



**REPUBLIC OF KENYA**

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

**HIGH COURT SUCCESSION CAUSE NO.12 OF 2011**

**IN THE MATTER OF ESTATE OF MARY GATHONI w/o GITHINJI (DECEASED)**

**MARGARET WANJIRU MUHIHIA.....APPLICANT**

**BETWEEN**

**CHARLES KAGWANJA KARIUKI.....RESPONDENT**

**RULING**

On 31<sup>st</sup> January 2018 this court delivered its judgment dismissing the respondents summons for revocation of grant dated 1<sup>st</sup> October 2013. Today what is before me is the summons dated 4<sup>th</sup> July 2018 where the applicant seeking orders for the removal of the caution lodged by the respondent on the title L.R Konyu/Ichuga/114.

On 20<sup>th</sup> April 2012 the applicant was issued with a certificate of confirmation of grant making her the sole heir to the said property which was her mother's estate.

The respondent efforts to have the same revoked was dismissed on 31<sup>st</sup> January 2018. The application to remove the caution was opposed by the respondent through his replying affidavit sworn on 17<sup>th</sup> December 2018. He also indicated that he had filed a notice of Appeal dated 5<sup>th</sup> December 2018 and that he current application was intended to steal a match against him.

Mr. Kinuthia argued the application on behalf of the respondent. He argued that this court had no jurisdiction to remove the said caution.

That caution is defined and its removal provided for in the Land Registration Act, under which the court is defined as the ELC. Hence the applicant ought to have filed a substantive suit for the removal of the caution in the Environment and Land Court.

He also submitted that there was an appeal pending in the Court of Appeal, and removal of the caution would render the appeal nugatory as the subject matter of the appeal would become non-existent hence the status quo needed to be maintained in the interests of justice.

The Applicant's response was that the respondent is her cousin and was fighting her over her mother's property and he had never appealed his court's judgment.

I have carefully considered the submissions by counsel.

Issues arise:

1. Does this court have jurisdiction to order the removal of the caution?
2. Is there any hindrance against the removal of the caution?

While it is correct that issued of jurisdiction must be raised at the earliest possible it would only have been fair to notify the applicant who is unrepresented, that they would be raising an issue of jurisdiction.

Be that as it may. In the words of Nyarangi JA in **Owners of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1** "... Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction". Hence I must of necessity deal with that issue first.

In determining that issue I must pose the question whether the matter before me is this land matter as envisaged by the Constitution that

created the special courts and the statutory legislation made by parliament to enforce the same?

s. 13 (2) of the ELC Act provides for the Jurisdiction of the court :

*In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes*

*(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(b) relating to compulsory acquisition of land;*

*(c) relating to land administration and management;*

*(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(e) any other dispute relating to environment and land.*

Succession matters are almost always about land – and the Law of Succession Act – relies on the land laws to effectuate the orders of transmission that is why beneficiaries have to use forms from the land laws, go to the lands office to register transmission, that by itself would have rendered all succession matters beyond the jurisdiction of the High Court.

I think it would be splitting hairs against the interests of justice if parties were required for every step that required the lands office or Lands Registry or an action by the Land Registrar to be required to file a substantive suit before the ELC Court.

The respondent herein lodged the caution in LR Konyu/Ichunga/1114 on the same date 1<sup>st</sup> October 2013 he filed the summons for revocation of grant claiming beneficial interest. This is fortified by his lawyer's letter of 11<sup>th</sup> March 2014 to the Land Registrar that the removal of the said caution would compromise his suit, which was the summons for revocation of grant. That Summons for revocation of grant was found to be without merit and was dismissed. His lodging of the caution had nothing to do with any land dispute provided for under S.13 (2) of the E&LC Act No.19/2011 as defined above. The removal of a caution lodged in a succession cause cannot by any stretch of imagination fall under

*“any other dispute relating to land and environment”*

Granted a caution is defined under the Land Registration Act, under s. 2 to include (a) *a notice in the form of a register to the effect that no action of a specified nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave the notice; or (b) a caveat;*

The language of s.73(1) is plain as day stating the manner for Withdrawal and removal of caution viz: *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. And Court is defined under s. 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;*

My view is that all these must be read together. These provisions were clearly intended for matters that would be considered disputes involving land as provided in s. 13 above. I am certain in view of Article 159 it could never have been the intention of the makers of the Constitution to make court proceedings a rigmarole for Wanjiku, as would happen if we were to follow counsel's submissions.

It is clear as day to me that the caution placed on this land was not in relation to a dispute that falls under the jurisdiction of the court as defined under that Act but a dispute that falls under the jurisdiction of this court.

This court is vested with the jurisdiction to deal all matters related to the succession cause: That is what section 47 of the Law of Succession Act states:

***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:*

In addition in Esther Nyambura & another v Edward Gall Wango [2014] eKLR the dealing with a similar issue pointed out the provisions of Section 2 of Chapter 160 Laws of Kenya (Laws of Succession Act) give this court the Jurisdiction to deal with the issue of removal of a caution in a succession cause. It provides:-

*"2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons."*

Key words here are:-

*"Except as otherwise expressly provided in the Act (Law of Succession Act) or any other written law, the provisions of the Act (Laws of Succession Act) shall constitute the law of Kenya in respect of all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act and to the administration of estate of those persons."*

(See also **In re Estate of Eunice Wanjiru Karuri (Deceased) [2018] eKLR**)

Hence my considered view fortified by similar findings in similar cases by other judges in this court is that removal of cautions in succession matters is governed by the provisions of the Act as provided for under s. 2, s. 47 and rules 49 and 73 of the P&A rules.

The Second issue is whether there is any reason not to remove the caution?

The applicant is the daughter of the deceased. She was entitled to inherit her mother's property, her being a married woman notwithstanding. No appeal has been file and there are no orders staying the execution of the grant.

Having found that this court has jurisdiction to order the removal of the caution, and having found no reason not to remove the same I allow the application and direct the Land Registrar to remove the caution lodged on the 1<sup>st</sup> October 2013 against LR Konyu/Ichuga/114.

No orders as to costs

**Dated, delivered and signed this 30<sup>th</sup> Day of April 2019 at Nyeri.**

**Mumbua T Matheka**

**Judge**

Court Assistant: Juliet

Mr. Kinuthia for respondent

Margaret Wanjiru Applicant

Mr. Kinuthia: I apply for certified copies of ruling and typed proceedings

Court: granted

**Judge**