



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 221 OF 2010

IN THE MATTER OF THE ESTATE OF KANYAKIRI NGONGO (DECEASED)

MARY WAWIRA KANYAKIRI.....CO-PETITIONER/ APPLICANT

V E R S U S

NICASIO NJUE KARIUKI.....1ST RESPONDENT

MUTITU HITIRA.....2ND RESPONDENT

R U L I N G

1. This is a ruling on the summons dated 19/11/2014 seeking for removal of restriction lodged against parcel No. Ngandori/Kirigi/4014 by the respondents.
2. The application is supported by the affidavit of the applicant Mary Wawira Kanyariki. She deposes that restriction has become an impediment to the execution of grant. Despite demand by the applicant, the respondents have been adamant to retain the restriction.
3. The 1st respondent in his replying affidavit admits placing the restriction. He says he was buying $\frac{1}{4}$ acre of the land Ngandori/Kirigi/4014 from the deceased. Out of the agreed consideration of Kshs.120,000/= the 1st respondent paid a total of Kshs.110,000/= leaving a balance of Kshs.10,000/=.
4. The 1st respondent states that he wants the applicant who is the administrator of the deceased's estate to refund the consideration he paid to the deceased. Removing the caution would mean that the 1st respondent will lose both the land and the money he paid to the deceased. The applicant is well aware of the 1st respondent's interest. A copy of the agreement is attached to the application. There was no response from the 2nd respondent to this application.
5. The applicant was being represented by R. Njeru advocate but she filed a notice to act in person on 27/06/2017.
6. On 30/10/2017 the applicant filed an amended summons intended to correct the first application dated 19/11/2014. The only tangible addition was that the grant was confirmed on 23/04/2014. The summons also named the respondents as Nicasio Njue Karaiuki and Hitira Mutitu.
7. The record shows that the grant was confirmed on 23/04/2014 whereas the estate of the deceased consisting of the only asset Ngandori/Kiriari/4014 was distributed. The 1st respondent is not claiming the portion on $\frac{1}{4}$ of an acre which he alleges to have bought from the deceased. He claims for refund of Kshs.110,000/= paid as deposit of the agreed consideration.

8. Although the applicant did not file a reply to the 1st respondent's claim, it is noted that the 1st respondent does not say that he has filed a suit for recovery of the deposit paid. He has a right to pursue the funds paid to the deceased from the administrator provided he can prove his case. In the absence of any suit filed, this court is at a loss on how the 1st respondent intends to recover his money.

9. The grant was confirmed on 23/4/2014 which is more than three years ago. The applicant cannot move to execute the grant because of the existing restriction. The 1st respondent has no interest in the land but in the refund. He has not given any justification why the restriction should remain against the title of the land.

10. As I have said earlier, the 1st respondent has a legal right to pursue his interest but cannot continue frustrating the applicant in carrying out her legal duty of executing the grant.

11. I find the application merited and allow it as prayed. The restriction placed on L.R. Ngandori/Kiriari/4014 is hereby ordered to be removed forthwith.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF NOVEMBER, 2017.

F. MUCHEMI

J U D G E

In the presence of:-

Applicant present