



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**SUCCESSION CAUSE NO. 77 OF 2013**

**IN THE ESTATE OF: OBED ABURILI OTENYO.....DECEASED**

**BETWEEN**

**GEORGE OCHOLA ABURILI.....APPLICANT**

**AND**

**JOSEPH ACHICHI ABURILI.....RESPONDENT**

**R U L I N G**

**Background**

1. The Certificate of Confirmation of Grant in this cause was issued on 18th April, 2018 in the following terms:

**(a) Joseph Anjichi Aburili and Joel Ngala Aburili – WEST BUNYORE/EBUSIKHALE/203 & 2253 in equal shares.**

**(b) Joseph Achichi Aburili – WEST BUNYORE/EBUSIKHALE/204 & 2287**

**Application**

2. By a Notice of Motion dated 27th July, 2018 brought under Section 3 and 3A of the Civil Procedure Act and Section 71, 79 and 83(b) of the Succession Act the applicant seeks the following orders:-

**1) That this Honourable Court be pleased to issue an order for removal of the restriction on WEST BUNYORE/EBUSIKHALE/2253 by the respondent to allow the registration of the conformed grant issued herein**

**2) That costs be provided for.**

3. The application is based on grounds among others that **HIGH COURT MISC. APPL. NO. 210 OF 2011** which was the subject of the restriction has been determined and further that the Land Registrar has declined to register the grant on account of the restriction that is in force on **WEST BUNYORE/EBUSIKHALE/2253 (hereinafter referred to as the suit property)**.

4. The application is supported by applicant's affidavit sworn on 27th July, 2018 in which he reiterates the grounds on the face of the application. Annexed to the affidavit is the Certificate of Confirmation of Grant in this cause issued on 18th April, 2018 to the effect that the applicant and respondent were to share **the suit property** in equal shares.

5. The application is opposed on the basis of a replying affidavit sworn by the respondent on 4th October, 2018. He avers that the Law of Succession is a stranger to applications titled NOTICE OF MOTION and further that he has appealed against this court's order dated 19th October, 2017. Annexed to the affidavit is a Notice of Appeal, a letter requesting for proceedings and certified copy of the judgment and receipt for the same marked JAA1, 2 and 3 respectively.

## **SUBMISSIONS BY PARTIES**

### **Applicant's submissions**

6. The applicant holds the view that this court has jurisdiction to grant an order for removal of the caution and further than an appeal does not operate as a stay. Applicant placed reliance on the law and the following authorities:-

- 1) *Section 73 of the Registration of Land Act*
- 2) *Joseph Kibowen Chemjor vs William C. Kisera [2013] eKLR*
- 3) *In re Withdrawal of Caution by Mary Njeri Mwaura [2017] eKLR*
- 4) *Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR*

### **Respondent's submissions**

7. The respondent holds the view that this court has no jurisdiction to grant an order for removal of the caution in this cause and further than the parties should await the outcome of the pending appeal. Respondent similarly placed reliance on ***Section 73 of the Registration of Land Act***.

### **Analysis and determination**

8. Both parties agree that *a caution may be withdrawn by the cautioner or removed by order of the court or by order of the Registrar. The applicant has demonstrated that the grant issued by this court on 18th April, 2018 cannot be registered on account of the restriction placed on the suit property by the respondent.*

9. Orders of court once issued are supposed to be obeyed. The fact that the respondent has filed a notice of appeal against this court's order does not under the provisions of Order 42 Rule 6 (1) & (2) entitle him to a stay of execution of this court's orders.

10. Section 3 of the Civil Procedure Act provides that:-

***In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.***

11. On the other hand Section 3A provides that:-

***Nothing in this Act 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.***

12. The court does not issue orders in vain. Under the powers granted to this court by section 63 (e) of the Civil Procedure Act, this court has jurisdiction to make such other interlocutory orders as may appear to the court to be just and convenient and especially to prevent an abuse of its process as the respondent is desirous of continuing to do.

### **Disposition**

13. From the foregoing analysis, I have come to the conclusion that the Notice of Motion dated 27th July, 2018 has merit and it is allowed in the following terms:-

***1) That an order for removal of the restriction on WEST BUNYORE/EBUSIKHALE/2253 placed by the respondent be and is hereby granted***

***2) The respondent shall pay the costs of this application***

**DATED AND SIGNED AT KISUMU THIS 20TH DAY OF DECEMBER 2018**

**T.W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Applicants - N/A