



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2518 OF 2010
IN THE MATTER OF THE ESTATE OF KAHUHU NJOKI ALIAS PETER
KAHUNGANGA (DECEASED)
MARGARET WANJIKU KAHUHU.....ADMINISTRATOR/RESPONDENT
VERSUS
NYAHANGI NGUNI
ALICE WAITHERA GATHIGI.....APPLICANTS
RACHEL WAIRIMU G. NGANGA

R U L I N G

1. There are two applications before court for determination. The first in time is a Summons dated 27th October, 2014 and taken out under Section 73 (1) of the Land Registration Act, 2012 of the Laws of Kenya and any other enabling provisions of Law.

The Applicant therein prays for orders that:-

1. That the caution lodged on title No. Kiambaa/Muchatha/T. 300 by Rachel Wairimu G. Nganga the 3rd Respondent herein be removed forthwith so as to facilitate the registration of the said title in the name of Margaret Wanjiku Kahuhu.
 2. That the District Land Registrar, Kiambu be served with a court order to ensure the removal of the said caution.
 3. That costs of this application be provided for.
2. The application is premised on the grounds that:
 1. That a grant of Letters of Administration was issued to the Applicant on 21st June, 2011.
 2. That the Respondents' application dated 28th May, 2012 for revocation or annulment of grant was dismissed with costs on 22nd July, 2014.
 3. That the Respondents' application dated 14th October, 2014 the Applicant was issued with a certificate of confirmation of grant directing that the title to the suit property be transferred to the Applicant as the absolute owner thereof.

4. That no transfer or registration of the title can be effected in the name of the Applicant due to the pending caution which was unlawfully and illegally lodged on the title by the 3rd Respondent herein on 2nd September, 2012.
5. That the said caution is not only causing the Applicant untold sufferings and mental anguish, it is also hindering the process of transfer and right of use and occupation of the subject suit property.
6. That it is in the interest of justice that the said caution be removed forthwith.
3. The application is supported by the affidavit of MARGARET WANJIKU KAHUHU, the Applicant/Administrator herein, sworn on even date.
4. Opposing the application, the Respondents' advocate ZACHARY NJAGI GATHAARA, filed in a Replying Affidavit sworn on 26th November, 2014. In that affidavit, counsel avers that the application is wrongly brought to Court and is defective in law and the orders sought cannot be granted. That the Family Court lacks jurisdiction to entertain and hear the application, and that the process and procedure provided under Section 73 of the Land Registration Act, 2011 are purely and essentially of a nature that could only be handled by the Environment and Land Court.
5. Counsel further contends 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.
6. He contends that the Land Registration Act, 2012 under which the instant application is brought defines term "court" under section 2 as follows: "Court" means the Environment and Land Court established under the Environment and Land Act, 2011.
7. It is his averment that the circumstances leading to the dismissal of the application for Revocation or Annulment of Grant and the subsequent Confirmation are highly suspicious, and that it is inadvisable to order for removal of the caution against the property, **KIAMBA/MUCHATHA/T.300** as the Respondent/Administrator will reap huge benefits from a fraudulent process as she may dispose or alienate the only estate property and the true heirs, the Applicants herein will suffer irreparable loss.
8. This court has carefully considered the application, the affidavits for and against as well as the oral arguments by the respective parties.
9. 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.
10. 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.
11. The Probate Court has grappled with the question of the extent of its jurisdiction times without number and a few examples of persuasive authorities come to mind. In **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004**, Ouko J (as he then was) held that:

“The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court’s jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”

12. It should be noted that a Probate Court is largely a Court of Equity and is further enjoined by the Law of Succession Act, especially Rule 73 of the Probate and Administration Rules, to make such orders as may be necessary for the ends of justice. In **PETER WASIKE SIBOKO V FELIX SAKINI WASIKE [2012]eKLR**, Gikonyo J held thus:

“Before I close on this aspect, I wish to say one more thing. The court, under the Law of Succession Act, and in particular Rules 63 and 73 of the Probate and Administration Rules, has wide powers, and where necessary, may resort to its inherent powers in dealing with any situation that might arise in relation to the estate of the deceased in order to do justice to the parties, ensure due administration of the estate and prevent prejudice to the rights of the dependants. The manner of approaching the court in probate and administration cases for intermediate relief, will therefore involve court's unfettered discretion inclined to doing substantial justice rather than paying homage to strict procedural technicalities.....”

13. Likewise, Kimaru, J in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005** held:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

14. In view of the foregoing, this court holds that it has jurisdiction to hear and determine this matter.

15. This court is alive to the fact that the circumstances under which the said restriction was lodged against the said property do not hold any more due to the dismissal of the said application for revocation dated 28th May, 2012.

16. On the second application, the Respondents have applied to this court for reinstatement of the said application dated 28th May, 2012 claiming that the same was dismissed and grant confirmed without their knowledge. It is their contention that although the Summons for revocation was to be heard on 21st July, 2014, the same was not on the daily cause list for that day, and found it mysterious how the matter proceeded the very next day on 22nd July, 2014.

17.They now urge this court not to order for removal of the caution against the said property as to do so would cause irreparable loss on the part of the Applicants who are the true heirs.

18.As has been stated herein, a Probate Court being a Court of Equity would endeavour to act in the interest of justice. It is therefore, the considered opinion of this court that the circumstances of this case demands that the court should exercise its discretion to allow the Applicants' application for reinstatement, for it would be necessary for the ends of justice.

Accordingly, this court orders as follows:

1. The application for removal of the said caution is hereby declined.
2. The said Summons for revocation dated 28th May, 2012 is hereby reinstated.
3. The said Summons should be fixed for hearing on a priority basis.

SIGNED DATED and DELIVERED in open court this **18th day of March 2015.**

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L. A. ACHODE

JUDGE