



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 780 of 1998

JOHN NJENGA WAGACHA alias JOHN WAGACHA GITHUKU.... APPLICANT

VERSUS

EDWARD MUROKI MBIYU.....RESPONDENT

RULING

On 17.07.06 the applicant filed summons under rules 49 and 73 of the Probate and Administration Rules made under the Law of Succession Act, Cap.160 applying for the following orders:-

1. That this honourable court be pleased to order the removal of the caution lodged illegally and unlawfully against Title No. Dagoretti/Riruta/6 which was lodged on 11.06.04 by EDWARD MUROKI MBIYU as entry No.1 in the Inhibitions, Cautions and Restrictions Section.
2. THAT in the event of the failure by the said EDWARD MUROKI MBIYU to execute withdrawal forms within ten (10) days of date of service of the order, the Registrar of the High Court do execute the same on behalf of the said EDWARD MUROKI MBIYU.

The grounds upon which the application is based are:-

- a) THAT the cautioner has absolutely no viable reason to lodge and/or maintain the caution on the register.
- b) THAT the said caution serves no useful purpose.

The application is supported by the applicant's affidavit sworn on 12.07.06.

At the hearing of the application on 05.12.06, the applicant was represented by learned counsel, Mr. G. Kamonde while the respondent appeared in person.

Applicant's counsel drew the court's attention to the fact that the applicant was issued with a grant of letters of administration of the estate of Amos Wagacha Wagithuku on 28.10.98 which grant was confirmed on 07.04.03. The certificate of confirmation of the grant shows that the deceased's estate was divided into two equal halves between two houses, i.e. the first house of Ruth Muthoni Mbiyu who is the respondent's mother and the second house of Hannah Wambui Githuku. In so far as the respondent is concerned, the certificate of confirmation of grant shows that Ruth Muthoni Mbiyu who is the respondent's mother is to get $\frac{1}{2}$ share of the deceased's landed properties Dagoretti/Kangemi/270, Dagoretti/Riruta/T.54, Kericho/Londiani/233 and Dagoretti/Riruta/6 in trust for herself and her children EDWARD MUROKI MBIYU (respondent herein), STEPHEN KARANJA MBIYU, JOSEPH NJENGA MBIYU and GABRIEL WAGACHA MBIYU in equal shares.

Applicant's counsel pointed out that the above mode of distribution is an order of the court which has not been appealed against. He added that on 11.06.04 the respondent lodged the caution subject matter of the present application and that nobody knows why the respondent lodged the caution since he has taken no other step regarding the subject land thereafter. Applicant's counsel complained that the caution is frustrating the administration of the deceased's estate unreasonably, which hinders the discharge of the administrator's duties under section 83 of the Law of Succession Act. Applicant's counsel also pointed out that if the respondent wished to oppose the present application, rule 60 of the Probate and Administration Rules requires that he should have entered an appearance in Form 26 in the Registry, which the respondent did not do despite having been served with the summons on 09.08.06.

Applicant's counsel urged the court to allow the present application since the respondent did not file any papers in opposition thereto.

The respondent's response was that his signature was forged in the application for partitioning the subject land, as was also the signature

of his elder brother, Stephen Karanja Mbiyu. The respondent added that the forgery was reported by him to the C.I.D. at Langata Police Station, Nairobi before he was served with the summons in this case; that police investigations relating to the alleged forgery are on-going; that he would be able to respond to the summons now under consideration after conclusion of the on-going police investigations; and that he should be given more time to engage a lawyer to advise him on how he should respond to the summons, which he acknowledged to have been served on him in August, 2006.

Answering questions raised by the court, the respondent said he had lodged the caution before reporting the alleged forgery to the police; that he lodged the caution after realizing that the administrator had denied him and his brother Stephen Karanja their rights as per the grant; that he (respondent) did nothing else after lodging the caution because he desired a family meeting to resolve the dispute but the administrator, i.e. applicant herein, did not facilitate such a meeting. The respondent added that his other reason for lodging the caution was that the family had agreed to sell one of the plots, i.e. Dagoretti/Riruta/T.54, and that the plot was duly sold but he and his brother Stephen Karanja were denied a share of the proceeds of sale.

In reply, applicant's counsel pointed out that the respondent was not to benefit directly from the deceased's estate but through his mother Ruth Muthoni Mbiyu, who is not complaining. Applicant's Counsel urged that the applicant should let the deceased's estate be distributed as per the confirmed grant and if he does not get his share from his mother, he can then claim such share from his mother. Applicant's counsel branded the alleged report to the Police as irrelevant to the matter before court, in addition to the alleged report being a mere allegation without documentary evidence to support it.

I have given due consideration to rival submissions of the parties.

The record shows that the grant in this case was issued to the applicant herein, John Njenga Wagacha alias John Wagacha Githuku on 28.10.98. It was confirmed on 07.04.03. The mode of distribution shows that the deceased's estate was to be distributed equally between the house of the first widow, RUTH MUTHONI MBIYU who is the respondent's mother and the house of the second widow, HANNAH WAMBUI GITHUKU. There is no record of anyone having appealed against that proposed mode of distribution.

Process server Peter J. Karugo swore an affidavit on 09.08.06 deposing that on 09.08.06 he served the respondent herein with the summons now under consideration. The respondent acknowledged before this court that he was duly served with the summons, as deposed by the process server.

The mode of distribution approved by the court is on a 50 - 50 basis as between the first widow, Ruth Muthoni Mbiyu and the second widow Hannah Wambui Githuku. Each of the widows is to inherit ½ share of the properties in question in trust for herself and her children. The respondent is named in the certificate of confirmation of grant as being among the children of the first widow, Ruth Muthoni Mbiyu. I find no fault with the mode of distribution.

The respondent did not file any application to oppose the summons now under consideration as required by rule 60 of the Probate and Administration Rules.

The caution the respondent is accused of unlawfully lodging is against Title No. Dagoretti/Riruta/6, which is among the properties forming the deceased's estate. The respondent is accused of lodging the caution on 11.06.04 and thereafter doing nothing else regarding the property in question. The applicant herein has good cause to complain against the respondent's unprocedural interference with the administration of the deceased's estate. The respondent's allegations of forgery of his signature are unsubstantiated and peripheral to the issue at hand and I ignore them. The respondent should work through his mother, Ruth Muthoni Mbiyu in pursuing any entitlement to the deceased's estate but not to be an obstacle to the administration of the deceased's estate through the caution now being challenged.

The upshot is that the summons dated 12.07.06 and filed on 17.07.06 for the removal of the subject caution is allowed and prayers 1 and 2 of the summons are granted as prayed.

Orders accordingly.

Delivered at Nairobi this 5th day of April, 2007.

B.P. KUBO

JUDGE