



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 281 OF 1995

IN THE MATTER OF THE ESTATE OF SAMUEL MATHAGA MANGO - DECEASED

ESTHER NYAMBURA.....1ST APPLICANT

MARY NASUBUGA.....2ND APPLICANT

VERSUS

EDWARD GALI WANGO.....RESPONDENT

RULING

The application dated 28/01/2013 made pursuant to section 47 of the Probate and Administration Rules seeks that summons issue to EDWARD GALI WANGO (the respondent) to show cause why the caution he placed on Title No. NjorojNgata Block 1/236 and Njoro Block 1/237 now subdivided into Block 1/4248, 4246, 4228, 4237, 4251, 4239 and 4140 cannot be reviewed.

The applicants state that the Succession Cause is finalised and only pending for distribution. There is a caution/ restriction placed on the titles and distribution cannot proceed without the caution being reviewed. The caution was placed by the respondent, who is one of the beneficiaries and who moved to the USA sometimes back, so it is not possible to serve him personally without incurring a lot of costs, which the estate cannot pay.

In the affidavit sworn by Esther Nyambura (1st applicant), she deposes that when they prepared to distribute the estate of the late Samuel Mathaga Wango, they realised that the respondent had placed a caution on the land, as a result of which the distribution cannot proceed.

On 17/05/2012 the court directed that the person who had placed the caution be summonsed to show cause why the caution should not be removed.

In opposing the application, the respondent confirms that he placed the caution and points out that despite this, the applicants caused the sale and subsequent transfer of Block 1/4237 to third parties. Further that a search carried out disclosed that Blocks 4138, 4139, 4141, 4142, 4143, 4249, 4250, 4252 and 4253 have been transferred and title deeds issued in the course of the caution and/ or during the stay period.

He describes the applicants as being dishonest about claims that he is the one halting distribution, yet she in cahoots with the other beneficiaries have masterminded transfers and issuance of titles to third parties - so distribution has actually taken place. Further that none of the other beneficiaries are

suffering and the applicant has always had a selfish interest in misappropriating their late father's estate.

He also explained his inability to attend court is due to the short notice which makes it difficult for him to secure a direct flight. He annexed a response from British Airways booking office which indicated that they required 90 days' notice, otherwise the flight charges are punitive and way beyond his means.

In arguing the application, Mrs. Ndeda on behalf of the applicants contends that several of the titles which the respondent claims to have been transferred during the existence of the caution, were actually transferred prior to the caution being lodged. She identifies these as Njoro/Ngata/Block 114140, whose title was issued on 03/10/2006 whereas the caution was placed on 12/01/2007, also Title No.114139 and 4141. She however concedes that some titles were transferred after caution had been placed. However, applicant's counsel insists that even then, the transfer was to the beneficiaries of the estate, and caused no prejudice. The respondent is not giving any reason why those titles should not go to those who are entitled. She points out that this matter was filed in 1995 and there being no orders restraining distribution, then the application should be reviewed.

In opposing the application, Mrs. Mukira submits that removal of caution and their placement is clearly provided under section 71-73 of the Land Registration Act of 2012. It is argued that the applicant has not demonstrated any steps she has taken to remove the caution, so the application is premature.

Counsel further submits that parcels No.4248, 4246, 4228, 4237, 4251, 4239 and 4140 which are said to have been sub-divided from the mother title are not affected by the caution, according to the searches filed. She also points out that, the court issued orders on 12th February 2007 barring any transfer of the sub-divisions to 3rd parties pending hearing and determination of the suit.

She also points out that some of the titles e.g. 439 has been issued to Ahmed Kiprono Kirui, who is not a beneficiary to the estate and the search shows that no caution has been registered. Parcel 4237 is described as non-existent as disclosed by a search at the lands registry.

She argues that in a number of parcels cited by the applicant, there are no cautions placed and the orders sought are speculative and there would be no basis for the court issuing orders for assumed cautions to be removed.

Counsel submits that under section 71-73 of the Land Registration Act, the court has no powers to summon the applicant to show cause why the caution should not be removed.

In response to this, Mrs. Ndeda submits that since this is a Succession Cause, and since the matter affects distribution of the estate then the proper provisions to invoke are under the Law of Succession Act.

The issues which arise for determination are:-

- (a) Which parcel have a caution lodged against them.
- (b) Is there any reason why the caution placed should remain in existence?
- (c) What provision of the law should the applicant invoke to seek removal of the caution?

I have perused the annexures and observe that:-

- (a) Titles No. Njoro/Ngata Block 1/4140, 4139 and 4141 were issued long before the caution was lodged.
- (b) Titles No. 4248, 4228, 4237, 4150, 4251, 4149, 4152 and 4153 are not affected by the caution.
- (c) Title no. 4237 according to the annexed search certificates, does not exist.

(d) Title No.4246, 4140, 4139, 4141, 4142, 4143, 4147, have remarks barring any transfers to third parties pending hearing of the suit filed.

Why did the respondent place the caution? This doesn't seem to be disclosed from the replying affidavit, and the impression I get from the said affidavit is that the respondent is irked by what he perceives to be arrogance and selfishness on the applicant's part. A perusal of the court file discloses that the order of stay were issued which had been earlier issued in favour of the applicant was vacated on 4th February 2011 by Ouko J - which would then mean there is no other suit pending. There was an application made to the court on 08/08/2012 by Mr. Gakinya concerning some attempt at eviction, but this doesn't seem to have been pursued. So as far as what is presented goes, there is no valid reason why the caution remains.

Question:

What is the procedure of removal for a caution in respect of the estate of deceased, which has the effect of stalling distribution of an estate under a Succession Cause? Would one move under Rule 47 of the Probate & Administration Rules or under section 71-73 of the Land Registration Act?

Law applicable to the question

Section 2 of Chapter 160 Laws of Kenya (Laws of Succession Act) 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."

Section 97 thereunder gives the Rules Committee power to make rules of procedure generally for the carrying out of the purposes and provisions of the Act.

Rule 47 of the P&A Rules, made pursuant to the provision of section 97 above, provides for the procedure of moving the court under section 61(1) or 71 of the Act.

It is noteworthy that the procedure provided under this rule (r47) is in respect of an application for grant of probate of a codicil discovered after a will has been proved.

Clearly the application herein not being an application for probate of a codicil after grant, the provisions of Rule 47 of the P&A rules are inapplicable. However, it is noteworthy that rule 49 thereunder provides that procedure for moving the court in circumstances where no specific provisions are provided for under the rules. The rule provides as follows:-

"49. A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit."

It is also noteworthy that section 47 of the Law of Succession Act, as read with Rule 73 of the P&A rules the court has power to entertain any application and determine any dispute under the

Act and to pronounce such decrees and make such orders as may be expedient.

Section 73 of the RLA, on the other hand, provides for circumstances under which a caution registered under section 71 of the Act (RLA) may be removed. The section provides:-

"73. (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to sub-section (2), by order of the Registrar."

(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice."

(3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

(4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs."

Section 73(1) contemplates a situation where the process of removal of the caution was initiated in court, like in the circumstances of this case.

Whereas the applicants' could also have moved the Registrar under **section 73(2)** of the **RLA**, in their capacity as the administrators of the estate of the deceased, I find nothing in that section that prevents them from moving under the Law of Succession Act.

In any event, by dint of the provisions of section 2 of the Law of Succession Act, the dispute regarding removal of the caution herein, in order to facilitate the administration of the estate of the deceased, is governed by the provisions of the Law of Succession Act and not the RLA.

In view of the foregoing, I hold the view that the right procedure for moving the court for removal of a caution with the effect of stalling distribution of an estate under Succession Cause is that contemplated under Rule 49 of the P&A rules.

I therefore direct the Land Registrar Nakuru to remove the caution as to enable the distribution of the estate to be concluded.

Delivered and dated this 31st day of July, 2014 at Nakuru.

H. OMONDI

JUDGE