



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO.758 OF 2015

(FORMERLY MERU H.C SUCCESSION CAUSE NO. 456 OF 2009)

IN THE MATTER OF THE ESTATE OF THE LATE M'KENYA NJAGI (DECEASED)

JOHN NJAGI DAN.....PETITIONER

- VERSUS -

JUSTUS NYAGA DAN M'KENYA.....1ST OBJECTOR

FRANCIS J. NJAGI M'KENYA.....2ND OBJECTOR

R U L I N G

1. Before this court is an application dated 2nd May, 2019 brought by way of summons by John Njagi Dan, the Petitioner/Applicant praying for the following orders namely:-

- i. That the application be certified urgent and be heard on priority (which prayer is now spent).
- ii. That this court be pleased to order/or direct the Lands Registrar Meru South District to lift/remove the caution lodged against land parcel L.R Karingani/Ndagani/91.
- iii. Costs.

2. This application has been brought on the following grounds namely:-

- a) That after full hearing, the determination of this cause was done vide judgment delivered on 14th November, 2018.*
- b) That certification of confirmed grant was issued on 15th November 2018 and later a rectified grant was issued on 19th December, 2018.*
- c) That the said grant has not been implemented fully.*
- d) That the applicant has presented RL19 registration.*
- e) That the Respondent in a bid to stall the extension of the Judgment of this honourable court placed a caution on L.R KARINGANI/NDAGANI/91 which has been registered by Registrar of Lands.*
- f) That the application for stay of execution of judgment was dismissed by this court vide its ruling dated 20th February, 2019.*
- g) That the applicant did not obtain leave to appeal against the judgment of this court.*
- h) That there are no orders of stay either from this court or the Court of Appeal.*
- i) That the registration of caution by Registrar is based on unknown reasons.*
- j) That the caution should be lifted.*

k) That the applicant wishes to transfer by way of transmission to each beneficiary their rightful shares.

3. The application is supported by the affidavit of the applicant sworn on 2nd May, 2019 where the applicant has reiterated the above grounds adding that he had followed due process only to be hindered by caution placed on Karingani/Ndagani/91. That the subdivisions that was to take place on 26th April, 2019 could not happen due to a caution placed on that parcel.
4. The Applicant has faulted the Respondent and the Lands Registrar for placing a caution when neither this court nor the Court of Appeal had issued as stay order. The Applicant has deposed that it is in the interest of justice that the orders sought are granted to enable beneficiaries enjoy the fruits of their litigation insisting that the Respondent would suffer any prejudice.
5. The Applicant's learned counsel has added that Applicant is unable to fulfill his obligations as an administrator because of the caution. He further contested the presence and the pendency of an application for stay in the Court of Appeal stating that he has not been served with any such application.
6. The other Respondents Justus Nyaga Dan M'Kenya and Francis J. Njagi through learned counsel Mr. Kirimi associated themselves with this application adding that the purpose of the caution was to circumvent due process and having failed to seek leave before filing notice to appeal, the intended appeal is in their a non- starter.
7. The Respondent (Justus E. Munene) vide a Replying Affidavit sworn on 4th May, 2019 has opposed this application.
8. The Respondent contends that the caution placed on the estate is intended to preserve and protect the estate. He further contends that he should be allowed to pursue justice to the appellate court.
9. The Respondent through learned counsel Mr. Mutege further insisted that this court having rendered itself is now *functus officio* and besides that it has no jurisdiction to deal with a caution placed on a parcel of land under **Section 71 of Land Registration Act**. In his view only the ELC court pursuant to the provisions of **Article 162(2)** of the Constitution of Kenya 2010 has jurisdiction to entertain proceedings related to removal of a caution and the same is provided under **Section 73 of the Land Registration Act**.
10. He further submitted that the Applicant as the appointed administrator has the mandate to move the ELC court for removal of the caution if aggrieved.
11. This court has considered this application and the grounds upon which it has been made. I have also considered the opposition made by the Respondent.
- 12 The first issue cropping up in this application and the response is whether this court has jurisdiction to entertain this application. The Respondent opines that this court having determined the cause and having rendered itself on the application of stay is *functus officio* and has no jurisdiction to remove a caution registered on the estate.
13. Let me first address myself on the question of *functus officio*. A court becomes *functus officio* only when it has fully determined a matter and the judgment executed in full. In my view in this instance where the judgment of this court has not been fully executed, this court cannot be *functus officio* because this application is in effect an attempt to fully execute the decision of this court. This court cannot be asked to do anything else apart from execution process because it has rendered itself and the applicant is not asking anything more than executing the judgment of this court.
14. Secondly on the question of jurisdiction, it is patently clear that we are dealing with a succession issue and the law of **Succession Act Cap 160** under **Section 47** gives this court the power, the mandate or the 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**".
15. The caution placed in that parcel of land known as Karingani/Ndagani/91, has been placed on a property that comprises the estate in this cause and it was placed specifically as a result of the decision made by this court on the distribution of the estate which includes that property. The application to register the caution and the attendant registration coming as it did, after this court declined to stay the execution of the judgment of this court, in my view was done to circumvent the ruling of this court and the due process of law. That is an abuse of court process and the Respondent's contention that the matter should now be determined by ELC court is at best diversionary and untenable.
16. As I observed in my ruling dated 20th February 2019, any further delay in execution of judgment is not in the interest of justice to the applicants. They are entitled to the fruits of litigation and this court treats the opposition of this application as further attempts by the Respondent to continue enjoying the fruits from the estate in exclusion of other beneficiaries. He has a right to pursue his appeal to the end but should not do so at the expense of others not reaping the benefits from their rightful shares in the estate as determined by this court.

In the premises I find merit in the application dated 2nd May 2019 and the same is allowed in terms of prayer 2 with costs.

Dated, signed and delivered at Chuka this 16th day of May, 2019.

R. K. LIMO

JUDGE

16/5/2019

Ruling signed, dated and delivered in the open court in presence of Muthomi for Applicant and Kaaria holding brief for Arithi for Objectors.

R.K. LIMO

JUDGE

16/5/2019