



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 83 OF 2009

TABITHA NJOKI KAGANO.....APPLICANT

VERSUS

JACOB KINYUA KAGANO.....1ST RESPONDENT

HARUN NJIRU MACERE (Legal Representative to the

Estate of the Late SAMSON MACERE MUNGE).....2ND RESPONDENT

RULING

1. The matter for determination before this court is summons in general dated 30.04.2021 in which the applicant seeks for orders that:

1) The restriction and court order registered against the titles of Land Parcels No. INOI/THAITI /2732 and INOI/THAITI /2951 be removed.

2) There be no order as to cost.

2. The application is brought under Rules 49 and 73 of the probate and administration rules and it's supported by the affidavit of Tabitha Njoki Kagano, the applicant herein and sworn on 30.04.2021 in which she reiterates the grounds as set out on the face of the summons general and further avers that she is unable to transmit the estate to the beneficiaries of the estate and further that, some interested parties by the name of Nancy Wanjira Wachira and Josphene Wangithi Mwai had made an application to set aside the judgment and that the application had been dismissed with costs.

3. The applicant's case revolves around the restriction lodged by Ndata Mugo Advocates in regard to the Parcel of Land INOI/THAITI /2951 which has never been removed despite the court pronouncing itself on several occasions; further, that the order issued on 01.11.2017 has not been appealed against or a stay of the dismissal orders sought or allowed. That this court is therefore bound to facilitate the enforcement of its orders by removing the restriction that is in place. The applicant thus urged this court to allow the application as prayed.

4. The parties took directions that the application be canvassed by way of written submissions and which directions were only complied with, by the applicant.

5. I have considered the application herein and I find that the main issues which arise for determination are:

i. Jurisdiction.

ii. Whether the orders sought can be granted by this court.

6. It is not in dispute that the respondent lodged a restriction on Land Parcel No. INOI/THAITI /2951 as shown on annexure TMK - 3. The certificate of official search shows that a restriction had been lodged by the firm of Ndata Mugo Advocates thus restricting any dealing on Parcel of Land INOI/THAITI /2951 pending the hearing and determination of Civil Cause at High Court at Embu.

7. The jurisdiction of the High Court in Probate and Administration matters is set out under **Section 47 of the Law of Succession Act**, which provides;

47. Jurisdiction of High Court

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:

8. In **Succession Cause Kerugoya 187 of 2012 In re Estate of Eunice Wanjiru Karuri (Deceased) [2018] eKLR** it was the court’s view that it had jurisdiction to make orders which are in the interest of justice and for just conclusion of causes which relate to the estates of deceased person.

9. In the case of **Margaret Wanjiku Kahuhu v Nyahangi Nguni and 2 others (2014) eKLR** the court addressed itself to the issue of removal of a caution where it held that:

“This Court however, notes that the Applicant’s application is also brought under any other enabling provisions of 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.”

10. **Rule 73 of the Probate and Administration Rule** provides: -

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

11. In view of the foregoing, there is no doubt that this court is seized of the jurisdiction to hear the application. The intention of Parliament under **Section 47 of the Law of Succession Act and Rule of 73 of Probate and Administration Rules** was to give this court wide power to deal with matters which arise for determination when dealing with disputes arising under the Act. Matters of removal of cautions and restrictions are matters which this court has jurisdiction when they arise in Succession disputes as they may bar the execution of the orders issued by this court just like the case herein.

12. From the records, it is clear that the restriction by the firm of Ndata Mugo Advocates was lodged on 14.01.2020; by a ruling dated 20.09.2017, Muchemi J. allowed the appellant’s prayer that a portion measuring 0.35 ha which had been excised out of Inoi/Thaita/2730 be transferred to her. She further reiterated that the said order has never been appealed against nor set aside.

13. This matter relates to the estate of the deceased herein which should devolve to his dependants who are defined under **Section 29 of the Law of Succession Act**. It provides:

“For the purposes of this Part, “dependant” means –

(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) Such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;

14. In the above premises, this court therefore finds that the application has merits and it is hereby allowed with no order as to costs.

15. It is so ordered.

Delivered, dated and signed at Embu this 26th day of January, 2022.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents