



In re Estate of Njigoru Muya Katheri (Deceased) (Succession Cause 280 of 2007) [2023] KEHC 26204 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26204 (KLR)

(FORMERLY NYERI SUCCESSION CAUSE NO. 2 OF 1981)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE 280 OF 2007

LM NJUGUNA, J

NOVEMBER 29, 2023

IN THE MATTER OF THE ESTATE OF NJIGORU MUYA

KATHERI

BETWEEN

KUDGETA WAMUGO NJIGORU APPLICANT

AND

FREDRICK MUKUA NJIGORU RESPONDENT

RULING

1. The applicant has filed Summons dated October 26, 2023 which is supported by the grounds set out on the face of the application and the Supporting Affidavit. The orders sought are as follows:
 - a. Spent;
 - b. That the honourable court be pleased to remove the caution placed by the respondent against the title, land parcel number Embu/Township 1xxx/330 on March 23, 2011;
 - c. That this honourable court do order the respondent to sign transmission forms to the name of the applicant immediately;
 - d. That in the event that the respondent fails to comply, the executive officer/ deputy registrar do sign the transfer by transmission forms to enable transfer of land parcel number Embu Township 1xxx/330 from the co-executors- Kudgeta Wamugo Njigoru and Fredrick Mukua Njigoru to the sole beneficiary Kudgeta Wamugo Njigoru, the beneficiary according to the will attached to the application;



- e. That an order do issue restraining the respondent from interfering in any manner with the sale of land parcel Number Embu Township 1xxx/330, or interfering with the property at any time before and after the sale of the said property; and
 - f. The respondent to pay the costs of this application.
2. In her Supporting Affidavit, the applicant deposed that she was bequeathed the impugned property through a will dated June 8, 1973. That the respondent was appointed co-trustee with the applicant *vide* appointment dated July 8, 1980. Through a court order dated January 26, 2023, the applicant was ordered to pay Kshs 16,800,000/= to the liquidator, Kenya National Assurance Limited and Kenya Commercial Bank Limited in Civil Suit No. 6 of 2017 at the High Court of Kenya in Embu, as payment towards a loan facility that lay in default. It is her case that she has been attempting to sell the property named Embu Township 1xxx/330 in order to make good the payment. However, that the respondent as co-trustee with her has refused to execute the relevant documents to enable transfer of the property to the prospective buyer. She has now sought the intervention of this court to enable execution of the said documents for purposes of the transfer by transmission process at the land's office.
 3. The application is opposed through a Replying Affidavit wherein the respondent stated that following issuance of the grant of probate, the property was jointly registered in the names of all the trustees at the request of the applicant citing the need for proper management of the same. He stated that he has significantly participated in investing on the said land and the applicant agreed to add him as a co-owner and he placed a caution on the property to secure his interest. That the applicant is attempting to dispose the property to 3rd parties without his involvement, leading him to file a claim at the ELC. He urged the court to dismiss the application as it is an abuse of the court process.
 4. The respondent also filed grounds of opposition stating that the application is *res judicata* and that this court became *functus officio* after it issued the grant of probate. That the orders sought are prejudicial to the respondent and are *sub-judice* as the ELC claim filed *vide* Originating Summons in case number 9 of 2023 at Embu is still pending. That when the property was registered in his name as a co-owner with the other trustees, he is entitled to place a caution on the land in order to safeguard his interests. That prayers 3, 4 and 5 of the application are misconceived and should not be entertained by the court as the respondent was registered as the co-owner of the property with the consent of the applicant. He argued that the joint ownership of the said land can only be disrupted in the ELC case.
 5. The court directed that the application be canvassed by way of Written Submissions. Both parties complied.
 6. The applicant submitted that, herself and the respondent were administering/distributing the estate of the deceased as co-trustees, which collaboration led them to distribute the estate of the deceased as stated in the will except for the property namely Embu Township 1xxx/330 which was bequeathed to the applicant. She challenged the averments of the respondent in his Replying Affidavit stating that the respondent did not in any way invest in the said land. That the purpose of adding the respondent as a trustee was to enable transfer of the property to the applicant as the beneficiary of the same through the deceased's will.
 7. She referred to the Ruling of this court dated September 24, 2009 where it was held that the applicant should be allowed to take up her estate according to the will. That this decision was upheld on appeal where the Court of Appeal reiterated the position taken by this court. That since then, the applicant has been managing the property and engaging with the creditors in negotiations where she was asked to pay Kshs 16,800,000/= and she has chosen to do so by disposing the named property. She stated that



the caution placed cited beneficial interest and wrongfully so, as the respondent is not a beneficiary of the said property.

8. The respondent, in his submissions, maintained that the application is *res judicata* and that the court is *functus officio* following issuance of the grant of probate. He also maintained that the orders sought herein are also sought in an ELC claim that is ongoing. He argued that through this application, the applicant is seeking to usurp her power as executrix of the estate of the deceased. That the duty to transfer the property from executrix cannot be taken over by the deputy registrar or court executive officer. That the respondent is a joint registered owner of the property according to the copy of green card provided. Reliance was placed on the case of in *Re Estate of Kilungu (Deceased)* (2002) 2 KLR 136 where it was held that sections 45(1) and 76 of the *Law of Succession Act* do not allow the court to entertain an application for injunction.
9. From the foregoing, the issues for determination are:
 - a. Whether the application is *res judicata*; and
 - b. Whether the court has jurisdiction to grant the orders sought.
10. On the 1st issue for determination, section 7 of the *Civil Procedure Act* provides for res judicata as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
11. Similarly, in the case of the *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, [2017] eKLR), it was held that:

“For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

 - a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
12. The respondent submitted that this court determined the issues raised in the application when it issued the grant of probate. A grant of probate was issued in this matter on October 29, 1981 in favour of both the applicant and the respondent jointly pursuant to the deceased’s will dated June 8, 1973. The application herein mainly seeks that the executors transfer the estate bequeathed to the applicant, to her name as provided in the will. This application does not seek to reappoint executors in the estate but rather it seeks orders that will facilitate distribution of the estate according to the will. I do not think that the application is res judicata and therefore, the same is rightly before the court.



13. As to whether this court is clothed with the relevant jurisdiction, I have perused the green card for the property which shows that the property is jointly owned by the applicant and the respondent. The orders sought herein stem from an issue that ideally should be determined by the ELC. To me, the contention is between a beneficiary of the estate of the deceased as against an alleged stranger who is claiming proprietary interest. The respondent, who is the alleged stranger has attempted to demonstrate his interest in the property. This court cannot entertain that line of argument as it is bereft of the relevant jurisdiction. The respondent submitted that the ELC case is pending in that court. In my view, this court will be guided once the ELC case is settled as it goes into issues of acquisition of and right to title over the land.
14. This being a succession cause, the grant of probate was issued and confirmed thus necessitating distribution of the estate save for the impugned property which has been presented in this application as a property jointly owned by the applicant and the respondent. According to the green card, the property was transmitted to the applicant and respondent jointly after issuance of the grant of probate. The role of this court is exhausted at the point of confirmation of the grant of probate or any other subsequent orders in that regard. Once the property is passed from the estate of the deceased to the beneficiary/ beneficiaries, any other issues regarding title to the land are to be placed before the ELC.
15. For my above-stated reasons, I find that the application lacks merit and is hereby struck out with no order as to costs.
16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF NOVEMBER, 2023.

L. NJUGUNA

JUDGE

