



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CASE NO. 750 OF 2009**

**JAMES CHEGE NJOROGE.....APPLICANT**

**VERSUS**

**TANNY OLE MULLA.....1ST RESPONDENT**

**KITETOI MANTIKOE.....2ND RESPONDENT**

**ANN MANTIKOE.....3RD RESPONDENT**

**JAMES MITHAMO KAMAU.....INTERESTED PARTY**

**RULING**

The application before this Court for determination is a Notice of Motion dated 8th April 2016, seeking orders that leave be granted to join James Mithamo Kamau in this suit as an Interested Party. An order was also sought for the lifting of the Court Order allegedly issued on 16th November, 2010 and registered as entry No. 5 against the proposed Interested Party's land parcel No. KAJIADO /KISAJU/4699, restraining the Interested Party from dealing with the said parcel until the hearing and determination of this Cause.

The grounds for the application are that the proposed Interested Party is the registered owner of land parcel No. KAJIADO /KISAJU/4699 located in Kitengela in Kajiado County, and the succession cause herein is related to land parcel NO. KAJIADO /KISAJU/1209. Further, that the original Applicant herein was claiming to have purchased a portion of KAJIADO /KISAJU/1209, and had through an application made in this cause dated 30th July, 2010 sought for restraining orders against the said land parcel. The proposed Interested Party however upon carrying out an official search realized that there is an order registered on 2nd December, 2010 against his land parcel No. KAJIADO/KISAJU/4699, which Order was allegedly issued in this matter on 16th November 2010, whereas as per the court record no such Court order was issued.

The proposed Interested Party explained in a supporting affidavit he swore on 8<sup>th</sup> April 2016 that sometimes in September 2015, he intended to sell a portion of his land parcel No. KAJIADO /KISAJU/4699, and the intended purchaser carried out an official search and informed him that there is an existing court order registered against the same, thereby restraining any dealing with the said parcel of land. Further, that the proposed Interested Party subsequently came to learn that the person who had registered the said court order is the Applicant herein, James Njoroge Chege, who confirmed upon discussion that he had registered the same by error and he wrote a letter to that effect. The proposed Interested Party annexed a copy of the certificate of the said official search and of the Applicant's letter.

He also averred that the Applicant in addition signed an application to withdraw the caution, but upon forwarding the same to Land Registry Kajiado, the proposed Interested Party was informed the said Court Order can only be removed through another Court Order. Mr. Gachuhi, the learned counsel for the proposed Interested Party relied on the pleadings filed during the hearing of the application on 14th November 2016, and submitted that the application was not opposed. Ms. Molinei, the learned counsel for the Respondents, confirmed that they did not oppose the application and were not aware of the alleged court order, and that the proposed Interested Party's parcel of land parcel is not part of the deceased's estate in this cause.

I have considered the application by the proposed Interested Party. As regards the first prayer for joinder as an interested Party, the Court notes that the application is brought pursuant to sections 1A, 3, 3A 18, and 63 of the Civil Procedure Act as well as Order 1 Rule 10 of the Civil Procedure Rules and Article 159 of the Constitution. It is notable in this respect that Rule 63 (1) of the Probate and Administration Rules provides as follows as regards the application of the Civil Procedure Rules to litigious proceedings in succession causes:

**“(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.”**

The provisions of Order 1 Rule 10 of the Civil Procedure Rules on substitution and addition of parties to civil suits are not applicable to succession causes by dint of Rule 63 of Probate and Administration Rules.

This finding notwithstanding, Rule 60 of the Probate and Administration Rules does provide that any interested person, whether or not he has been served with notice, who wishes to be heard upon or to oppose any application, and has not already appeared in the proceedings, shall enter an appearance in Form 26 in the registry in which the application is made giving his address for service, and may file such affidavits as he considers proper. Therefore the Applicant need only enter appearance to have audience before the Court, and having done so is properly before this Court as an Interested Party.

The second prayer for lifting of the orders against land parcel No. KAJIADO /KISAJU/4699 is unopposed, and after perusing the Court record I also found that no order was given in this Cause by this Court on 16th November 2010 that was required to be registered against the title of the said land parcel No. KAJIADO /KISAJU/4699. In any event the proceedings herein concern succession to land Parcel KAJIADO /KISAJU/1209, and land parcel No. KAJIADO /KISAJU/4699 was not part of the deceased's estate and has indeed been shown to belong to the Interested Party. Lastly the Interested Party provided evidence of the Applicant's admission that he registered the order against land parcel No. KAJIADO /KISAJU/4699 in error.

This Court therefore finds that the Notice of Motion dated 8th April 2016 has merit and accordingly orders as follows:

1. James Mithamo Kamau be and is hereby joined in this suit as an Interested Party.
2. The Court Order allegedly issued by this Court on 16th November 2010, and registered as entry No. 5 against land parcel No. KAJIADO /KISAJU/4699 restraining dealing with the said parcel until the hearing and determination of this Cause, be and is hereby lifted.
3. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 1<sup>st</sup> day of February 2017.

**P. NYAMWEYA**

**JUDGE**