



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 3002 “A” OF 2003**  
**IN THE MATTER OF THE ESTATE OF ZIPPORAH NJERI MWAURA (DECEASED)**

SALOME WAMBUI GITAU.....1<sup>ST</sup> APPLICANT

MWANGI KOGL.....2<sup>ND</sup> APPLICANT

TIRUS KAMAU MBURU.....3<sup>RD</sup> APPLICANT

MWAURA KOGL.....4<sup>TH</sup> APPLICANT

KARANJA KOGL.....5<sup>TH</sup> APPLICANT

VERSUS

KOGI MWAURA WALLACE..... RESPONDENT

**RULING**

1. The deceased Zipporah Njeri Mwaura died on 23<sup>rd</sup> February 1991. She left a Will made on 30<sup>th</sup> November 1988. A grant of letters of administration with Will annexed was made on 31<sup>st</sup> December 2003 to her daughter Miriam Muthoni and daughter in-law Salome Wambui Gitau (1<sup>st</sup> applicant). The deceased left LR. No. Gatamaiyu/Kamuchege/415 measuring 10.40 acres, plot No. 18 at Kamuchege Shopping Centre and 4 shares at Thome Cooperative Society.

2. The respondent Kogi Mwaura Wallace is a son to the deceased. On 8<sup>th</sup> December 2005 he filed summons to have the grant revoked on the basis that the deceased had not left any Will; that the alleged Will was not made by her as she was illiterate, too old and sick to make a Will; and that she could not dispose of Gatamaiyu/Kamuchege/415 by the Will as she owned only 2 acres of the land, the rest being held in trust for her children. The summons was heard by Justice W. Musyoka who rendered a judgment on the same. It was found that the deceased had made a valid Will.

3. The court heard the application dated 6<sup>th</sup> September 2004 for the confirmation of the grant with Will annexed and allowed it. A certificate of confirmation was issued in which the 1<sup>st</sup> applicant got 4.40 acres, the 2<sup>nd</sup> applicant Mwangi Kogi got 1 acre, the 4<sup>th</sup> applicant Mwaura Kogi got 1 acre and the 5<sup>th</sup> applicant Karanja Kogi got 1 acre all from Gatamaiyu/Kamuchege/415. The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> applicants are the deceased's grandsons. The 3<sup>rd</sup> applicant Tirus Kamau Mburu is the son of the deceased daughter Miriam Muthoni (a co-administrator) who has since died. Her entitlement to Gatamaiyu/Kamuchege/415 was 3 acres.

4. The respondent has since 12<sup>th</sup> September 1988 lodged a caution against Gatamaiyu/Kamuchege/415. This means the applicants, as beneficiaries, cannot realise their respective entitlements under the certificate of confirmation. This is what led to the applicants to file the present summons dated 16<sup>th</sup> November 2018 for an order directed at District Land Registrar Kiambu to lift the caution.

5. It should be noted that the respondent was aggrieved by the judgment delivered on 4<sup>th</sup> May 2018 and preferred an appeal to the Court of Appeal. The appeal has not been determined, and an application for stay of execution of the judgment was dismissed.

6. In answer to the summons to lift the caution, the respondent filed a notice of preliminary objection dated 6<sup>th</sup> February 2019 whose grounds were that this court was *functus officio* and had no jurisdiction to handle the matter as the jurisdiction to deal in a matter relating to the caution under **section 73** of the **Land Registration Act, 2012** belonged to the Environment and Land Court as defined under **section 3** of the **Act**. It was further contended that as long as there was the appeal before the Court of Appeal this court could not handle the summons. The response to the objection was filed by the 1<sup>st</sup> applicant. She swore that this was not a land dispute but a succession cause; that as long as there was no stay, the certificate of confirmation has to be executed by the removal of the caution; and that the court does not become *functus officio* when it is called upon to execute its own orders.

7. Mr Madegwa for the applicants and Mr Arusei for the respondent filed written submissions which made reference to several decided cases. I have considered them.

8. The respondent challenged the Will made by the deceased on various grounds. One of the grounds was that, although Gatamaiyu/Kamuchege/415 was registered in the name of the deceased she held 5 acres of the land in trust for him; that he had bought the 5 acres comprised in the title. The court did not agree with the respondent. It dismissed his challenge to the Will on the basis that the 5 acres was held in trust for him. The court went ahead to confirm the grant issued with Will annexed and distributed the deceased's estate comprised in the title to the applicants. The respondent challenged the deceased's title to Gatamaiyu/Kamuchege/415 in these succession proceedings and lost. He did not make the challenge in the Environment and Land Court. It is because he lost in his bid that he now raises the issue of jurisdiction.

9. This succession court found that the deceased made a valid Will over free property that she owned, and which was registered in her name. The beneficiaries had been identified in the Will, and that has been confirmed by the court which has consequently distributed the estate to those beneficiaries. The court can only become *functus officio* after the estate has been transferred to its respective beneficiaries as ordered in the certificate of confirmation. That has not been done because of the caution lodged against the title subject of the estate. The court has found that the respondent who put the caution has no claim to the estate. There is no outstanding dispute, land or otherwise, over the estate and its beneficiaries. There is no outstanding claim by the respondent over Gatamaiyu/Kamuchege/415. I agree with the applicants that this court, sitting as a succession court and having found that the applicants are the beneficial owners of the respective parcels in Gatamaiyu/Kamuchege/415, is the one entitled to enforce the orders by ordering the removal of the caution lodged by the respondent. The respondent, by placing a caution on the title, was expressing a beneficial interest in the title. This court has found that he does not have the beneficial interest. There is no outstanding litigation over the title that can go to the Environment and Land Court created under **Article 162(2)(b)** of the Constitution and **section 13** of the **Environment and Land Court Act**.

10. I bear in mind the principle of *functus officio* in **Jersey Evening Post Limited –v- A I Thani [2002] KLR 542** and **Mengunya Saum Murgani –v- Kenya Revenue Authority [2014]eKLR**, but find that this court is not seeking to revisit the judgment that was delivered. The court is being asked to enforce its own orders for the beneficiaries (the applicants) to realise the fruits of the certificate of confirmation issued on 23<sup>rd</sup> May 2018. Court order and decrees are not issued in vain.

11. In conclusion, as to whether the court lacks jurisdiction to deal with the summons, my answer is that the court has the jurisdiction. Similarly, the court, in dealing with the summons, is not *functus officio*.

12. There was no response to the summons beyond the preliminary objection which has not been sustained. The result is that the summons is allowed with costs. The District Land Registrar Kiambu is ordered to lift the caution that was lodged on 12<sup>th</sup> September 1988 against Gatamaiyu/Kamuchege/415 by the respondent.

13. The preliminary objection dated 6<sup>th</sup> February 2019 is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 28<sup>TH</sup> day of JANUARY, 2020**

**A.O. MUCHELULE**

**JUDGE**