



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 15 OF 2015

IN THE MATTER OF THE ESTATE OF ELIUD GACHOKI KIBARA (DECEASED)

AND

BERNARD MUTHUKU GACHOKI.....APPLICANT

VERSUS

RICHARD MUTHII GACHOKA.....RESPONDENT

JANE WANGU GACHOKI.....1ST PARTY

MERCY WAMWIRUA GACHOKI.....2ND PARTY

PURITY WANGARI GACHOKI.....3RD PARTY

JOSPHINE WAMUYU GACHOKI.....4TH PARTY

RULING

1. The application pending before this court is the one dated 3rd October 2019 filed by Bernard Muthuku Gachoki. It seeks an order that the cautions, restrictions, inhibitions which are currently lodged on land Parcel No. Inoi/Ndimi/435 by the Respondent Richard Muthii Gachoki be vacated and or removed.

2. The application is based on the facts that the grant of letters of administration was confirmed on 18th April 2018. Later on 14th August 2018 the grant was rectified with an order that land parcel No. Inoi/Ndimi/435 be shared equally between Jane Wangu Gachoki, Mercy Wamwirua Gachoki, Purity Wangari Gichoki and Josphine Wamuyu Gachoki. A rectified grant was issued on 23rd October 2018.

3. The applicant depones that the Respondent in attempts to block other beneficiaries has placed cautions, restrictions and or inhibitions on the title for no just cause. It is his prayer that the cautions, restrictions and inhibitions be removed so that the beneficiaries can develop their portions.

4. The respondent in his affidavit sworn on 20th November 2019 claims that the Applicant ought to move the ELC Court for the removal of the cautions. He avers that he has valid reasons for placing the caution as his son, one Kennedy Gachoki Muthii resides on the land and has made extensive developments on it. He challenged the distribution of the land as it would render his son destitute. He further contends that he had filed a protest which was dismissed.

I have considered the application. The issue which arises for determination is whether this court has jurisdiction to order the removal of the cautions, restrictions and inhibitions on Land Parcel No. Inoi/Ndimi/435.

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:

The respondent challenges the jurisdiction of the court, that it ought not to hear land and environment matters, or give orders as regards the same. However, case law has established that the probate court has jurisdiction over land matters as far as it relates to the estate of the deceased.

In Civil Succession *Kerugoya 187 of 2012 In re Estate of Eunice Wanjiru Karuri (Deceased) [2018] eKLR* this court held that it has 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.

On the issue of removal of a caution this court gave reference to the case of *Margaret Wanjiku Kahuhu -V- Nyahangi Nguni and 2 others (2014) eKLR* which 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.”

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.”

This is the court seized of the matters which are raised in 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 powers 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 grants issued by this court.

There is no dispute that Land Parcel No. Inoi/Ndimi/435 forms part of the estate of the deceased. **Section 45 of the Act** makes it an offence for any person to intermeddle with the estate. It provides:

(1) “Every application to the court under section 26 of the Act shall, where a grant has been applied for or made but not confirmed, be brought by summons in Form 106 in that cause, or, where no grant has been applied for, be brought by petition in Form 96; and the summons or petition and supporting affidavit shall be filed in the registry and copies thereof served upon the personal representative of the deceased: Provided that, if representation has not been granted to any person, a copy of the petition and supporting affidavit shall be served upon the persons who appear to be entitled to apply for a grant under the Act.(2) The application shall be supported by evidence on affidavit in Form 15 or 16 stating that no grant of representation to the estate of the deceased has been confirmed and containing, so far as may be within the knowledge of the applicant, the following information and particulars –

(2) (a) the date of the death of the deceased and whether he died testate or intestate and, if testate, the date of his last will and whether oral or written;(b) the relationship of the applicant to the deceased and the grounds upon which, having regard to the provisions of section 29 of the Act, the applicant claims to have been a dependant of the deceased at the time of his death;(c) the name and address of every other dependant of the deceased at the time of his death;(d) whether the deceased made any gift in contemplation of death (whether or not falling within the provisions of section 31 of the Act) and, if so, the nature, amount and value thereof;

(e) Whether a grant to the estate of the deceased has been issued and, if so, to whom and upon what date;

(f) the nature, situation and amount of the deceased’s property and the value of his net estate;

(g) any past, present or future capital or income of the applicant derived or expected to be derived from any source;

(h) the existing and future means and needs of the applicant;

(i) whether the deceased had during his lifetime made any advancement or other gift to the applicant;

(j) the conduct of the applicant in relation to the deceased;

(k) the situation and circumstances of the deceased’s other dependants (if any) and of the beneficiaries under any will of the deceased; and(l) the general circumstances of the case including the deceased’s reasons for not making provision for the applicant.

(3) Copies of the proceedings shall be served upon such persons (if any) as the court may direct.

(4) The application shall without delay be set down by the registry before the court for hearing upon notice to the applicant and to such persons as have been served with the proceedings and to such other persons (if any) as the court may direct.

(5) At the hearing of the application the court shall have regard to the information and particulars referred to in subrule (2) and also to such evidence as may be adduced as to the conduct of the applicant in relation to the deceased as required by paragraph

(e) of section 28 of the Act.

The beneficiaries of the estate and their shares have been determined by this court. Kennedy Gachoki Muthii is not one of the beneficiaries and is not a party in these proceedings. His alleged occupation of the land amounts to the intermeddling with the estate. He has no right to remain on the estate of the deceased.

In this case the respondent is a beneficiary of the estate who seeks to block his sisters from their proposed share of the estate, his protest on the same was heard and determined by the court and dismissed. He therefore had an opportunity to raise his grievance and the court made a determination on it. It seems the actions by the Respondent is an attempt to frustrate the orders of this court, as regards execution of the confirmed grant. It is expedient and in the interest of justice that litigation must come to an end,

CONCLUSION

For the foregoing reasons, I find that this court has jurisdiction to grant the prayers for the removal of the caution so that the Estate may be distributed as per the grant confirmed by this court. The application has merits and is allowed. I order that the cautions and restriction placed on land parcel No. Inoi/Ndimi/435 be removed.

Signed by:

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HON. LADY JUSTICE LUCY GITARI

JUDGE

Dated, signed and delivered at Kerugoya by HON. LADY JUSTICE J.N. MULWA on this 12TH Day of NOVEMBER 2020.

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HON. LADY JUSTICE J. N. MULWA

JUDGE