose the subject application but at the same time they have not appealed against the decision which was delivered on 19.01.2022. They have not stated why they have not appealed and why they decided to approach this court vide a miscellaneous cause. They ought to have filed an appeal and within that appeal seek the orders they are seeking but filing a miscellaneous cause is without basis and an abuse of court process. If the applicants had run out of time and were seeking for extension of time within which to lodge an appeal, then a miscellaneous application could have been a viable option but in this case it is not.

32. The applicants have also claimed that there is no succession cause pending their own intended appeal, indicates that there is a *Succession Cause No. E023/21 in Mutomo Senior Principal Magistrate's Court*. The Orders that the applicants felt aggrieved about emanated from a succession cause pending in Mutomo Law Courts. Besides that, the Respondent has exhibited P&A documents (**P & A Form 80, 5 & 57**) filed in that court clearly showing that a Succession Cause in respect of the estate of the late **John Peter Macharia (deceased)** is pending where the Respondent has petitioned for letters of administration of the estate of John Peter Macharia (deceased).

33. The applicants claim that there is no cause pending in the lower court in view of the evidence placed before this court is therefore not merited.

34. This court further finds that the Respondent's assertions that she is a surviving spouse of the deceased and has children with the deceased have not been controverted by was of a further affidavit by applicants. The claims made by the applicants that the respondent is a stranger to the deceased has been controverted by her replying affidavit but her claims that she was married to the deceased and that the Area Chief recognizes her as per the letter exhibited has not been controverted by the applicants. That in effect means that the respondents claim in respect to the estate has not been challenged by the applicants and that negates some of the grounds raised by the applicants in this application.

35. I also find that the applicants have contradicted themselves because on one hand, they claim that they are running the business in both Kunda Kindu Bar and Florida 2 Bar but on the other hand, they depon that they run only Kunda Kindu Bar while the respondent runs Florida 2 bar. The apparent contradiction shows that the applicants have either not come to court in good faith or they are factual in their contention either way, I am not persuaded that the applicants have shown sufficient cause for this court to exercise its discretion in their favour.

36. This court finds that the issues raised by the applicants as to who is entitled to the estate as a beneficiary or who can be considered a dependant within the meaning of *Section 29 of Law of Succession Act* are premature at this stage. The issues are yet to be resolved by the trial court and the applicants will have their chance to state their case during trial.

From the foregoing, this court finds that the **application** dated 26th January, 2022 is **unsustainable** because of **lack in merit** and **been incompetent**. It is disallowed for that reason but I shall make **no Order as to costs** because this is a family matter.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF MARCH 2022.

HON. JUSTICE R. K. LIMO

JUDGE



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