



REPUBLIC OF KENYA



In re Estate of Wanjau Kimori alias Wanjau S/O Kimori (Deceased) (Probate & Administration Appeal 5 of 2018) [2023] KEHC 17870 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PROBATE & ADMINISTRATION APPEAL 5 OF 2018**

FN MUCHEMI, J

MAY 25, 2023

BETWEEN

VIRGINIA NJERI MUTURI 1ST APPLICANT

ALFRED MWANGI WANJAU 2ND APPLICANT

AND

GEORGE MUTUNE KIAMA 1ST RESPONDENT

STEVE KABUITU WAMBUGU 2ND RESPONDENT

RULING

Brief facts

1. The application for determination dated December 21, 2022 brought under Rule 49, 59(1) and 73 of the *Probate & Administration Rules*. It seeks for orders that the Land Registrar of Nyeri County do remove the caution registered against Land Parcel No Githi/Muthambi/8XX
2. The respondents opposed the application and filed a replying affidavit dated February 7, 2023.

The Applicants' Case

3. The applicant depose that judgment herein was delivered on 15/7/2021 whereby the court distributed the estate comprising of LR Nos Githi/Muthambi/8XX and Githi/Igana/4XX equally between the applicants.
4. The 1st applicant states that on 29/3/2022, he entered into an agreement with the respondents and 3 others with whom he had earlier sold some portions out of LR No Githi/Muthambi/8XX and agreed that they would accept smaller portions following the court's judgment on the reduced acreage. On 12/7/2022, the respondents went ahead and placed a caution on LR No Githi/Muthambi/8XX. As such, the 1st applicant contends that the sub division of the said property cannot take place due to the



said caution and he is still desirous of the respondents and the three others getting the portions of land of the size agreed in their agreement dated 29/3/2022.

The Respondents' Case

5. The respondents state that the applicants have not disclosed the full particulars in respect of the circumstances leading to the lodging of the caution against LR No Githi/Muthambi/8XX. The respondents further state that prior to the court's judgment dated 15/7/2021, the 1st respondent and the 1st applicant, with the full knowledge and consent of the 2nd applicant, entered into an agreement dated June 29, 2012 whereby the 1st applicant sold to him a portion of 2.0 acres out of parcel of land LR No Githi/Muthambi/8XX at a purchase price of Kshs 540,000/-. The 1st respondent avers that he paid the full purchase price and the same was acknowledged by the 1st applicant.
6. The 1st respondent avers that upon payment of the full purchase price, he took vacant possession and occupation of the said portion and started development of the land which developments he estimates costs Five Million Five Hundred Thousand Shillings (Kshs 5,500,000/-).
7. Further, the 2nd respondent entered into an agreement with the 1st applicant, with the knowledge and consent of the 2nd applicant, on May 3, 2011 where the 1st applicant sold to him a portion of 2.0 acres out of LR No Githi/Muthambi/8XX at a consideration of Kshs 400,000/- which was settled in full. Similarly, the 2nd respondent took vacant possession and occupation of the said land and developed the same which he estimates at a value of Kshs 2.2 Million.
8. The respondents further state that on April 7, 2022, they paid to the 2nd applicant each a sum of Kshs 100,000/- so that she could not evict them from their portions out of the suit property claiming that they had occupied her part of the land or the side to which she was entitled out of the suit land.
9. The respondents state that they together with other plaintiffs have filed a suit in Senior Principal Magistrate's Court Mukurweini MELC Case No E008 of 2021 whereby they have sued both the applicants for specific performance or breach of contract in respect of the suit land. As such, the respondents argue that if the court removes the caution lodged on LR No Githi/Muthambi/8XX, they will be evicted from the portions which they have occupied for over eleven (11) years and which they have developed and their suit will be prejudiced or rendered nugatory therefore suffering great loss.
10. The respondents further state that no prejudice will be occasioned on the applicants as they have other portions of land which they have occupied and they only want the caution removed so that they can alienate or sell the land.
11. The 2nd applicant filed a Further Affidavit dated March 10, 2023 where she states that she has never been a party to any sale agreements entered into between the 1st applicant and the respondents. She further states that the acknowledgement slip dated June 29, 2012 indicates that the parties are the 1st applicant and respondents and thus it is unfathomable how her consent or knowledge of the transaction is implied in the said transaction.
12. The 2nd applicant states that the sale agreements entered into by the 1st applicant and respondent are illegal and have no legal effect. They amount to intermeddling with the affairs of the estate of the deceased which is punishable under the law as provided for under Section 45 of the [Law of Succession Act](#).
13. The 2nd applicant argues that the respondents are not protected by the law notwithstanding their averments that they have developed their portions of land on LR No Githi/Muthambi/8XX. Further, the fact that there is an ongoing case being Mukurweini PMELC No E008 of 2021 claiming specific



performance has no basis in law as the sale agreements were a nullity ab initio and therefore no action can be founded on the said agreements.

14. The 2nd applicant states that the sum of Kshs 100,000/- paid to her by the respondents was for reimbursement of costs incurred in defending Mukurweini PMELC No E008 of 2021 and not to evict the respondents as alleged.
15. The 2nd respondent avers that she stands to suffer great prejudice as she will be denied her rightful inheritance while the respondents have a cause of action against the 1st applicant to recover their money or get their portions of land from the 1st applicant's share which he is more than willing to fulfil. Therefore, the 2nd applicant prays that the application be allowed as prayed to give effect to the judgment of the court delivered on July 15, 2021 and ensure that the estate is fully administered.
16. Parties disposed of the application by way of written submissions.

The 1st Applicant's Submissions.

17. The 1st applicant reiterates the contents of the supporting affidavit and submits that the respondents are in breach of Section 45 of the Law of Succession Act as they bought from him, portions of the suit property but the grant was yet to be confirmed. To support his contentions, the 1st applicant refers to the case of Jane Kagige Geoffrey & Another vs Wallace Ireri Njeru & 2 Others [2016] eKLR.
18. The 1st applicant relies on the case of Moses Kamande Nyambura vs Francis Munyua Ngugi [2018] eKLR and submits that no consent from the land control board was obtained by the respondents upon purchase of the suit land which is agricultural land. As such, the 1st applicant argues that the agreements are not only void but void ab initio.
19. The 1st applicant further submits that after the judgment of the court, the respondents took him to an advocate where they executed an agreement that each respondent would get one acre instead of the initial two acres. The agreement was duly executed and thus the 1st applicant argues that the respondents ought to remove the caution which was lodged three months after the agreement dated 29/3/2022.
20. The 1st applicant submits that prior to the agreement dated 29/3/2022, the respondents and others filed a case, Mukurweini PMELC Case No E008 of 2021 claiming the portions they bought. However after the agreement dated 29/3/2022, the other three buyers did not pursue the case any further and thus they would like to have this matter expedited so that they can receive their entitlement as per the agreement. Moreover, the 1st applicant submits that the fact that there is an ongoing case between the parties does not justify the caution remaining on the subject piece of land.

The 2nd Applicant's Submissions

21. The 2nd applicant reiterates the contents of her supporting affidavit and submits that she was not aware of the sale agreements dated May 3, 2011 and June 29, 2012 entered into by the 1st applicant and the respondents. Relying on Section 107 and 108 of the Evidence Act the 2nd applicant argues that the respondents have not placed anything on record to show that she was aware of the said agreements.
22. The 2nd applicant further submits that the said sale agreements were entered into by the respondents and the 1st applicant after the death of the deceased and before the grant was confirmed. The said agreements according to the 2nd applicant has no legal effect as the 1st applicant did not have any interest in the said asset that he purported to dispose by way of sale. The 2nd applicant relies on the case of David Njogu Kibaka (Deceased) HC Kerugoya Case No 48 of 2012 quoted with approval in Re Estate of



Eunice Wanjiru Karuri (Deceased) (2018) eKLR. The 2nd applicant argues that the said sale agreements are a nullity and thus of no legal effect. It therefore follows that it does not matter that the respondents have gone ahead and developed the said portions. The 2nd applicant submits that the respondents developed the property at their own peril and this court should not condone such an illegality. The 2nd applicant further states that the evidence as to the developments on the respondents portions through the annexed reports is illegally obtained evidence and thus the court should not consider the same.

23. The 2nd applicant submits that the court should order for the removal of the caution as the respondents do not have enforceable interest in the estate of the deceased. Further, the existence of the caution is blocking the distribution of the estate of the deceased which was ordered by the court in its judgment dated 15/7/2021. Moreover, the 2nd applicant argues that the respondents have another recourse against the 1st applicant which they have already exercised in filing Mukurweini PM ELC Case No E008 of 2021. To support her contentions, the 2nd applicant relies on the case of *Re Estate of Eunice Wanjiru Karuri (Deceased)* (2018) eKLR.

The Respondents' Submissions

24. The respondents in reiterating the contents of their affidavit submit that this is a court of equity and thus it should not allow the applicants to unjustly enrich themselves. Citing the case of *Joel Mwangangi Kithure vs Priscah Mukorimburi* [2022] eKLR.
25. The respondents further rely on the case of *Steadman vs Steadman* [1976] AC 536 at 540 and submit that they have performed their contractual obligations and thus the applicants cannot move under the guise of Succession Law provisions to have the caution removed which has the result of frustrating the sale agreement.
26. The respondents cite the case of *Macharia Mwangi Maina & 87 Others vs David s/o Mwangi Kagiri* [2014] eKLR and submit that the applicants are precluded from hiding under the provisions of intermeddling with the estate when they have come to court with unclean hands and have failed to fully disclose material facts.

The Law

Whether the applicants have presented sufficient evidence to warrant removal of the caution.

27. The removal of a caution and its placement is clearly provided under Section 71 – 73 of the *Land Registration Act*, 2012.

Section 73 provides:-

- (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to sub section (2), by order of the Registrar.
- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If the cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after



giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for payment of costs.

29. Section 47 of the *Law of Succession Act* gives this Honourable court discretion to make orders which in the interests of justice and for just conclusion of causes which relate to the estates of a deceased person. It provides:-

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

30. A party who has obtained a grant is free to apply for orders for enforcement if he is unable to distribute the estate. The court has inherent powers to make orders. Rule 73 of the *Probate and Administration Rules* provides:-

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

31. The issue of removal of a caution was addressed in the case of *Margaret Wanjiku Kabubu vs Nyabangi Nguni & 2 Others* (2014) eKLR where it was held:-

This Court however, notes that the applicant's application is also brought under any other enabling provisions of the law. This being a succession matter and given the fact that registration and or removal of a caution is not expressly provided for under the Succession Act, this Court is of the considered view that its jurisdiction under Section 47 of the *Succession Act*, Cap 160 and Rule 73 of the *Probate and Administration Rules* are appropriate in the instant case."

32. The background of this case is that this court, on appeal from the judgement of Senior Principal Magistrate Mukurweini gave the two assets of the deceased LR No Githi/Muthambi/8XX and Githi/Muthambi/4XX the applicants herein to share equally. The appeal judgement was delivered on July 15, 2021. It is this judgement that the 1st applicant seeks to execute by seeking for removal of caution.

33. In this application, the record shows that the respondents lodged a caution on 12/7/2022 against land parcel No Githi/Muthambi/8XX A copy of Certificate of Official Search was annexed to the application. The 1st applicant annexed an agreement dated 29/3/2022 which provides that following the judgment of the court, the portions he had initially sold to the respondents would have to be scaled down. The respondents however argue that they entered into agreements with the 1st applicant on May 3, 2011 and June 29, 2012 respectively for a consideration of Kshs 540,000/- and Kshs 400,000/- respectively. It was further stated that the respondents paid full consideration and then occupied their respective portions which they have developed for years to date. It is further stated that the developments have cost them millions in shillings and thus they are apprehensive that if the court removes the caution, they stand to suffer irreparably. The respondents also state that the 2nd applicant was well aware and gave her consent to the said purchases of the suit properties.

34. The court distributed the estate of the deceased on 15/7/2021 and therefore under Section 47 of the *Law of Succession Act* and rule 73 of the *Probate & Administration Rules* it has inherent powers to give orders for execution of the grant. The respondents have recourse against the 1st applicant in the Environment and Land court where they have already filed a suit Mukurweini PM ELC case No E008 of 2021.

35. From the facts of this application, it is evident that the appeal judgement has not been overturned. Therefore, there is nothing standing on the way against execution of the grant. If there is a case currently pending in the Environment and Land Court, it does not affect the judgement of this court in my view.



36. It is my finding that this application dated December 21, 2022 has merit and is hereby allowed in terms of prayer 1 of the application.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF MAY, 2023.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 25TH DAY OF MAY 2023.

