



REPUBLIC OF KENYA



Mugo v Kang’ethe (Civil Appeal E016 of 2022) [2024] KEHC 5555 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E016 OF 2022
LM NJUGUNA, J
MAY 8, 2024**

BETWEEN

DORCAS NJOKI MUGO APPLICANT

AND

CRISPIN KIENYU KANG’ETHE RESPONDENT

RULING

1. For determination is chamber summons dated 07th July 2023 through which the applicant is seeking the following orders:
 1. That the honourable court be pleased to lift the cautions and or restrictions placed on parcel number Kaagari/Weru/1168; and
 2. That costs of this application be provided for.
2. The application is premised on the grounds on its face and facts deposed in the supporting affidavit thereof.
3. It is the applicant’s case that while the appeal herein was pending determination, the respondent and his 3 relatives proceeded to encumber the suit land claiming purchaser’s interest. That following this court’s judgment delivered on 03rd July 2023, the appeal was allowed, setting aside the revocation orders of the trial court. That it is important that the orders sought be granted to enable implementation of the grant and for the applicant to enjoy the fruits of the said judgment.
4. The respondent opposed this application through a notice of preliminary Objection dated 24th July 2023 through which he challenged this court’s jurisdiction to grant the orders sought.
5. The preliminary objection was canvassed by way of written submissions.
6. In her submissions, the applicant stated that this court bears the proper jurisdiction to determine the application since the issue raised does not invoke the jurisdiction of the Environment and Land Court



(ELC). That the ownership dispute was already determined in Embu ELC Civil Appeal No. 3 of 2017 and that there is no dispute to be referred to the said court. She submitted that this court becomes functus officio when its judgment is fully executed and for this argument, she cited the case of In *Re Estate of M'Kenya Njagi (deceased)* (2019) eKLR. That the orders sought can be granted under section 47 of the *Law of Succession Act*. Further reliance was placed on the case of *In Re Zipporah Njeri Mwaura (deceased)* (2020) eKLR. She urged the court to dismiss the preliminary objection.

7. The respondent submitted that the jurisdiction of the courts flows from *the constitution* and that issues touching on land should be placed before the ELC. He relied on the provisions of Articles 162 (2) and (3) and 165(3) of *the Constitution*, Sections 73 and 78 of the *Land Registration Act* and the case of *Samuel Kamau Macharia v. KCB & 2 others*, Civil Application No. 2 of 2011. He urged that the application should be referred to the ELC and that this court lacks jurisdiction to determine it.
8. The issue for determination is whether this court is clothed with the relevant jurisdiction to determine the application.
9. The applicant seeks orders that the encumbrances placed on the suit land by the respondent and his relatives, be removed to enable her enjoy the fruits of the judgment and implement the grant. The said judgment was delivered on 03rd July 2023 and through it, the court overturned the trial court's findings revoking the grant.
10. The respondent, through his preliminary objection, challenges the jurisdiction of this court because the outright nature of the orders sought is to lift cautions and/or restrictions, and to him, the orders should be sought from the ELC and not this court. Section 47 of the *Law of Succession Act*, sets out the jurisdiction of the High Court in Probate and Administration matters. The section provides that;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

Rule 73 of the *Probate and Administration Rule* provides that:

“Nothing in these rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

11. The High Court bears jurisdiction to determine issues of removal of a caution where the same arises within succession proceedings and where the orders impact subsequent actions in the estate of the deceased. In such cases, the court shares jurisdiction with the ELC to a limited extent. As stated hereinbefore, the orders may be granted through the discretion of the court bestowed upon it by section 47 of the *Law of Succession Act* and Rule 73 of the Probate & Administration Rules. Further, in the case of *Margaret Wanjiku Kabubu Vs Nyahangi Nguni and 2 others* (2014) eKLR the court stated thus on the issue of removal of a caution:

“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.”



12. Having said that, I find that the preliminary objection lacks merit and it is hereby dismissed.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 08TH DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

..... for the Applicant

..... for the Respondent

