



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 923 OF 2012**

**IN THE MATTER OF THE ESTATE OF RACHEL WAMBUI CHEGE**

**EVANS MUTHEMBA CHEGE.....APPLICANT**

**VERSUS**

**MARY WAITHERA CHEGE.....RESPONDENT**

**RULING**

1. Following the judgment of this court that was delivered on 21<sup>st</sup> November 2014, there was an appeal lodged in the Court of Appeal to challenge the decision. The appeal followed leave that was issued in the ruling delivered on 18<sup>th</sup> July 2018 for extension of time to appeal. In the ruling of 18<sup>th</sup> July 2018, along with the leave, the court issued a restraining order in respect of the distribution of land parcel Kabete/Lower Kabete/2008 until the appeal is heard and determined.

2. The applicant Evans Muthemba Chege has asked that the ruling be reviewed so that the restraining order extends to land parcel Kabete/Lower Kabete/2007. His case was that the application leading to the ruling made reference to both parcels, and that even the draft Memorandum of Appeal annexed to the application leading to the ruling was in relation to the two parcels. Therefore, in order to protect the subject matter of the appeal, both parcels have to be preserved by the restraining order. He stated that, to realise the intention of the court in the ruling of 18<sup>th</sup> July 2018, the restraining order should be reviewed to affect both parcels.

3. The replying affidavit of John Kabara Chege opposed the application. His case was that although the application had sought to restrain both parcels, the court had considered the matter and only restrained one parcel. The court was therefore *functus officio* having addressed itself on the issue and rendered a decision.

4. I accept that the Memorandum of Appeal related to both Kabete/Lower Kabete/2007 and Kabete/Lower Kabete/2008. The applicant seeks to challenge the way this court dealt with the distribution of the two parcels. My ruling of 18<sup>th</sup> July 2018 sought to protect only Kabete/Lower Kabete/2007. It was an error on the part of the court to state that the only property affected by the appeal was Kabete/Lower Kabete/2008. In any case, the notice of appeal indicated that the applicant had been aggrieved by the entire judgment of this court. The judgment was in respect of these two parcels, and others. The court has the responsibility, after allowing the applicant to appeal out of time, to protect the subject matter of the dispute until the appeal is heard and determined.

5. These are the reasons why I allow the application dated 31<sup>st</sup> July 2018 and filed on 1<sup>st</sup> August 2018. I review the ruling of 18<sup>th</sup> July 2018 so that the restraining order shall be in respect of both Kabete/Lower Kabete/2007 and Kabete/Lower Kabete/2008, and the order shall be in place until the appeal is heard and determined.

6. I make no orders as to costs in regard to the application.

7. In relation to the application dated 2<sup>nd</sup> March 2017, the respondent Mary Waithera Chege sought that the applicant be removed as a co-administrator and be replaced by John Kibara Chege to enable the confirmed grant to be executed. Her case was that the respondent had refused to cooperate to execute the transmission documents to facilitate the distribution of the estate of the deceased in accordance with the certificate of confirmation dated 24<sup>th</sup> January 2017. The application was opposed by the applicant.

8. One can clearly see why the applicant is not able to participate in the execution of the certificate of confirmation that was issued on 24<sup>th</sup> January 2017. The certificate seeks to distribute, among other parcels, Kabete/Lower Kabete/2007 and Kabete/Lower Kabete/ 2008. The two parcels are the subject of the appeal now pending in the Court of Appeal. If the application to substitute the applicant is allowed, the estate, including those two parcels, will be distributed to the beneficiaries. That will take away the subject matter of the appeal. The appeal will be rendered nugatory.

9. It is for this reason that I will not allow the application dated 2<sup>nd</sup> March 2017. I dismiss the same, but make no orders as to costs.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of JANUARY 2019**

**A.O. MUCHELULE**

JUDGE