



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 214 OF 2010**

**IN THE MATTER OF THE ESTATE OF NTHIGA MBOGO (DECEASED)**

**LYDIA MUTHONI DANIEL.....APPLICANT**

**VERSUS**

**MARY WAMBETI EDWARD.....1ST RESPONDENT**

**JANE GICHUKU.....2ND RESPONDENT**

**MARGARET GATURI.....3RD RESPONDENT**

**R U L I N G**

This is a ruling on the application dated 23/3/15 seeking for orders that;

1. *The land registrar Embu be ordered to remove the caution and restriction registered against land parcel number Ngandori/Kirigi/6418, 6421, 6422, 6423, 6424 and 5185.*
2. *That costs of this application be provided for.*

The application is supported by the affidavit of Lydia Muthoni Daniel sworn on 23/3/2015. The applicant states that the respondents are her step children and that she is the administrator of the estate of the deceased. The respondents have registered a caution against the said parcels of land. It is further contended that the respondents registered the caution to frustrate implementation of the grant whereas the applicant is the sole beneficiary.

The applicant prays that the Land Registrar be ordered to lift the caution to enable her administer the estate and distribute the same as per the grant issued by this court as there is no appeal against the same.

The respondents in the affidavit sworn by the 1st respondent Mary Wambeti opposed the application. The deponent states that she has authority from the other respondents to swear the affidavit. She states that there is a pending application for revocation of grant confirmed on 8/4/2015 in favour of the applicant/petitioner.

The 1st respondent states that the applicant lives on her husband's land L.R. Ngandori/Kirigi/6414 which should be shared among the daughters of the deceased while L.R. Ngandori/Kirigi/6421 should be given to one John Muchangi and Alex Mureithi who are living on the land L.R. Ngandori/Kirigi/6422 should be shared between Gerald Mbogo and Andrew Ireri L.R. Ngandori/Kirigi/6423 should be shared between Edue Muchangi and Keneth Mureithi L.R. Ngandori/Kirigi/6424 should be given to Antony Gitonga. John Muchangi, Alex Mureithi and Antony Gitonga all live on the said land and if the land is transferred to the applicant she might sell it. The respondents urge the court not to remove th caution.

The applicant stated that she was relying entirely on her affidavit but further added that the respondents and any other person were not entitled to a share of the deceased's land. The 1<sup>st</sup> respondent is the daughter of the deceased's by his first wife and she invaded the land taking away the applicants belongings from the house which the respondent now occupies together with her children.

The respondents submitted that they are children of the deceased and that the deceased also had grandchildren. It is argued that the respondents have filed an application for revocation of grant and that for that reason the caution should be retained. The parties named in the application for revocation of grant are the grandchildren of the deceased.

The grounds upon which a caution and restriction should be lifted were discussed in the cases below;

In the case of **MARIA NGANGI GWAKO VS CHARLES MWEZI NGANGI [2014] eKLR**, the applicant sought an order for the removal of caution lodged by the respondent on parcel of land known as LR .No Wanjare/Bokeire/1467. The court held that;

- a. *Under the Land Registration Act a caution can only be lodged and maintained by a person who claims a right to obtain an interest in land, lease or charge which is capable of creation by an instrument registrable under the Land Registration Act.*
- b. *When a caution is objected to by a proprietor of land, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place.*

In the case of **JACOB MWANTO WANGORA VS GEDION M. WANGORA & 3 OTHERS [2013] eKLR** The applicant sought that a caution be removed. The court held that the applicant needed to prove that the restriction on LR No. Ngong/Ngong/2141 was illegal and not justifiable.

In view of the above decisions, the onus is on the respondents to prove that the restriction is legal and justifiable. The respondents have the onus to justify why the restriction should not be removed as the high court already quashed the decision of the tribunal.

[The grounds in the application for revocation of grant are that the deceased had subdivided parcel number Ngandori/Kirigi/6418, 6421, 6422, 6423 and 6424 out of parcel number 5185. it is alleged that the grant was obtained by means of untrue allegations of facts essential in the case and without the consent of the family. The respondents argue that the applicant in the supporting affidavit the has not explained how the grant was obtained without the consent of the family.

On 30/10/2014 when the grant was confirmed, the court noted that the respondents had been served with the summons of confirmation of grant and that they did not file any objection.

It is a fact that the respondents' summons for revocation of grant has not been heard. It is noted that the respondents did not oppose the confirmation of grant despite having been served by the applicant. However, the rules of natural justice require that the respondents be given hearing in regard to the pending summons.

For these reasons I decline to grant the orders in this application. Parties are directed to take directions before the Deputy Registrar for hearing of the summons for revocation of grant within 30 days to avoid delay.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2015.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Applicant**

**All 3 respondents**