



**Waruru v Wahome & another (Succession Cause 2 of 1999)  
[2023] KEHC 19856 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19856 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 2 OF 1999  
FN MUCHEMI, J  
JULY 6, 2023  
IN THE MATTER OF THE ESTATE OF KIHARA GACHAU  
(DECEASED)**

**BETWEEN**

**MARY WANJIRU WARURU ..... APPLICANT**

**AND**

**RICHARD NDIANG'UI WAHOME ..... 1<sup>ST</sup> RESPONDENT**

**BEATRICE WAIRIMU GATHIRU & ESTHER GACHIGI**

**WAHOME ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief Facts**

1. The application dated February 15, 2023 brought under Section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* seeks for orders of removal of the restriction placed on land parcel numbers Aguthi/Muruguru/1840, 1841 and 1842.
2. In opposition to the application, the 1<sup>st</sup> respondent filed grounds of opposition and a preliminary objection dated March 22, 2023.

**The Applicant's Case**

3. The applicant states that the grant of letters of administration was confirmed on January 22, 2009 and distributed land parcel number LR No Aguthi/Muruguru/339 equally amongst the three houses of the deceased. The said land of LR No Aguthi/Muruguru/339 was subdivided into three parcels of land being LR Nos Aguthi/Muruguru/1840, 1841 & 1842. The applicant further states that the ruling in this court was temporarily stayed pending the determination of High Court Civil Suit No 132 of 2011



(OS) which later became Nyeri ELC No 514 of 2014 and finally Nyeri CM ELC No 51 of 2018. The applicant argues that there are no more claims or encumbrances in regard to the subject parcels of land and thus the restrictions ought to be lifted.

4. The applicant further states that this court has jurisdiction to issue the orders sought to facilitate completion of the administration of the estate.

### **The 1st Respondent's Case**

5. The 1<sup>st</sup> respondent states that he is not a registered owner of any of the said parcels of land and that the 2<sup>nd</sup> respondent is deceased. Further, the 1<sup>st</sup> respondent states that the succession court herein became functus officio on conclusion of the succession cause.
6. The 1<sup>st</sup> respondent states that there are specific provisions on the removal of cautions or restrictions in the [Land Registration Act](#) namely Section 73 (for cautions) and Section 78 (for restrictions). Consequently, the 1<sup>st</sup> respondent argues that the instant application is contrary to the law.
7. The 1<sup>st</sup> respondent further states that the applicant can only deal with land parcel number Aguthi/Gatitu/1841 which is registered in her name. He further argues that although he filed certain applications in this succession cause, he was not a petitioner. He further adds that the outcome of the appeal case mentioned in the restriction has not been communicated to the court. As such, the 1<sup>st</sup> respondent argues that in totality the application is wrong in law and in procedure and is otherwise an abuse of the court process.
8. The applicant put in a response to the grounds of opposition dated March 27, 2023 and stated that the 1<sup>st</sup> respondent is a son to Esther Gachigi Wahome (deceased) and a beneficiary to her parcel of land number Aguthi/Muruguru/1842.
9. The applicant states that this court in its ruling dated November 28, 2014 stayed execution of the confirmation of grant issued on January 22, 2009 pending the final determination of the Originating Summons in High Court Civil Suit No 132 of 2011 which was filed by the 1<sup>st</sup> respondent on an issue of occupation. The High Court in Civil Suit No 132 of 2011 declared the suit as abated on October 1, 2018. The applicant further states that no party has moved the court to discharge the orders dated November 28, 2014 in the succession cause.
10. The applicant further states that she had applied for removal of the restriction but the land registrar directed that she obtains a court order. It is further argued that there is no appeal pending in this cause and that the entry of the restriction was only meant to last and end with the Succession cause. As such, the applicant argues that she cannot use or develop her parcel of land as there exists an encumbrance on it. Furthermore, the applicant contends that the 1<sup>st</sup> respondent wants to remain in court with unnecessary applications to prevent her and the other beneficiaries from benefiting from the fruits of the judgment.
11. Parties filed submissions to dispose of this application. The 1<sup>st</sup> respondent relied on his grounds of opposition.

### **The Applicant's Submissions**

12. The applicant relies on Section 47 of the [Law of Succession Act](#) and the cases of *In Re Estate of Eunice Wanjiru Karuri (Deceased)* [2018] eKLR, [In Re Estate of Ciantu Gatwanyaki \(Deceased\)](#) [2017] eKLR and [In Re Estate of Eunice Wanjiru Karuri \(Deceased\)](#) [2018] eKLR and submits that the court has the requisite jurisdiction to deal with the matter of removal of a caution in a bid to enforce the grant. The applicant argues that land parcel numbers Aguthi/Muruguru/1840, 1841 & 1842 form part of the



estate of the deceased and the court has determined the beneficiaries of the estate and their respective shares and thus what is left is execution of the grant.

13. The applicant submits that the 1<sup>st</sup> respondent is not a beneficiary to the estate and his interests lie elsewhere which prevent the beneficiaries of the estate from enjoying the fruits of the grant. The applicant argues that if the 1<sup>st</sup> respondent has a claim, he can file his cause of action to the portion of inheritance belonging to his late mother Esther Gachigi Wahome. His alleged occupation of the land amounts to intermeddling of the estate and thus he has no right to remain on the estate of the deceased.
14. The applicant argues that in the event the 1<sup>st</sup> respondent seeks to block the rightful beneficiaries from their proposed share of the estate, his application for revocation of grant was heard and determined and dismissed for lack of merit. He thus had an opportunity to raise his grievances and the court made a determination on it. The applicant further argues that this court stayed execution of the grant to give the 1<sup>st</sup> respondent's interest factored in the civil matter which clearly proves that he is heel bent on frustrating the orders of this court. Furthermore, the applicant argues that the 1<sup>st</sup> respondent has never moved the court after his case was declared abated.
15. The applicant submits that the restriction was to be removed upon the finalization of this succession cause. Hence, the stay order issued in this cause was to be lifted to enable the Land Registrar vacate, lift or remove the restriction placed on the property. The applicant further relies on the case of *In Re Estate of Ciantu Gatwanyaki (Deceased)* [2017] eKLR and submits that it is inappropriate for the 1<sup>st</sup> respondent to hold her and the other beneficiaries hostage as he has no enforceable right to the estate at all. The applicant submits that the restriction placed on the suit property does not serve any useful purpose and there is no land dispute pending in any court between the parties to justify the continued existence of the restriction. To support her contentions, the applicant relies on the case of *In Re Estate of Jacob M'Miru (Deceased)* [2018] eKLR.

## The Law

### Whether the applicant has presented sufficient evidence to warrant removal of the restriction.

16. The 1<sup>st</sup> respondent submits that this court became *functus officio* when it concluded the succession matter. As such, he argues that this court has no jurisdiction to entertain the instant application as removal of restrictions and cautions are under the purview of the Environment and Land Court. The applicant submits that this court has jurisdiction as the suit properties form part of the estate of the deceased and the court made a determination of the beneficiaries and their respective shares of the estate. What is remaining is to execute the grant, which the applicant submits that this court's jurisdiction abides as long as the issue remains the enforcement of the grant issued to an applicant.
17. The jurisdiction of the High Court in Probate and Administration matters is set out under Section 47 of the *Law of Succession Act* which provides:-
  - "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."
18. In the case of *Re Estate of Cornelio Ndigwa Zakayo alias Cornelius Ndigwa Zakayo (Deceased)* [2021] eKLR the court held

"That the intention of Parliament under Section 47 of the Law of Succession Act was to give the court wide power to deal with matters which arise for determination when dealing with disputes arising under the Act. Matters of removal of cautions and restrictions are matters



which this court has jurisdiction over when they arise in succession disputes as they may bar the execution of the grants issued by this court just like the case herein."

19. Similarly in the case of *Margaret Wanjiku Kabuhu vs Nyabangi Nguni & 2 Others* [2014] eKLR the court addressed itself to the issue of removal of a caution where it held that:-

"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."

20. It is therefore my considered view that this court has jurisdiction to entertain this application. The matter herein is a succession dispute and not a land matter. This court on January 22, 2009 confirmed the grant and proceeded to distribute the estate amongst the beneficiaries. The distribution of the estate is impeded by the fact that there exists a restriction placed against the title of the land. Since the applicant has been unable to enforce the grant she is entitled under Section 47 of the *Law of Succession Act* to apply to this court to remove any encumbrance that stands in the way of enforcing the grant.

21. The placement and removal of a restriction is provided in Section 76 – 78 of the *Land Registration Act*. Section 76 provides:-

"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 the making of a further order is made, and may prohibit or restrict all dealings or only the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register."

22. Section 78 (2) of the Act provides for the removal of the restriction as follows:-

"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 or varied or other order as it deems fit and may make an order as to costs."

23. Section 78(2) of the *Land Registration Act* empowers any beneficiary with a share of land in the estate of the deceased to move the court for removal of a restriction. The applicant herein is a beneficiary and has the capacity to file these summons contrary to the arguments of the 1<sup>st</sup> respondent.

24. The court record shows that on September 18, 2002, the parties herein entered a consent to have the grant of letters of administration to issue to both of them and that the grant be confirmed and the



land be distributed equally amongst the three houses. On October 16, 2008, the matter came up for confirmation of grant but since a protest was filed the day before, the court gave directions on the hearing of the protest and confirmation of grant by way of viva voce evidence. The protestor did not attend court on January 22, 2009, the day of the hearing of the protest and the court dismissed the protest and confirmed the grant.

25. On October 19, 2009, the court allowed an application dated August 14, 2009 which authorized the Deputy Registrar to sign all the transmission documents on behalf of Esther Wambui Wahome to give effect to the grant. On July 6, 2011, parties entered a consent to place an inhibition pending the determination of the summons dated January 4, 2011 which sought for orders of the revocation of grant. The application was subsequently withdrawn on July 8, 2011 and on the same day, the 1<sup>st</sup> respondent filed a fresh application for revocation of grant which the court dismissed for lack of merit on November 28, 2014. The court further stayed the execution of the confirmed grant pending the hearing and determination of Civil Suit No 132 of 2011 (OS).
26. The court record shows that HC Civil Suit No 132 of 2011 was moved to the Environment and Land Court being ELC Case No 514 of 2014 and by an order of the said court on April 12, 2018. The ELC case was subsequently transferred to the Chief Magistrates court and was registered as CM ELC Case No 51 of 2014. The matter came up for mention on October 1, 2018 and the court marked the matter as abated as one of the respondents, Beatrice Wairimu Gathiru was deceased and had not been substituted. Following the said proceedings, the 1<sup>st</sup> respondent has not moved this court or the CM ELC court in any way. The restriction was placed until the determination of the succession cause herein. This cause was concluded on November 28, 2014 when the last application by the 1<sup>st</sup> respondent challenging the grant was dismissed. No appeal was preferred against the court's ruling. As such no case is pending in court on the estate of the deceased. It is therefore my considered opinion that the restriction placed on the suit property ceased to be in force when this cause was concluded. Further, the restriction was placed against the mother title and upon subdivision, the restriction ceased to exist.
27. This court hereby gives the following orders:-
  - a. That the restriction placed on LR Aguthi/Muruguru/339 became null and void following sub-division.
  - b. That the Succession case having been concluded, the said restriction ceased to have any legal effect on the land LR Aguthi/Muruguru/339.
  - c. That the resultant parcels LR Nos Aguthi/Muruguru/1840,1841 and 1842 are free from any restriction or inhibition.
28. Each party to meet their own costs of this application.
29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 6TH DAY OF JULY, 2023.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEO LINK THIS 6TH DAY OF JULY 2023**

