REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

Succession Cause 192 of 1999.

IN THE MATTER OF THE ESTATE OF MARTAL MUKAMI……....DECEASED

JOSEPH MURUTHI WACHIRA……..……PETITIONER

Versus

JAMES MATHENGE NDUNYU……..…….OBJECTOR

RULING

The Notice of Motion before court is dated 28th May 2003. It seeks that the court orders the Executive Officer of this Court to execute all relevant documents necessary for registration of one acre out of property TETU/UNJIRU/589 in the name of James Mathenge Ndunyu the Applicant herein.

The background to this matter is that property **TETU/UNJIRU/589** measuring 4.1 acres is the property of the estate of MARTAL MUKAMI, deceased. Before Letters of Administration were issued in respect of that estate Macharia Wachira now deceased, sold his portion of that land to James Mathenge Ndunyu. He sold one acre. That sale agreement was witnessed by his other brothers who are beneficiaries of that estate. When this matter was in the lower court by an order issued on 14th April 1989, the court awarded the Applicant 1.1 acres. On the matter coming to this court, the court reviewed that order by its ruling of 27th November 2001, whereby the court granted the Applicant one acre only. A confirmed grant was issued in that regard. It is in that background that the Notice of Motion dated 28th May 2003 is brought. The Applicant has stated that the Petitioners have refused to sign the transfer in accordance with the confirmed grant. Hence why the Applicant seeks that the Executive Officer would be authorised to sign those documents.

The matter was opposed and a replying affidavit was filed. In that affidavit it is deponed that the court cannot force an administrator to sign any documents. Further that the Executive Officer of this court cannot sign documents on behalf of the administrators. That the Applicant was supposed to give the administrators another land in exchange for the one awarded in this succession cause. I would wish to start by dealing with the argument that the Administrators cannot be forced to sign any papers and further that the Executive Officer cannot sign in their stead. The court had inherent powers by virtue of *Rule 73* of the Probate and Administration rules. The grant was confirmed by this court and having been confirmed there ought not to be any impediment in carrying out the terms of that confirmed grant. It ought to be noted that that grant has never been revoked or set aside. The Court can grant authority to the Executive Officer to sign any papers which would in effect be in compliance with an order of the court. The administrators say that the Applicant has failed to fulfill his part before transfer could be undertaken. That cannot be entertained at this stage because the grant has been confirmed unconditionally. In any case that statement that the applicant ought to transfer another land was very vague for this court to pay regard to it. In opposition to the application the advocate for the administrator faulted the application for

having quoted the provisions of the Civil Procedure. I find that such quotation is not fatal to the application. Because the orders that the Applicant seeks are clear, the court will invoke its inherent power and grant the prayers as sought.

The other ground of opposition raised by counsel for the administrators was that the application ought to have been brought by summons as provided in *Rule 49* of the Probate and Administration Rules. That rule provides as follows:

"***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."***

My response to that argument is that to file an application by way of Notice of Motion when the rules state that it ought to be by Chamber Summons is not fatal in itself. This indeed was the finding in **Civil Appeal No. 284 of 1997 JOHNSON JOSHUA KINYANJUI & ANOTHER AND RACHEL WAHITO THANKE & ANOTHER.** The appropriate portion of that case is as follows:

"***If an application is brought under different rules, one calling for a Notice of Motion application and another calling for a chamber summons application then the party applying has a choice to use a Notice of Motion procedure. If during the course of the hearing the party abandons the application under a rule which entitles him to apply by way of a Notice of Motion, the application does not become incompetent."***

*Order 50 rule 11 provides**:***

"***Where any application which is authorized to be made in court is made in chambers the judge may either adjourn the application into court or hear it in chambers."***

*Order 50 rule 10 provides**:***

"***Any judge or magistrate may adjourn into court an application made to him at chambers which he deems more convenient to be considered in court."***

It can be seen that no application is to be defeated by use of wrong procedural mode and the judge has the discretion to hear it either in court or in chambers".

The Administrator's objection therefore to the Respondent's application having been brought under Notice of Motion is rejected. The court therefore grants the following order: That the Executive Officer of this honourable court is hereby empowered and authorized to execute all relevant documents for registration and application to Land Control Board, survey, sub-division and transfer of one acre out of **TETU/UNJIRU/589** and transfer the same in the name of JAMES MATHENGE NDUNYU. The costs of the application dated 28th May 2003 are awarded to James Mathenge Ndunyu as against the administrator.

Dated and delivered at Nyeri this 2nd day of October 2007.

MARY KASANGO

JUDGE