



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 27 OF 2017

IN THE MATTER OF THE ESTATE OF SHIMBA RUTHIA ALIAS SHIMBA NDWIGA (Deceased)

RUFUS MURITHI NYAGA.....APPELLANT/RESPONDENT

VERSUS

JULIET WANJA IRERI.....RESPONDENT/APPLICANT

RULING

A. Introduction

1. This is a ruling for the application dated 21st February 2019 in which the applicant seeks for the following orders;

- a) *That the land registrar Embu be ordered to remove the caution and restriction registered against the land parcel Nos. Kyeni/Mufu/9237, 9238, 9239 and 9240, the resultant of land parcel No. Kyeni/Mufu/1055.*
- b) *That this Honourable Court be pleased to issue an order of eviction of the appellant/respondent from the land parcel Nos. Kyeni/Mufu/9240 which is the resultant of land parcel No. Kyeni/Mufu/1055.*
- c) *That the Officer Commanding Station (OCS) Runyenjes be ordered to provide security and enforce compliance with the order.*
- d) *That cost of this application be in the cause.*

2. It is the applicant's case that she is a beneficiary of land parcel No. Kyeni/Mufu/1055 which was subdivided into portions which resulted to land parcel Nos. Kyeni/Mufu/9237/9238/9239 and 9240 which the respondent is a stranger to.

3. The applicant further states that respondent has unreasonably registered a caution over land parcel Nos. Kyeni/Mufu/9240 and proceeds to illegally occupy the same whereas the land registrar has refused to lift the same.

4. In rejoinder, the respondent states that he was dissatisfied with this court's decision to dismiss the appeal and has since filed a notice of appeal which has chances of success and as such he placed the caution of the suit land to preserve the same pending appeal as the suit property is the sole subject matter of the appeal.

5. The respondent further stated that he resides in the suit property with his entire family and his eviction will render him destitute and homeless and that in any case the applicant has filed her application in the wrong court.

6. The parties disposed of the application by way of written submissions.

B. Applicant's Submissions

7. The applicant submits that she is a beneficiary of land parcel No. Kyeni/Mufu/1055 which was subdivided into portions which resulted to land parcel Nos. Kyeni/Mufu/9237/9238/9239 and 9240 which the respondent is a stranger to.

8. The applicant further submits that the respondent has unreasonably registered a caution over land parcel No. Kyeni/ Mufu/9240 and proceeds to illegally occupy the same whereas the land registrar has refused to lift the same.

9. The applicant further submits that an eviction order should issue to remove the respondent out of land parcel No. Kyeni/Mufu/ 9240 failure to which she and other beneficiaries stand to suffer irreparable loss.

C. Respondent's Submissions

10. The respondent submits that the instant application lacks merit and should be dismissed with costs as the court is *functus officio* and it became so when it delivered its final decision. The respondent relies on the case of **In re Estate of Kinuthia Mahuti (Deceased) [2018] eKLR**.

11. The respondent further submits that this court lacks jurisdiction to execute orders of the trial court as it is not the court that passed the orders neither did the court that pass the orders transfer the same to this court for execution.

12. The respondent further states that if the application is allowed, the appeal will be rendered nugatory and as such the caution and restriction are justified and are in the interest of justice.

D. Analysis & Determination

13. I have considered this application, the submissions and the authorities relied on by the parties.

14. The application seeks for orders to evict the respondent, who had his appeal before this court struck out.

15. The applicant seeks to evict the respondent from the suit property which was bequeathed to the applicant and other beneficiaries of the deceased's estate. The respondent on his part asserts that he lodged the caution and/or restriction against the suit lands in order to preserve them pending appeal.

16. Whereas it is not denied the notice of appeal has been filed, it is well settled that an appeal does not operate as a stay of execution. I do note that the respondent has not filed any stay of execution application but instead lodged the caution and/or restriction against the suit properties. This is in my opinion an attempt by the respondent to go around the trial court's orders thereby denying the applicant and other beneficiaries the fruits of their judgment.

17. The respondent has raised the issue of the principle of *functus officio* arguing that the appeal having been struck out by the court, no appeal exists. As such the applicant's motion is misconceived and cannot be entertained.

18. The application was filed after striking out the memorandum of appeal. At that stage, the appeal did not exist to justify the filing of an interlocutory application by any of the parties. I agree with the respondent that the principle of *functus official* prevent a court to re-open a matter that has been concluded. The applicant has no legal factual basis on which to approach this court for the orders sought.

19. I find that the application before this court is misconceived and not properly before the court.

20. It is hereby struck out with costs to the respondent.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Both parties