



REPUBLIC OF KENYA



**In re Estate of Mary Kinanu (Deceased) (Succession Cause 548 of 2015)
[2024] KEHC 10920 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 548 OF 2015
EM MURIITHI, J
SEPTEMBER 19, 2024
IN THE MATTER OF THE ESTATE OF MARY KINANU (DECEASED)**

BETWEEN

LISPHER KARWITHA RUTERE PETITIONER

AND

ANDRIAN MUTUMA TUMBIRI RESPONDENT

RULING

1. By Summons under certificate of urgency dated 5th June 2023 pursuant to Section 73 and 75 of the *Land Registration Act* and section 48 of the *Law of Succession Act*, the applicant seeks that, “this honorable court be pleased to issue orders directing District Lands Registrar Meru to withdraw and remove the caution placed on against land title number Kibiricha/Kibiricha/6905 on 27/4/2023.”
2. In her affidavit in support of her application, the applicant avers that she obtained the certificate of confirmation of grant herein on 12/7/2017 whereof land parcel numbers Kibiricha/Kibiricha/3958 and 3743 were transmitted to her. She approached the District Land Registrar and successfully had the caution placed on LR No. Kibiricha/Kibiricha/3743 by the respondent removed. The suit land was subsequently subdivided into Kibiricha/Kibiricha/6902, 6903 and 6905, but after she conducted a search on 31/5/2023, she discovered that the respondent, who had no interest thereof, had placed another caution on Kibiricha/Kibiricha/6903. She prays for the removal of the said caution to pave way for distribution of that land.
3. The respondent swore a replying affidavit on 26/10/2023 in opposition to the application. He avers that the applicant is his estranged wife who starting selling family properties and neglected him and their 2 children. Land parcel No. Kibiricha/Kibiricha/6905, which is a subdivision of LR No. Kibiricha/Kibiricha/3743, is not part of the deceased estate and there are pending proceedings before the land registrar under section 73(2) of the *Land Registration Act* and their union is due for dissolution in Meru CM Divorce Cause No. E005/2023. The applicant has equally registered a caution over



his land parcel No. Kibiricha/Kibiricha/7144 due to the underlying family dispute. In his view, the moment LR No. Kibiricha/Kibiricha/3743 was distributed, the court became functus officio and the resultant subdivisions and their dealings are outside the ambit of this court, thus the application ought to be dismissed with costs.

Submissions

4. The applicant urges that the court does not become functus officio after it has delivered a final decision in civil proceedings, because it retains its power to undertake several actions including but not limited to review, execution proceedings and such other steps towards the closure of the file. She faults the respondent for failing to either substantiate his claims that the suit land forms part of the matrimonial properties or his interest in the suit land. She urges that this matter is a succession cause and not a land matter and therefore this court is vested with the necessary jurisdiction to hear and determine it. She urges that the respondent is neither a creditor nor a beneficiary and as such, he had no locus standi to block the distribution of the estate of the deceased. She alludes to the inherent jurisdiction of this court under Sections 47 and 73 of the *Law of Succession Act*, and cites *Margaret Wanyike Kabubu v Nyahangi Ngarui & 2 others* (2014) eKLR.
5. The respondent urges that court became functus officio upon issuance of the certificate of confirmation of grant, and cites *Roskey v Sang* (Succession Cause 66 of 2011) [2023] KEHC 20925 (KLR). He urges that placing this dispute before this court is to engage the court in matters beyond its jurisdiction, as the appropriate court is the Environment and Land Court and the Land Registrar who has broad quasi-judicial roles as enunciated under sections 73 and 78 of the *Land Registration Act*. He urges the court to dismiss the application for want of jurisdiction and for being in contravention of the doctrine of exhaustion.

Analysis and determination

6. Before delving into the merits of the application, the court wishes to preliminarily satisfy itself that it is vested with the requisite jurisdiction to hear and determine the matter.
7. The respondent urges that the court became functus officio upon confirmation of the grant while the applicant maintains that the court has jurisdiction to deal with the application and issue appropriate orders.
8. It is trite that a court ultimately becomes functus officio after distributing the estate to the beneficiaries, and the matter can only be revisited on appeal. The court still reserves its inherent jurisdiction under sections 47 and 73 of the *Law of Succession Act* to determine disputes and pronounce such decrees therein as may be expedient and necessary for the ends of justice.
9. *In Re Estate of George M'Mboroki (Deceased)* [2008] eKLR, where the court (Ouko J. as he then was) that:

“It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them...The *Law of Succession Act* and the Probate and Administration Rules make provision for the exercise of the court’s inherent jurisdiction, which must be approached within the above parameters.”
10. This court finds that its jurisdiction persists as long as the grant has not been fully implemented.



11. The sole issue for determination is whether the threshold for the removal of the caution lodged against LR No. Kibiricha/Kibiricha/6905 by the respondent has been met.
12. Section 76 of the *Land Registration Act* provides that;
 - “(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
 - (2) A restriction may be expressed to endure— (a) for a particular period; (b) until the occurrence of a particular event; or (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.
 - (2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.
 - (3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.”
13. Section 78 of the *Land Registration Act* provides that;
 - “(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.”
14. As to whether the respondent is a beneficiary of the estate, there no dispute that the deceased herein, who died on 22/10/2010, was survived only by the applicant. The respondent is entangled in this case by his marriage to the applicant on 16/2/2013, 3 years after the death of the deceased herein. The suit property, having been inherited by the applicant during the coverture of her marriage to the respondent, on 11/4/2017 after the grant was confirmed, validates the respondent’s interest therein.
15. Section 5 of the *Matrimonial Property Act* provides that:

“Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property.”
16. Equally in *SN v FM* [2019] eKLR, the court (Mabeya J.) held that:-
 - “24. The net effect of the foregoing is that any property acquired during the subsistence of the marriage, including that which is inherited forms part of matrimonial property. The only time that inherited property is excluded from matrimonial property is if it was acquired before marriage. Property that is inherited during the subsistence of the marriage is not excluded from matrimonial property except if it was acquired before marriage.



25. I am not alone in this interpretation of the Act. In *ENK v JNK* [2015] eKLR, Musyoka J. pronounced himself thus:-

“From the language of the said Act, there is no provision which excludes inherited property from the definition of matrimonial property. Indeed, section 5 of the Act impliedly excludes it in the definition. According to section 5, the only time such property will not form part of matrimonial property (sic) where the inheritance was before the marriage. In this case, the asset in question was inherited during matrimony and therefore it forms part of matrimonial property.”

17. The court notes that the applicant has equally lodged a caution against LR No. Kibiricha/Kibiricha/7144 which is registered in the name of the respondent. Whether those 2 properties are matrimonial properties subject to division between the parties or not is not for this court to decide.
18. This court finds that the respondent has substantiated his resistance to the removal of the caution on LR No. Kibiricha/Kibiricha/6903.

Orders

19. Accordingly, for the reasons set out above, this court finds that the application dated 5/6/2023 is without merit and it is dismissed.
20. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 19TH DAY OF SEPTEMBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. K. Mugambi for the Applicant.

Mr. Mugo for the Respondent.

