



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 153 OF 2013**

**IN THE MATTER OF THE ESTATE OF JUSTUS NYAGA CHINDANO (DECEASED)**

**BETWEEN**

**LUCY WAMBETI BEDAN.....APPLICANT**

**VERSUS**

**JAMES NJUE CINDANO.....1<sup>ST</sup> RESPONDENT**

**HENRY NJERU CINDANO.....2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. This ruling pertains to the summons dated 30<sup>th</sup> August 2018 in which the applicant seeks orders to remove cautions placed on Land Parcels No. Gaturi/Nembure/946, 653, 111 and Gaturi/Kianjoma/T.14 which form part of the estate of the deceased.
2. It is the applicant's case that being the administrator of the deceased's estate and having obtained the certificate of confirmed grant dated 26/2/2018, she could not proceed with transmission of the parcels of land as the respondents had placed cautions on the suit property. It is the applicant's case that the respondents are not beneficiaries of the deceased's estate and as such have no interest capable of being safeguarded through placing cautions.
3. In rejoinder, the 1<sup>st</sup> respondent filed a preliminary objection that the summons dated 30/08/2018 were misconceived and ought to be dismissed. The preliminary objection is grounded on the fact that the issues relating to removal of cautions over the suit property are provided for under the Land Registration Act and as such fall under the jurisdiction of the Environment and Land Court and not this court.
4. The parties filed submissions to dispose of both the preliminary objection and the summons dated 30/08/2018.

**B. Applicant's Submissions**

5. In response to the preliminary objection by the 1<sup>st</sup> respondent it is submitted that this court has jurisdiction over the matter before it as it did not become *functus officio* when it confirmed the grant and as such it can still entertain summons for amendment, rectification, or revocation or intermeddling or any other issue that may arise before the grant is implemented.
6. It is further submitted that this court's jurisdiction persists as long as the issue remains the implementation of grant issued to the applicant has not been fully achieved.
7. The applicant thus submits that the preliminary objection is unmerited and ought to be dismissed.
8. In support of the applicant's summons to remove the caution over the suit property it is submitted that the respondents are not beneficiaries of the deceased's estate. This is confirmed by the withdraw of their objections to the grant claim against the applicant. It is argued that the cautions are therefore an effort to frustrate the implementation of the grant issued to the applicant.

**C. 1<sup>st</sup> Respondent's Submissions**

9. It is submitted that this court has no jurisdiction to determine family trust and overriding interest in relation to land matters and as such the

placing of caution by the 1<sup>st</sup> respondent is justified. It is further submitted the jurisdiction to entertain the matter relating to lodging or removal of caution is the exclusive jurisdiction of the Land and Environment court.

10. It is further submitted that having confirmed the grant, the succession court is *functus officio* and subsequently the issues relating to the caution and/or restriction on the suit property cannot be dealt with by this court.

#### **D. Analysis of Law**

11. I have considered the pleadings before me. There is no dispute that the 1<sup>st</sup> Respondent has lodged a caution on the suit property as shown on annexture LWB 2 (a) – (d) – certificates of official search showing that a caution is lodged by the respondents who are claiming interest as beneficiaries. The issues which arise for determination are:

a) *Whether this court has jurisdiction to entertain the summons dated 30/08/2018.*

b) *Whether the applicant is entitled to the orders sought.*

12. The 1<sup>st</sup> Respondent claims that this Court does not have jurisdiction to deal with the question of removal of caution as that is jurisdiction for Environment and Land Court which is established under **Section 4 of the Environment and Land Court Act** and pursuant to **Article 162 (2) (b) of the Constitution**.

The Section provides:

***“There is established Environment and Land Court.”***

13. The Article provides:

***“Parliament shall establish Courts with status of the High Court to hear and determine disputes relating to –***

***The environment and the use and occupation and title to land.”***

14. **Section 73 (I) of the Land Registration Act** provides that caution may be withdrawn by the cautioner or removed by Court or by order of the registrar. That the court here refers to the Environment and Land Court established under the Act in case of land disputes.

15. The applicant submits that this court has jurisdiction over a file before it as it did not become *functus officio* when it confirmed the grant and as such it can still entertain summons for amendment, rectification and or revocation or intermeddling and further that this court’s jurisdiction persists as long as the issue remains the implementation of grant issued to the applicant.

16. In my view, the matter before me is a succession cause but not a land dispute. There is no doubt that this court is vested with the necessary jurisdiction to hear and determine the succession matter to conclusion. The conduct by the respondent in this matter clearly demonstrates that they are aware that they have no valid claim against the estate of the deceased. That is why they agreed to abandon their protests and objections in this cause. These withdrawals were recorded as an order of the 26/02/2018.

17. This court thereafter proceeded to confirm the grant on the 30<sup>th</sup> April 2018. The distribution of the estate is impeded by the fact that there exists a caution lodged against the land of the deceased. The respondents lodged the cautions on the 27<sup>th</sup> August 2018 six (6) months after withdraw of the protests which demonstrates bad faith on part of the respondent. It is obvious that the lodging of cautions was intended to defeat the orders of this court in distribution of the estate.

18. The respondents are neither creditors to the estate or beneficiaries and as such had no *locus standi* to block the distribution of the estate of the deceased.

19. **Section 47 of the Law of Succession Act:**

***“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.”***

20. A party who has obtained a grant is free to apply to the Court if he is unable to enforce the grant. The Court has inherent powers to make orders. **Rule 73 of the Probate and Administration Rules** provides:

***“Nothing in these Rules shall limit or otherwise affect the inherent power 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.”***

21. The issue of removal of caution was addressed in the case of **Margaret Wanjiku Kahuhu v Nyahangi Nguni and 2 others [2014] eKLR** it was stated: -

***“The Applicant brought her application under Section 73 (1) of the Land Registration Act, 2012. This has prompted counsel for***

*the Respondents to contend that this Court has no jurisdiction to deal with this matter as it is purely and essentially of a nature that could only be handled by the Environment and Land Court. To that end this Court is in agreement with the counsel for the Respondents that indeed the said provision falls under the province of the Environment and Land Court. Indeed, the Respondents' contention that the jurisdiction of the Family and Probate Court emanates from the Law of Succession Act, Cap. 160, in so far as concerns administration of deceased persons' property is quite correct.*

*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."*

22. The applicant has brought the application under Rules 49, 63 and 73 of Probate and Administration Rules. The Law of Succession Act which gives Court inherent jurisdiction to deal with administration of Estates has no provision to remove a caution from the land forming the estate of a deceased person even where the caution is wrongly lodged as is the case in this matter.

23. I find the provisions under which this application is brought gives Court inherent powers to entertain the application and make orders that would be in the interest of justice and to prevent abuse of Court process. I am of the view that this Court has jurisdiction to entertain the application and grant the orders sought should it be found to have merit.

24. It has been established tht the respondents have no legal interest in the estate of the deceased. This court has jurisdiction to ensure that the grant is enforced as required by the law. I reach a conclusion that the respondents have no valid reason to block the distribution of the estate.

25. Consequently, I find that the preliminary objection dated 8<sup>th</sup> October 2018 has no merit and it is hereby dismissed.

26. I also find that the summons dated 30<sup>th</sup> August 2018 has merit and it is hereby allowed.

27. The effect of this court's orders is that the caution registered on the suit property be and is hereby removed.

28. Each party to meet their own costs.

29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muriuki for Ithiga for Administrator**

**Administrator present**