

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE 112 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE M'IMUNYA M'EREA (DECEASED)

RULING

A grant of representation in respect of the late M'Imunya M'Erea, the deceased, was confirmed in favour of Lunge M'Imunya, the petitioner on 30th January 2008. It would appear that the only property left by the deceased is ITHIMA/NTUNENE/720.

On 9th November 2001, some three years before the death of the deceased, one Josephat Kubai M'Ikunyua, the respondent in this application, placed a caution on the said property as a licensee. There was also a subsequent restriction recorded on 28th September 2004 following the death of the deceased.

The petitioner by chamber summons dated 20th June 2008 seeks that:-

“.....the caution registered against L.R. ITHIMA/NTUNENE/720 on 9th November, 2001 and the restriction registered on 28th September 2004 be removed, lifted, raised and vacated.”

The petitioner/applicant deposes that he is unable to distribute the estate due to the fact that the respondent who is his brother and a beneficiary cautioned the land and also later after the death of the deceased caused a restriction to be entered against the title of the said property.

In reply, the respondent has averred that the dependants of the deceased were not consulted by the petitioner/applicant when he sought before the confirmation of the grant. That the petitioner/applicant has allocated to himself a bigger portion than his siblings. That strangers have been included as beneficiaries. That the affidavit of consent has been forged.

I have carefully considered these arguments. I have already noted the two restraints on disposition. One was registered during the lifetime of the deceased while another was registered after his death. It is not clear why the first caution was entered apart from an explanation that it was done by the respondent as a licensee. The respondent has explained the second restriction on the basis that the distribution of the estate has not been properly done. That explanation, however, does not support the sequence of events. The restriction was registered on 28th September 2004, some four years before the grant was confirmed. It was registered one month after the death of the deceased and indeed before this cause was filed.

Under the provisions of sections 131 and 136 of the Registered Land Act, any person claiming any right in land can lodge and the Registrar may register a caution or restriction prohibiting or restricting dealings with the land in question.

The above sections further provide circumstances for the withdrawn removal or variation of the two restraints on disposition. A caution may be removed by order of the court or by the Registrar depending on the circumstances for its registration.

Similarly, a restriction can also be removed or varied by the court and the Registrar in terms of section 138 of the Registered Land Act. The court has an absolute discretion in considering whether or not to remove, withdrawn or vary a caution or a restriction.

In the matter before me, I have already noted that the registered owner of the suit property is deceased. A grant of representation has been confirmed in favour of the applicant. The respondent has maintained that the distribution as depicted in the confirmed grant is unfair as it allocates a large part of the estate property to the applicant while at the same time it purports to include a stranger as a beneficiary.

He has also argued that the confirmation of the grant was based on a forgery. Based on all these, the respondent has intimated his intention to seek the revocation of the grant. In view of the matters raised by the respondent regarding the grant and bearing in mind that the respondent intends to challenge the same, it is only fair and just that the restriction and caution on the title of the suit property be preserved pending the intended action by the respondent. This, however, should not be a licence to perpetuate the caution and restriction. Application for revocation must be filed within twenty-one (21) days of this ruling.

The application fails and is dismissed. I make no orders as to costs. Mention on

Dated and delivered at Meru this 12th day of June 2009.

W. OUKO

JUDGE