



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**SUCCESSION CAUSE NO. 128 OF 2013**

**IN THE MATTER OF THE ESTATE OF CORNELIO NDWIGA ZAKAYO ALIAS CORNELIUS NDWIGA ZAKAYO  
(DECEASED)**

**JULIANA MUTITU NWIGA.....PETITIONER/APPLICANT**

**VERSUS**

**NELSON NTHIGA MUGU.....OBJECTOR/RESPONDENT**

**RULING**

1. The matter for determination before this court is a chamber summons dated 21.06.2021 in which the applicant seeks for orders that:

*(i) The caution lodged against parcel of Land No. Ngandori/ Ngovio/3770 in favour of Nelson Nthiga Mugu be removed.*

*(ii) The cost of this application be provided for.*

2. The application brought under Rule 49 of the Probate and Administration Rules and its supported by the affidavit of Juliana Mutitu Ndwiga, the applicant herein and sworn on 21.06.2021 in which she reiterates the grounds as set out on the face of the chamber summons and further avers that she is unable to transmit the estate to the beneficiaries of the estate due to the caution placed on the property by the respondent.

3. The applicant's case revolves around the caution lodged by the respondent in regards to Land Parcel No. Ngandori/Ngovio/ 3770 where the respondent declined to remove the same, despite his application for revocation of grant issued to the applicant having been declined by this court; further that, the order dismissing the summons for revocation of grant has not been appealed against, or challenged in any way. That, this court is therefore bound to facilitate the enforcement of its orders by removing the caution that is in place; she proceeded to argue that the averments that the objector/respondent has instructed his counsel on record to file a claim at the Environmental and Land Court remains a mere allegation as the suit has not been filed and in any event there are no stay orders preventing this court from removing the caution or enforcing its orders.

4. That the court is guided by the provisions of Section 73 (1) of the Land Registration Act, 2012 which provides that 'the court has discretion to remove any caution placed on the suit property and further, Section 63 (c) and (e) of the Civil Procedure Act which provides that 'in order to prevent the ends of justice from being defeated, the court may if it so prescribes, make such orders as may appear to the court to be just and convenient. The applicant thus urged this court to allow the application as prayed.

5. The respondent in his replying affidavit deposed that he is entitled to one acre out of Land No. Ngandori/Ngovio/3770 herein due to the fact that he catered for legal costs in a suit involving the deceased, a brother of the deceased and an uncle by the name Naftary Kaguchia in Civil Case No. 1800 of 1979 at Nairobi wherein, the parties agreed that he would be allocated one acre out of their entitled portions in Land No. Ngandori/Ngovio/349 and at the conclusion of which, each of the brothers was allocated 5 acres each. That he proceeded to pay for the subdivision process, stamp duty, registration fees and acquisition of new titles in a bid to ensure that the judgment had been fully executed and the three new portions as a resultant being Land Parcel Nos. Ngandori/Ngovio/3768, 3769 and 3770 whereby 3770 is the subject of this application.

6. He contended that his claim is only on the agreed 1 acre to be hived out of Land Parcel No. Ngandori/Nguviiu/3770 and that, it is only fair and just that parties are fully heard and a determination made by this court. It was his case that despite his summons for revocation of grant having been unsuccessful, he still has a chance to realize his rights elsewhere and so he prayed that the caution should not be removed. He averred that the application herein lacks merit and is an abuse of the court process and it should be dismissed with costs.

7. The parties took directions that the application be canvassed by way of written submissions and which directions were duly complied with.

8. I have considered the application herein together with the respondent's replying affidavit on record. I have equally considered the respective submissions by the parties.

9. It is not in dispute that the respondent lodged a caution on Land Parcel No. Ngandori/Nguviu/3770 as shown on annexure JMN-4. The certificate of official search showed that a caution was lodged by Nelson Nthiga Mugu who claims interest as a purchaser of the land in question. The issues which arise for determination are: -

*i. Jurisdiction.*

*ii. Whether the orders sought can be granted by this court.*

10. The Respondent claims that it is the Environment and Land Court that has jurisdiction to determine the question of removal of caution as that is jurisdiction for Environment and Land Court which is established under **Section 4 of the Environment and Land Court Act**.

11. Further that, **Section 73 (I)** of the Land Registration Act provides that caution may be withdrawn by the cautioner or removed by Court or by order of the registrar. According to the respondent, "courts" in that content refers to the Environment and Land Court established under the Act while the applicant on her part argues that even the High Court has jurisdiction to remove the caution placed on the suit property.

12. 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;

**47. Jurisdiction of High Court**

***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:***

13. In Civil Succession **Kerugoya 187 of 2012 In re Estate of Eunice Wanjiru Karuri (Deceased) [2018] eKLR** it was the court's view that it had jurisdiction to make orders which are in the interest of justice and for just conclusion of causes which relate to the estates of deceased persons.

14. In the case of **Margaret Wanjiku Kahuhu Vs Nyahangi Nguni and 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."***

15. **Rule 73 of the Probate and Administration Rule** provides:-

***"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."***

16. In view of the foregoing, there is no doubt that this court is seized of the matters which are raised in the application. The intention of Parliament under **Section 47 of the Law of Succession Act and Rule 73 of Probate and Administration Rules** was to give this 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.

17. By a ruling delivered on 10.03.2021, this court pronounced itself where it held that the applicant, the respondent herein did not satisfy the conditions for revocation of grant issued under Section 76 of the Law of Succession Act and so, his application was dismissed with costs. In the same breadth, the said ruling further determined that the respondent was neither a creditor nor a beneficiary of the estate and as such, had no claim in the estate of the deceased. This Court issued a certificate of confirmation of grant in relation to the estate herein on 20.02.2014 but the distribution of the deceased' estate is impeded by the caution lodged by the respondent.

18. From the record, it is clear that the caution by the respondent was lodged on 17.01.2007; this was way before the deceased's death. It is not very clear why the respondent had to wait till very late in the day and only lay claim on the deceased's estate. This court has ably pronounced itself that the respondent is neither a debtor to the estate nor a beneficiary and therefore lacks standing to block the distribution of the estate of the deceased.

19. This matter relates to the estate of the deceased herein which should devolve to his dependants who are defined under **Section 29 of the Law of Succession Act**. It provides:

***"For the purposes of this Part, "dependant" means –***

***(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased***

*immediately prior to his death;*

*(b) Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;*

20. In the foregoing, this court therefore finds as follows:

*(i) The application has merits.*

*(ii) The Land Registrar is directed to remove the caution to enable the distribution of the estate to be concluded;*

*(iii) Each party to bear its own costs of the application.*

21. It is so ordered.

**Delivered, dated and signed at Embu this 15<sup>th</sup> day of December, 2021.**

**L. NJUGUNA**

**JUDGE**

.....Applicant

.....Respondent