



Kamau & another (Suing on behalf of the Estate of Benson Wanjie Waititu (Deceased)) v Attorney General & another (Miscellaneous Application 7 of 2023) [2023] KEHC 23118 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION 7 OF 2023
A MSHILA, J
SEPTEMBER 29, 2023**

BETWEEN

MERCY WAIRIMU KAMAU 1ST APPLICANT

ELIZABETH MWARA NDICHU 2ND APPLICANT

**SUING ON BEHALF OF THE ESTATE OF BENSON WANJIE WAITITU
(DECEASED)**

AND

ATTORNEY GENERAL 1ST RESPONDENT

KIAMBU DISTRICT LAND REGISTRAR 2ND RESPONDENT

RULING

Background

1. Before court is the originating summons dated June 22, 2023 and brought under order 37 rules 1 (g), 2& 8 of the *Civil Procedure Rules* & rule 73 of the *Probate & Administration Rules*. the applicants/co-administrators sought for the following orders that:-
 - a. The 2nd respondent be ordered to vacate and remove all the entries and encumbrances of the 2 stale prohibitory orders issued in Nrb HCCC No 1590 of 1981 Rurigi Karonjo v Benson Wanjii Waititu & Nrb RMCC case No 8181 of 1981 registered against the title No Githunguri/Githiga/702 (2.67Ha) in compliance with certificate of confirmation of grant issued on September 20, 2019 in Githunguri SPM Succession Cause No 141 of 2016 In the matter of the Estate of Benson Wanjie Waititu (deceased) forthwith.
 - b. The 2nd defendant be ordered to register the discharge of charge dated May 13, 2022 executed by Agriculture Finance Corporation forthwith.



- c. The 2nd defendant be ordered to register forms LRA 39 & LRA 42 for title No Githunguri/Githiga/702 (2.67 Ha) as per the distribution in certificate of confirmation of grant issued on September 20, 2019 in Githunguri SPM Succession Cause No 141 of 2016 In the matter of the Estate of Benson Wanjie Waititu (deceased).
 - d. The 2nd defendant be ordered to issue 5 new title deeds out of the original title No Githunguri/Githiga/702 (2.67 Ha) as per the distribution in the certificate of confirmation of grant dated September 20, 2019 in Githunguri SPM Succession Cause No 141 of 2016 In the matter of the Estate of Benson Wanjie Waititu (deceased).
 - e. The parties be at liberty to apply for further orders for purposes of complying with the certificate of confirmation of grant dated September 20, 2019.
2. The originating summons are based on the grounds that the applicants are the administratrixes of the estate of Benson Wanjie Waititu (deceased) as such they lodged the grant of letters of administration, certificate of confirmation of grant and discharge of charge to enable them implement the distribution as ordered in certificate of confirmation of grant dated September 20, 2019 but could not proceed as there exists two stale prohibitory orders and a discharge of charge which they seek this court to order that they be vacated and/or removed by the 2nd defendant.
 3. The applicants swore the supporting affidavit herein. They deposed that together with other beneficiaries of the estate of Benson Wanjie Waititu (deceased) they desire that title No Githunguri/Githiga/702 be free from all encumbrances and entries registered against it with the 2 stale prohibitory orders issued in Nrb HCCC No 1590 of 1981 & Resident Magistrate Nairobi case No.8181 of 1981. They attached a search certificate dated 23rd June 2022 to that effect. That their advocate lodged the registration forms LRA39, the certified copy of the grant of letters of administration dated July 23, 2018 and certificate of confirmation of grant dated September 20, 2019 and discharge of charge dated May 13, 2022 and the original title No Githunguri/Githiga/702 (2.67Ha) at the Kiambu district land registrar to enable them implement the distribution as ordered in the certificate of confirmation of grant dated September 20, 2019 but the Kiambu District Land Registrar advised them to obtain a court order to remove the 2 stale prohibitory orders. They deposed that the 2 cases were disposed of and abated over 30 years ago after the decree was satisfied by the deceased and the original title deed was surrendered back to the deceased and the same is in their custody. The court was urged to order the Kiambu District Land Registrar to remove and/or vacate the prohibitory orders and discharge of charge so as to leave the title free from any encumbrances for the purposes of registering the grant of letters of administration dated July 23, 2018 and certificate of confirmation of grant dated September 20, 2019 as court orders are not granted in vain. The court was urged to allow the orders as prayed.
 4. The 1st and 2nd respondents' filed their grounds of opposition dated August 7, 2023. The grounds are as follows;-
 - a. That the applicant ought to seek the lifting of the prohibitory orders in the respective matters the orders were issued not through this miscellaneous application.
 - b. That this court lacks jurisdiction as the orders being sought should be granted in the Environment and Land Court.
 - c. That this application is an apparent misuse of the court process.
 5. Parties did not file submissions.



Issues For Determination

6. Having considered the originating summons and the grounds of opposition the main issue for determination is whether this court has jurisdiction to grant the orders sought.

Analysis

7. The applicants herein seek for the court to order the 2nd respondent to vacate and remove all the entries and encumbrances of the 2 stale prohibitory orders issued in Nrb HCCC No 1590 of 1981 Rurigi Karonjo v Benson Wanjii Waititu & Nrb RMCC case No 8181 of 1981 registered against the title No Githunguri/Githiga/702 (2.67Ha) further the 2nd respondent is also required to register the discharge of charge as well as register forms LRA 39 & LRA 42 for title No. Githunguri/Githiga/702 (2.67 Ha). All this entries are as per the distribution in certificate of confirmation of grant issued on September 20, 2019 in Githunguri SPM Succession Cause No 141 of 2016 In the matter of the Estate of Benson Wanjie Waititu (deceased).
8. The respondents contend that the applicants should file their application in the court that issued the said prohibitory orders. in any case, the court herein was said to lack jurisdiction as the same is vested in the Environment and Land Court.
9. The applicants herein have approached court vide a miscellaneous application by way of originating summons as the administrators of the estate of Benson Wanjie Waititu (deceased). They were issued with a grant of letters of administration and a certificate of confirmation of grant in the matter of the estate of the deceased. That they want to implement the said confirmed grant but the land registrar advised them to seek for a court order to remove the 2 prohibitory orders and a discharge of charge issued against the title belonging to the deceased. They attached a decree as proof that the 2 cases were disposed of 30 years ago when the decree was satisfied and the original title deed returned to them.
10. The applicants herein as the administrators of the estate of Benson Wanjie Waititu (deceased) have a duty to distribute the estate as provided for in the certificate of the confirmation of grant. However, the applicants are unable to implement the said grant as there exists encumbrances that hinder dealings on title No Githunguri/Githiga/702. The decree in the 2 suits as earlier mentioned has been satisfied as such the applicants should be able to acquire a clean title.
11. See the case of *Shahmad v Shamji Bros & another* (1957) EA 438 where it was held that a party has a vested right to the judgments which ought to be effected.
12. The 2 cases in Nairobi where the prohibitory orders are said to have been issued were disposed of 30 years ago and the decree therein having been satisfied by the deceased and the original title deed for title No Githunguri/Githiga/702 being surrendered back to the deceased, the applicants herein deserve to effect the certificate of confirmation of grant in regard to the estate of the deceased.
13. The grounds of opposition are rejected as the high court is found to have jurisdiction to deal with a miscellaneous application of this nature as the same deals with the duty of an administrator in effecting the certificate of confirmation of grant belonging to the estate of a deceased's person.
14. As stated in the foregoing paragraph, the applicable law is found under the provisions of rule 49 of the *Probate and Administration Rules* and section 47 of the *Law of Succession Act* which gives this court the power to exercise its discretion to make such orders which are in the interest of justice for a just conclusion of the cause which relates to the estate of the deceased person.
15. Section 47 of the *Law of Succession Act* reads as follows:-



‘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.’

16. Rule 49 of the *Probate and Administration Rules* reads as follows:-

“A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these rules, shall file a summons supported if necessary by an affidavit.”

17. In the upshot, the applicants’ application is found to be merited and the same is allowed as prayed.

DATED AND DELIVERED AT KIAMBU THIS 29TH DAY OF SEPTEMBER, 2023.

A. MSHILA

JUDGE

