



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**LAND AND ENVIRONMENT COURT**  
**MISC CIVIL APPLICATION NO. 290 OF 2014**  
**GRACE MUTHONI NGATHO.....APPLICANT**  
**VERSUS**  
**BURTON NGANGA NGOTHO.....1<sup>ST</sup> RESPONDENT**  
**THE DISTRICT OFFICER KIAMBAA DIVISION.....2<sup>ND</sup> RESPONDENT**

**RULING**

The application for determination by this Court is the Notice of Motion dated **9<sup>th</sup> September 2014**, brought under **Order 51 Rule 1 of the Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act and Section 26 and 78(2) of the Land Registration Act** seeking for orders that the court be pleased to lift the restrictions on parcels of land No. **Kiambu/Kihara/728 and Kiambaa/Kihara/T.428** herein referred to as suit properties.

This application is premised on the grounds stated on the face of the application and the applicant's supporting affidavit in which she stated that she is the registered owner of the suit properties, but she has been unable to undertake subdivision and subsequent transfer of the said properties owing to restrictions placed by the Respondents. Further that she wrote a letter to the Registrar, Kiambu District Land Registry on 8<sup>th</sup> February 2011, and also put a restriction to the said parcels as she felt her properties were under threat owing to the inference by the 1<sup>st</sup> Respondent. She averred that she tried to settle this matter with the 2nd Respondent but did not succeed. Therefore, the Respondents actions have caused and continue to cause her anxiety and undue prejudice. She therefore seeks for the said orders.

This application is opposed by the 1<sup>st</sup> Respondent who is the son of the applicant. He stated that the suit properties were registered in his father's name, **Wilson Ngoho Nganga**, who died on 26<sup>th</sup> October 2008. After his demise, the applicant filed for Letters of Administration together with his sister **Winnie Wairimu Ngotho**, in 2009. He alleges that a suit Succession Cause No **264 of 2009**, was filed in court surreptitiously and therefore the Letters of Administration given to the applicant and his sister Winnie were obtained through fraud and misrepresentation. Further that he has since applied for revocation of the Grant on the grounds of fraud. He also stated that a deceased person's property ought to devolve in Law to its rightful beneficiaries unless a beneficiary voluntarily foregoes that benefit with his/her full knowledge, participation and consent which position does not obtain in the present case. He further stated that the applicant is using the court for selfish interests as he is aware that the applicant intends to subdivide the land and sell of portions to unsuspecting buyers with the sole aim of disinheriting him.

Therefore, the 1st Respondent sought for this court to affirm the restriction pending the hearing and determination of the succession matter pending in court.

The applicant in reply to the 1<sup>st</sup> Respondent's Replying affidavit filed a further affidavit on 24<sup>th</sup> November 2014, wherein she confirmed that the 1<sup>st</sup> Respondent is her son and that the suit properties were her late husband's before they were transferred to her as the Administrator of the Estate after the determination of Succession Cause No 264 of 2009 through a Certificate of Grant dated 23<sup>rd</sup> February 2011. She also averred that the 1<sup>st</sup> Respondent refused to cooperate during the process of succession though the same was filed with his knowledge. She further stated that her intention of applying for an Order to lift the restriction on parcels No. **Kiambu/Kihara 728** and **Kiambaa/Kihara T.428** is to allow her undertake subdivision, subsequent transfer of the said properties to her children including the 1<sup>st</sup> Respondent.

The applicant filed her submissions on **24<sup>th</sup> November 2014**, wherein she reiterated the contents of her affidavit and added that the 1<sup>st</sup> Respondent was guilty of delay as he filed his objection to the Grant after 8 months. That she holds both legal and equitable title in the aforementioned properties by virtue of the authority derived from the Confirmed Grant and that she holds a life interest in the property in contention sought by the 1<sup>st</sup> Respondent which is her matrimonial home. She outlined how each beneficiary was to get a share from the suit properties and seeks to have the application allowed.

I have considered the affidavit evidence presented as well as the provisions of the Registered Land Act (now repealed) In terms of **section 136** of the **Registered Land Act (now repealed)**, it is the Registrar, who on application or on his own motion may order the registration of restrictions. According to **section 138** of the **Registered Land Act**, a restriction can be removed either by the Registrar or the court. **Section 138(2)** aforesaid provides that,

***“Upon the application of any proprietor affected by a restriction and upon notice thereof to the Registrar, the court may order a restriction to be removed or varied, or make such other order as it thinks fit, and may make an order as to costs.”***

There are factors cited by the 1<sup>st</sup> Respondent which do raise plausible questions about the complicity of the applicant in the filing and obtaining of the Certificate of Grant and the subsequent transfer of the suit properties to her names without the knowledge of all the beneficiaries. I have looked at the annexure **“GMN9”** which is the titled **“Agreement of the Beneficiaries”** and note that the said document was signed on **19<sup>th</sup> November 2014**, and excludes the 1<sup>st</sup> Respondent who is a beneficiary to the estate of Wilson Ngotho Nganga. The said document was also signed after the applicant had filed this application and after it had elicited a reply from the 1<sup>st</sup> Respondent. There is also an application pending before the Family Division having been filed by the 1<sup>st</sup> Respondent. It can only be just and fair for this court to allow the application filed by the 1<sup>st</sup> Respondent heard and determined on merit as it touches on the suit properties herein. Since both the applicant and the 1<sup>st</sup> Respondent have lodged restrictions on the suit properties, the said should remain in force until the **Succession Cause No 2836 of 2014** and **Succession Cause No 264 of 2009** have been heard and determined in finality. Consequently, the application dated **9<sup>th</sup> September 2014**, is hereby dismissed entirely with no orders as to costs.

It is so ordered.

Dated, Signed and delivered this **9th day April of 2015**

**L. GACHERU**

**JUDGE**

In the Presence of:-

Mr Oketch for the Plaintiffs/Applicant

1st Respondent in person

Hilda: Court Clerk

**L. GACHERU**

**JUDGE**