



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Joseph Lisanza Lukale (Deceased) (Succession Cause
235 of 2011) [2022] KEHC 13451 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 235 OF 2011
WM MUSYOKA, J
SEPTEMBER 23, 2022**

IN THE MATTER OF THE ESTATE OF JOSEPH LISANZA LUKALE (DECEASED)

RULING

1. The application is dated 23rd October 2020. It relates to two matters pending at the Kakamega Chief Magistrate's Court, being Kakamega CMCCC Nos. 321 and 503 of 2008. The applicant, Elias Moard Mategwa, is the administrator herein. He would like the two lower court matters withdrawn from the said court and consolidated with the instant succession cause. He would also like to have orders made for the reconstruction of the court file in Kakamega CMCCC No. 321 of 2008.
2. The application is not opposed, for there is no reply to it, despite service.
3. I directed the Deputy Registrar to call for the original records of the two lower court files. Only the file in Kakamega CMCCC No. 503 of 2008 was availed. The file for the other matter is not available at the registry of the lower court, hence the prayers for its reconstruction. I have perused the record relating to Kakamega CMCCC No. 503 of 2008. The suit is by Joseph Lukale Lisanza against Gilbert Lisanza Khamasi, and it seeks only two prayers, removal of a caution registered in Kakamega/Ileho/311 and costs. As the file in Kakamega CMCCC No. 321 of 2008 was not availed, I have no idea what that suit is about.
4. Consolidation of suits is feasible where the suits sought to be consolidated relate to the same issues, and can be disposed of together, within jurisdiction. The cause herein is for succession of Kakamega/Ileho/311, while the suit in Kakamega CMCCC No. 503 of 2008 related to removal of a caution registered in the same property, Kakamega/Ileho/311. The two suits are related to that extent. The probate suit is limited to distribution of Kakamega/Ileho/311, and orders on distribution of the said property have since been made. After orders confirming the grant are made, the administrator is required to present the certificate of confirmation of the grant to the land registrar for transmission of the property as per the contents of the certificate.
5. Transmission of property as per the certificate of confirmation of grant is not provided for under the *Law of Succession Act*, Cap 160, Laws of Kenya. It is not a process under the *Law of Succession Act*, nor the rules made under it, that is to say the Probate and Administration Rules. Transmission is governed



by the land legislation, to wit the *Land Registration Act*, No. 3 of 2012, and the *Land Act*, No. 6 of 2012. The provisions relating to transmission are set out in sections 61 and 62 of the *Land Registration Act* and sections 50 and 51 of the *Land Act*. Cautions, their registration and removal are also provided for under the same legislations, at sections 71,72,73,74 and 75 of the *Land Registration Act*.

6. Sections 61,61,71,72,73,74 and 75 of the Land Registration Acts provide as follows on transmission and cautions:

“ 61. Transmission on death of a sole proprietor or proprietor in common

- (1) If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of [deceased]” or “as administrator of the estate of [deceased]”, as the case may be.
- (2) Upon confirmation of a grant, and on production of the grant the Registrar may, without requiring the personal representative to be registered, register by transmission—
 - (a) any transfer by the personal representative; and
 - (b) any surrender of a lease or discharge of a charge by the personal representative.
- (3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

62. Effect of transmission on death

- (1) Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or chage with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.
- (2) The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor

71. Lodging of cautions

- (1) A person who—



- (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
 - (b) is entitled to a licence; or
 - (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, No. 3 of 2012 Land Registration [Rev. 2016] [Issue 3] L9 - 32 may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.
- (2) A caution may either—
- (a) forbid the registration of dispositions and the making of entries; or
 - (b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution.
- (3) A caution shall be in the prescribed form, and the Registrar may require the cautioner to support the caution by a statutory declaration.
- (4) The Registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under this Act
- (5) Subject to this section, the caution shall be registered in the appropriate register.

72. Notice and effect of caution

- (1) The Registrar shall give notice, in writing, of a caution to the proprietor whose land, lease or charge is affected by the caution.
- (2) A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court.

73. Withdrawal and removal of caution

- (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (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 a 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 the payment of costs.
- (5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.
- (6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.

74. Second caution in respect of the same matter The Registrar may refuse to accept a further caution by the same person or anyone on behalf of that person in relation to the same matter as a previous caution.

75. Wrongful cautions Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person”

7. Sections 50 and 51 of the [Land Act](#) provide as follows on transmission

“ 50.

- (1) If a sole proprietor or a proprietor in common dies, the proprietor's personal representative shall, on application to the Registrar in the prescribed form and on production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative's name of the words “as executor of the will of (.....) [deceased]” or “as administrator of the estate of (.....) [deceased]”, as the case may be.
- (2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission—
 - (a) any transfer by the personal representative; and
 - (b) any surrender of a lease or discharge of a charge by the personal representative.



- (3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor. Effect of transmission on death.

51.

- (1) Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.
- (2) The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor.”

8. The issue of jurisdiction naturally arises. The High Court is the court for the purposes of the processes the subject of the *Law of Succession Act*, according to section 47 of the *Law of Succession Act*. The Environment and Land Court and the empowered subordinate courts is the court for the purposes of the processes under the land legislation, according to sections 2 and 101 of the *Land Registration Act* and sections 2 and 150 of the *Land Act*. That would mean that when it comes to removal of cautions, the applicable law should be the land legislation, not the *Law of Succession Act*, and the court with jurisdiction should be either the Environment and Land Court or the empowered subordinate court, and not the High Court. Consequently, the High Court should have no jurisdiction over matters relating to administration of the land legislation, which should include removal of cautions.

“2 Court” means the Environment and Land Court established by the Environment and Land Court Act, 2011 (No. 19 of 2011), and other courts having jurisdiction on matters relating to land;

101 Jurisdiction of court The Environment and Land Court established by the Environment and Land Court Act, 2011 (No. 19 of 2011) and subordinate courts have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

“2 Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011; No. 19 of 2011;

150. The Environment and Land Court established in the Environment and Land Court Act is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

9. Sections 2 and 101 of the *Land Registration Act* and Sections 2 and 150 of the *Land Act* states as follows: -



10. The effect of what I have stated above should be that Kakamega CMCCC No. 503 of 2008 ought not be consolidated with the instant cause. The consolidation would not assist the High Court in making orders on distribution of the estate, for it has already made those orders. What pends is transmission of the assets to the names of the persons indicated in the certificate of confirmation. The High Court has no jurisdiction over the transmission process, and removal of cautions, to facilitate transmission, is beyond its powers. That jurisdiction lies with the Environment and the empowered subordinate court, and Kakamega CMCCC No. 503 of 2008 is before the proper court. I shall accordingly not order the withdrawal, transfer and consolidation of Kakamega CMCCC No. 503 of 2008 with the instant cause. I will not make orders on Kakamega CMCCC No. 321 of 2008 as I am yet to see that file.
11. On the reconstruction of Kakamega CMCCC No. 321 of 2008, the applicant should make that application before the court seized of that matter.
12. From what I have said so far it should be clear that there is no merit in the application dated 23rd October 2020, and I hereby dismiss the same. The file in Kakamega CMCC No. 503 of 2008 to be returned to the relevant registry.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 23RD DAY OF SEPTEMBER 2022

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Elias Moard Mategwa, the applicant, in person.

Mr. Getanda, instructed by Onsando Getanda & Company, Advocates for the protestors.

