



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**SUCCESSION CAUSE NO. 190 OF 2002**

***In the matter of the Estate of FESTUS MAIKO MBUTI (Deceased)***

**KELLEN MUTHONI MBOGO..... PETITIONER/APPLICANT**

**VERSUS**

**CYPRIAN KINYUA NYAGA..... 1ST RESPONDENT**

**ELIAS KITHINJI NYAGA.....2ND RESPONDENT**

**R U L I N G**

1. This is a ruling the application dated 15/12/15 seeking for orders that the court be pleased to order that the Embu District Land Registrar do lift the caution placed by the respondents on Ngandori/Ngovio/2417 and that the respondents and or their agents/servants/children or anyone claiming through them be evicted from the same parcel of land.

2. The applicant also seeks that the OCS Manyatta Police Station provides security during the eviction. The application is supported by the affidavit of Kellen Muthoni Mbogo. In the affidavit, it is stated that the applicant was issued with a confirmed grant on 22/4/2014. The respondents who were protesters in the succession cause did not appeal against the same but have cautioned the said land. The respondents have refused to vacate the land despite numerous demands. The applicant prays that the orders sought be granted so that litigation can come to an end.

3. The respondents in the replying affidavit stated that the deceased was their uncle and was the elder brother of their mother. The deceased was registered as the owner of Ngandori/Ngovio/2417 on behalf of the family. The remains of the deceased and his late widow were interred at the said parcel of land. Their deceased uncle's family and the family of the respondents lived on the said parcel of land and have developed it extensively.

4. The respondents claim that they never informed of the succession proceedings and were subsequently left out in the grant confirmed on 22/4/2014. This is despite acknowledgement by the applicant in the letter dated 30/10/2003 that the respondents deserved to be given a share in the estate of the deceased. The respondents said they placed a caution on the said parcel of land to avoid being left destitute. They have further stated that they have filed summons of revocation of grant dated 11/1/2016.

5. The applicant submitted that the respondents did not file any objection to the application for confirmation of grant and did not appear in court to stop the confirmation. It is argued that the respondents are not dependants of the deceased under the Law of Succession Act. She stated that she had offered to give the respondents a portion of the deceased's land on humanitarian grounds but they rejected the offer on grounds that the portion was small. It is further argued that the respondent's application to

revoke the grant is a delaying tactic and an afterthought. The respondents are indolent and cannot be aided by equity.

6. The respondents submitted that they were not informed when the succession cause was filed by the applicant. Parcel number Ngandori/Ngovio/2417 was registered in the name of the deceased on behalf of the family of Maiko Kimani Mbuti. The families of the deceased and the respondents live on the said parcel of land and have both developed it. The respondents argue that they were excluded as beneficiaries of the estate. Their deceased mother was entitled to inherit from her late father. Now that she is dead, the respondents are entitled to inherit her share in their uncle's estate.

7. In a further affidavit, the applicant stated that L.R Ngandori/Ngovio/2417 was a resultant subdivision of a parcel of land which had been registered in the name of James Kiriamburi the brother to the deceased. The parcel was subdivided into two portion and parcel 2417 was registered in the name of the deceased while the other one was registered in the name of James Kiriamburi.

8. The respondent's mother was not given any land as she had settled on her husband's land together with her children. The respondent's mother was buried on the original parcel of land and it happened that her grave is lies on parcel 2417. The respondents were aware of the succession proceedings and were given chance by court to raise issues but they did not.

9. In the case of **MARIA NGANGI GWAKO VS CHARLES MWENZI NGANGI [2014] eKLR** the court held that:- *When a Caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said Caution and the need for it to remain in place.*

10. In the case of **JACOB MWANTO WANGORA VS GEDION M. WANGORA & 3 OTHERS [2013] eKLR** the court held that

*The applicant also needed to prove that the restriction on LR No. Ngong/Ngong/2141 was illegal and not justifiable.*

11. The applicant in justifying why the caution is illegal and should be removed submitted that the respondents did not file any objection to the application for confirmation of grant and did not appear in court to stop the confirmation. The respondents are not dependants of the deceased under the Act.

12. As held in the case of **MARIA NGANGI GWAKO VS CHARLES MWENZI NGANGI [2014] eKLR** (supra), the respondents have a duty to explain why the caution should not be lifted.

13. The respondents claim that the deceased held the land on behalf of the entire family and that they are entitled to inherit their late mother's portion. However, the respondents have not satisfied this court as to their interests on the land. It has not been demonstrated that the deceased held the land on behalf of the entire family.

14. The land was originally one parcel with that of James Kiriamburi a brother to the deceased. It is not denied that the respondent's mother did not claim any share of the family land at the time her siblings were used and owned the land in issue. The applicant's father took his share from his brother at the right time. The respondents have not shown that they are heirs of the deceased under the Act and neither have they explained why they did not claim a share from James Kiriamburi's land who happens to be their other uncle.

15. The brief history of the case shows that the respondents were not serious in pursuing their applications in court. Having been given a chance to prove their claim that they were beneficiaries, they failed to do so.

16. A perusal of the court proceedings indicate that the respondents had filed an application for dependency dated 21/7/2005 which was never prosecuted. This is an indication of indolence on their part and as stated by counsel for the applicant equity does not aid the indolent.

17. When the application finally came up for hearing on 26/6/2008 the court noted the delay of pursuing the dependency application and directed that it be together with the summons for confirmation of grant. The court also directed that the applicants in the application dated 21/7/2005 for dependency be served with the application for confirmation of grant so that they could react to it. There is no indication in the court proceedings that the applicants ever responded or reacted to the application for confirmation of grant. The grant was confirmed on 22/4/2014.

18. After the grant was confirmed, it took the respondent about two years up to 12/01/2016 to file the summons for revocation. The respondent has a history of indolent litigants. The application ought to have been filed immediately after the confirmation. This application has not been fixed for hearing for the same reason of indolence on part of the respondents.

19. The respondents are asking the court to allow the summons to be heard first before this application is determined. The court has to look at the chances of success of such an application before giving the respondent time to fix it for hearing.

20. Without pre-empting the summons, the law favours the applicant as the rightful heir of the estate as opposed to the respondents. The grant was made to the rightful heir of the estate and confirmed after giving the respondents time to file a protest against confirmation which right they did not exercise.

21. In my considered opinion, the summons has little or no chances of success. Litigation has come to an end and justice has to be seen to be done. I agree with the applicant who cited the maxim that "Equity does not aid the indolent but the vigilant".

22. The applicant has shown that the caution lodged by the respondents was an afterthought and has no legal basis or justification. The respondents have not proved that they have any tangible interest in the land LR. Ngandori/ Nguvio/2417 to be secured by the caution. The existence of the caution is therefore not justifiable.

23. It follows that the respondents are in illegal occupation of the deceased's land and must be evicted to give space to the applicant in implementing her rights as the rightful heir in accordance with the grant confirmed on 22/04/2014.

24. The application is therefore allowed as prayed with no order as to costs.

25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF JULY, 2016.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Ms. Thugu for Kahiga for Applicant**

**Ms. Muthaura for Ithiga for respondent**

**Parties present**