



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 187 OF 2012

IN THE MATTER OF THE ESTATE OF EUNICE WANJIRU KARURI (DECEASED)

AND

JOSEPH MUTUGI KONGO.....1ST APPLICANT

GEOFFREY MBUI KONGO.....2ND APPLICANT

VERSUS

MURIUKI MBURU.....RESPONDENT

RULING

1. This matter relates to the estate of **Eunice Wanjiku Karuri**, deceased, who died on 7th August, 1997. Letters of administration were issued to **Joseph Mutugi Kongo** and **Geoffrey Mbui Kongo** on 11th July, 2012. It was confirmed on 30th September, 2015. The estate of the deceased comprised in Land Parcel No. **Mwerua/Kithimbu/947** measuring 1 ½ acres was distributed to the heirs as follows:

Joseph Mutugi Kongo 1 ½ acres to share equally.

Geoffrey Mbui Kongo

Wamwirua Gakuya Wakaruri Balance of share.

Wamwirua Gakuya Wakaruri – **Mwerua/Kithimbu/945** – whole share.

2. The petitioners Joseph Mutugi Kongo and Geoffrey Mbui Kongo filed application dated 2nd February, 2017 against one Muriuki Mburu who is the protestor herein. The Petitioners seek an order that the caution which was registered against the titled land parcel No. **Mwerua/Kithimbu/947** be lifted. The application is based on the facts that though the respondent had filed a protest, he abandoned it and he did not oppose the application for confirmation of grant. However, the Respondent had lodged a caution on the title number **Mwerua/Kithimbu/947**. The applicant wrote letters to the Respondent to remove the caution but he did not respond to the letters. The Respondent lodged the caution as a purchaser.

3. Upon being served with the application, the Respondent filed a replying affidavit sworn on 22nd May, 2017. His claim is that he had purchased 1 ½ acres out of land parcel No. **Mwerua/Kithimbu/947** from the applicants who had acknowledged receipt of Ksh.110,000/-. The applicant refused to perform their part of the contract. The applicants also failed to refund the money so that he could remove the caution. He lodged the caution to protect his interests. He deposes that this Court lacks the necessary jurisdiction

to order the removal of the caution.

4. The Respondent is further contending that the applicants have sold the land to a 3rd party to show they intend to transfer the land. That if the caution is removed, he will suffer irreparable loss since the applicants have no other land or property which can be attached to repay the debt. He prays that the application be disallowed.

5. The application proceeded by way of written submissions. For the applicants, submissions were filed by Maina Kagio and Company Advocates while for the respondent, submissions were filed by Ngigi Gichoya and Company Advocates.

6. I have considered the application. There is no dispute that the Respondent has lodged a caution on land parcel Number **Mwerua/Kithimbu/947** as shown on annexture GMK – 1 certificate of official search showing that a caution is lodged by Muriuki Mburu who claims interest as a purchaser. The issues which arise for determination are:

1. Jurisdiction.

2. Removal of Caution.

7. The Respondent claims that this Court does not have jurisdiction to deal with 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** and pursuant to **Article 162 (2) (b)** of the **Constitution**. The Section provides:

“There is established Environment and Land Court.”

The **Article** provides:

“Parliament shall establish Courts with status of the High Court to hear and determine disputes relating to –

The environment and the use and occupation and title to land.”

It is further submitted that Parliament enacted the **Land Registration Act** to revise, consolidate and rationalize the registration of title to land to give effect to the principles and objects of devolved government in Land Registration and for connected purposes.

8. The **Land Act** repealed the **Registered Land Act Cap 300** under which the land in dispute was registered. That the **Land Registration Act** defines the Court under **Section 2** as follows:

“Court – means the Environment and Land Court established under the Environment and Land Court Act, 2011.”

That caution is defined under the **Act** to mean

“A notice in the form of register to the effect that no action of a specific nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave notice.”

Section 73 (I) of the **Act** provides that caution may be withdrawn by the cautioner or removed by Court or by order of the registrar. That the Court here is the Environment and Land Court established under the Act. The applicant submits that since the Respondent abandoned the application for revocation of grant and did not oppose the application for confirmation of grant he ought to remove the caution. It is further submitted the respondent was not a beneficiary of the estate of the deceased. It is further submitted that if at all there was any transaction between the respondents and the applicant in relation to the land in

question which belongs to the estate of the deceased, it was an act of intermeddling with the estate of the deceased. That under **Section 82 (b) (ii)** of the **Law of Succession Act** provides that no property shall be sold before the confirmation of grant. As such land sold by an administrator before the confirmation of grant, he purchaser does not get good title.

9. The matter before me is a succession cause. There is no doubt that this Court is adorned with the necessary jurisdiction to hear and determine the matter. The facts are not in dispute. The conduct by the Respondent in this matter clearly demonstrates that he is aware that he has no valid claim against the estate of the deceased. That is why he decided to abandon the application for revocation of grant and did not oppose the confirmation of grant. This shows that his claim lies elsewhere and not in this succession cause. He submits that the caution is to cater for his interests as the applicants may not be able to refund. As such the respondent is not claiming land from the Estate but is seeking a refund from the applicants. This is a claim against the applicants specifically and not against the estate of the deceased. This Court has proceeded within its jurisdiction and confirmed the grant. The distribution of the estate is impeded by the fact that there is a caution. The applicants and the respondent intermeddled with the estate of the deceased. This is because though the agreement does not show the date when it was entered, clause 2 states the balance was payable to the vendor by the purchaser on 31st December, 2011. Clause 3 states that the vendors were selling their beneficial interest. As such if the balance was payable by end of December, 2011, it means that the sale was before the grant was issued and confirmed. It means the applicants and the respondents were intermeddling with the estate. **Section 45** of the **Law of Succession Act** provides:

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of or otherwise intermeddle with any free property of a deceased person.”

The respondent was not indebted to the estate of the deceased. The caution by the respondent was lodged on 17th January, 2017. This was long after the grant was confirmed on 30th September, 2015. The caution was intended to defeat the orders of this Court in distribution of the estate. The respondent who was not a debtor to the estate and not a beneficiary had no *locus standi* to block the distribution of the estate of the deceased. He was an intermeddler. In the Estate of **David Njogu Kibaka (deceased) H.C. Kerugoya Cause No. 48 of 2012** it was stated:

“If Raphael Muturi and Peter Karanja Maringa purchased the property from one of the survivors and not from the deceased, then the legal position is that such transaction amounts to intermeddling with the estate of a deceased person. The property of a dead person does not vest in his heirs or survivors indeed such persons acquire no legal title to the property until after the confirmation process. Prior to the confirmation the property vests in the administrator. Heirs and survivors have no interest in the property capable of being disposed of by way of sale. They cannot sell the property as they have no title to it and therefore they have no title to pass to those who purport to purchase the property from them. Their interest in the property does not concretize or crystallize until after the confirmation process when the property is transferred by the administrator to their names. Consequently, a person who purchases such property from an heir or survivor before the latter’s right over it crystalizes acquires no title at all in the property of the intestate. If Raphael Muturi and Peter Karanja Maringa therefore allegedly purchased the property from the heirs and survivors, then the purported sale was a nullity and the property cannot be confirmed to them.”

10. I am in agreement with this statement by my brother. If then agreement between the applicants and the respondent was a nullity, the respondent has no claim against the estate. What he can claim is refund of purchase price. The respondent having transacted with the applicants before the grant was confirmed has no claim that can rightly be enforced against the estate of the deceased. He lodged a caution which seems to have been lodged after the grant was confirmed. His claim that he will suffer irreparable loss as the applicants have no attachable properties. This is not the case as the two applicants are entitled to a share of the estate which he can attach after the distribution. **Section 82 (b) (ii)** of the **Law of Succession Act** provides that no immovable property can be sold before the confirmation of grant.

11. My view is that this Court has discretion to make orders which in the interest of justice and for just conclusion of causes which relate to the estates of deceased person. **Section 47** of the **Law of Succession Act**:

“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.”

12. A party who has obtained a grant is free to apply to the Court if he is unable to enforce the grant. The Court has inherent powers to make orders. **Rule 73** of the **Probate and Administration Rules** provides:

“Nothing in these Rules shall limit or otherwise affect the inherent power 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.”

13. The issue of removal of caution was addressed in the case of **Margaret Wanjiku Kahuhu -V- Nyahangi Nguni and 2 others (2014) eKLR** it was stated:-

“The Applicant brought her application under Section 73 (1) of the Land Registration Act, 2012. This has prompted counsel for the Respondents to contend that this Court has no jurisdiction to deal with this matter as it is purely and essentially of a nature that could only be handled by the Environment and Land Court. To that end this Court is in agreement with the counsel for the Respondents that indeed the said provision falls under the province of the Environment and Land Court. Indeed the Respondents’ contention that the jurisdiction of the Family and Probate Court emanates from the Law of Succession Act, Cap. 160, in so far as concerns administration of deceased persons’ property is quite correct.

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.”

The applicant has brought the application under **Section 47** of the **Law of Succession Act** and **Rule 73** of **Probate and Administration Rules**. The **Law of Succession Act** which gives Court inherent jurisdiction to deal with administration of Estates has no provision to remove a caution from the land forming the estate of a deceased person even where the caution is wrongly lodged as is the case in this matter. I find the provisions under which this application is brought gives Court inherent powers to entertain the application and make orders that would be in the interest of justice and to prevent abuse of Court process. I am of the view that this Court has jurisdiction to entertain the application and grant the orders.

14. On the issue of removal of caution. I am in agreement with the counsel for the Respondent on the issue of the jurisdiction of the Environment and Land Court as stated above with regard to removal of caution. This matter relates to the estate of the deceased Eunice Wanjiku Karuri which should devolve to her 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;

The respondent claims he is a purchaser but as I have pointed, he did not purchase from the deceased but from proposed beneficiaries even before the grant was confirmed. He intermeddled with the estate and did not acquire any interest in the estate. He has deponed rightly that he is claiming a refund from the applicants. He cannot block the distribution of the estate when he has no enforceable interest in the estate. His claim does not lie in the estate of the deceased but in a suit for refund of the monies he paid the applicants. The removal of caution cannot be pegged on the refund of the purchase price. This Court has jurisdiction to ensure that the grant is enforced as there was no objection to its confirmation. I find that the respondent has no valid reason to caution the estate of the deceased. His claim for refund lies elsewhere. I find that the application has merits. I direct that the caution registered on Land parcel No. **Mwerua/Kithimbu/947** shall be removed. Costs to the applicants.

Dated and delivered at Kerugoya this 1st day of March, 2018.

L. W. GITARI

JUDGE

Ruling read out:

Mr. Ndana holding brief for Applicants' counsel.

Mr. Ngigi for Respondent.

Court assistant Naomi Murage.

L. W. GITARI

JUDGE

1.3.2018