



REPUBLIC OF KENYA



**In re Estate of Kamukii Mwethi (Deceased) (Succession Cause  
94 of 2017) [2024] KEHC 1657 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1657 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE 94 OF 2017  
A MSHILA, J  
FEBRUARY 23, 2024  
IN THE MATTER OF THE ESTATE OF KAMUKII MWETHI (DECEASED)**

**BETWEEN**

**PETER KINYANJUI MWAURA ..... 1<sup>ST</sup> APPLICANT**

**JOHN KINYANJUI MWAURA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PHYLLIS NJAARI MBURU ..... 1<sup>ST</sup> RESPONDENT**

**NJOROGE GUITATI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before court is Summons dated 21<sup>st</sup> February, 2023 and brought under Rule 43, 49 and 73 of the *Probate and Administration Rules*. The Administrators Peter Kinyanjui Mwaura and John Kinyanjui Mwaura sought for orders that:-
  - a. Spent
  - b. That this Honourable Court be pleased to order the lifting, cancellation and/or removal of all restrictions, cautions, encumbrances and/or inhibitions registered on title number Kiambaa/kihara/680 to pave way for an expeditious distribution of the land to the beneficiaries.
  - c. That this Honourable Court be pleased to order the Kiambu District land registrar not to register any restrictions, cautions, encumbrances and/or inhibitions on title number Kiambaa/kihara/680 without an order from this Honourable Court.
  - d. That this Honourable Court be pleased to order the Kiambu District land registrar to dispense with the production of the original title deed of land parcel no. Kiambaa/kihara/680 registered



in the name of Kamukii Mwethi in order to facilitate the subdivision and transfer of the subject suit property to the respective beneficiaries.

2. The application is premised on the grounds that the Certificate of Confirmation of Grant was confirmed on 22<sup>nd</sup> September, 2022 as such distribution is long overdue. That no appeal or review has been lodged and that all the issues in dispute have been settled. The caution dated 8/12/2022 by Evans Mwaura Kamukii is extraneous as he has already been provided for.
3. The application is supported by the affidavit of John Kinyanjui Mwaura and Peter Kinyanjui Mwaura sworn on 28<sup>th</sup> February, 2023. They deposed that this court confirmed the grant and the mode of distribution vide its judgment delivered on 22<sup>nd</sup> September, 2022 and there being no review or appeal there is need to clear any impediments on the title to pave way for distribution. That they engaged a surveyor to assist with sub-division who informed them that the land registrar would not process their transmission application unless all encumbrances on title number Kiambaa/kihara/680 are removed. They deposed that a perusal of the green card indicated that there were restrictions that needed to be cleared. That entry 2, 3, 4 and 5 had been removed vide court orders though not effected, entry 6, 7 and 9 were vanquished vide the judgment delivered on 22<sup>nd</sup> September, 2022.
4. Evans Mwaura Kamukii filed his replying affidavit sworn on 27<sup>th</sup> March, 2023. He deposed that he is opposed to the instant application as he has preferred an appeal at the Court of Appeal as he is aggrieved by the decision of this court. He deposed that the court herein recently granted stay orders and review and that the encumbrances registered are in order. The court was urged to disallow the application herein as allowing the same would render the appeal at the Court of Appeal Number E114 of 2023 nugatory. He denied being mentally ill.
5. Phillis Njaari Mburu and Njoroge Guitati swore their affidavit on 30<sup>th</sup> March 2023. They deposed that Phyllis and Evans registered a caution as well as the court pending hearing and determination of the suit. They deposed that they are dissatisfied with the court's decision as such the cautions should remain in force pending the Appeal No. 79 and 2019-Nairobi.
6. In their supplementary affidavit, John Kinyanjui Mwaura and Peter Kinyanjui Mwaura deposed that Evans Mwaura Kamukii is not an administrator of the estate. His mental state was said to have deteriorated. They deposed that there was no notice of appeal as such the claim that there was an appeal was meant to mislead the court. The orders granted on 22/3/2023 were said to have emanated from lies as such the same should be stayed, reviewed and expunged from the court records. The objection to the instant application was said to be a way to derail the 1<sup>st</sup> and the 2<sup>nd</sup> house from enjoying the fruits of the judgment
7. The parties were directed to canvass the application by way of written submissions. Hereunder is a summary of the rival submissions.

### **Applicants' Submissions.**

8. The Applicants submit that the court has pronounced itself on all the relevant issues as such any issue dragging the process should be dismissed. It was submitted that the houses were given an equal share as such a disagreement from one house should not derail the other houses. It was submitted that the beneficiaries of the 4<sup>th</sup> house do not have priority entitlement to the estate. The stay of execution was said to be unwarranted as the same is meant to delay the completion of the process. The Applicants submit that distribution of the estate in a polygamous marriage is done in accordance with the houses represented by the wives regardless of the number of children in each house. The court was urged to find that the 4<sup>th</sup> house is guilty of intermeddling to the detriment of the other beneficiaries and that



there is need to distribute the estate and close the matter. The court was urged to issue an order to clear the caution to pave way for distribution. Introduction of Njoroge Guitati and Peninah Wanjiru as beneficiaries was said to be res judicata as the same has been determined by a competent court. In the end, it was submitted that litigation must come to an end as the previous court's judgments are binding, there is no appeal pending and there is no stay.

### **1<sup>st</sup> Respondent's Submissions**

9. Evans Mwaura Kamukii submitted that stay of execution was granted on 22/3/2023 so as to preserve the status quo pending appeal. He submitted that he will suffer substantial loss which cannot be compensated should the sub-division proceed. That he filed his appeal on time as such he does not mean to delay the administration of justice and that the appeal dated 23/3/2023 has high chances of success. The court was urged to disallow the Applicant's application in the interest of justice.

### **2<sup>nd</sup> Respondent's Submissions**

10. The 2<sup>nd</sup> Respondent submitted that Grace Guitati now deceased had lodged an appeal at the Court of Appeal against the decision that she is not a beneficiary of the deceased's estate as such lifting of the restrictions would be detrimental if indeed the appeal succeeds. It was submitted that the Applicants will not suffer any prejudice if the orders sought are not granted. Reliance was placed in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR. The court was therefore, urged to dismiss the application with costs.

### **Issues for Determination**

11. Having considered the Applicants' application as well as the affidavits filed in support and /or in opposition of the application, the rival submissions by the parties, the main issue for determination is whether the court should lift the restrictions registered on title number Kiambaa/kihara/680.

### **Analysis**

12. Section 73 (I) of the *Land Registration Act* provides that a caution may be withdrawn by the cautioner or removed by Court or by order of the registrar.
13. Section 47 of the *Law of Succession Act*, sets out the jurisdiction of the High Court in Probate and Administration matters. The section provides that:-

Jurisdiction of High Court

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:

14. Rule 73 of the *Probate and Administration Rule* provides that:-

“Nothing in these rules shall limit or otherwise affect the inherent powers 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.”



15. Refer the case of *Margaret Wanjiku Kabubu v Nyabangi Nguni and 2 others* (2014) eKLR where the court in addressing itself to the issue of removal of a caution it held that:-
- “ 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.”
16. The Applicants herein have applied to this court for the removal of all cautions and/or restrictions registered on title number Kiambaa/kihara/680 to pave way for distribution of the deceased’s estate. They averred that the distribution of the estate is way overdue and that no appeal has been lodged. It was averred that all issues arising had been dealt with by the court in previous decisions and that the court had ordered for the removal of all the other restrictions.
17. The Respondents oppose the application as they contend that they will suffer substantial loss if the restrictions are removed and sub-division takes place as their intended appeals have high chances of success.
18. From the record, the court confirmed the grant and the mode of distribution vide its judgment delivered on 22/9/2022. This caused the administrators of the estate to engage surveyors so as to facilitate sub-division and distribution of the estate. The same was not possible as there exists restrictions lodged by the Respondents on the title to the suit land. The Respondents allege that they are dissatisfied with the judgment of the court in regard to their share of the estate as such have lodged an appeal.
19. Evans Mwaura Kamukii claims to have filed an appeal at the Court of Appeal number E114 of 2023, a perusal of the record shows that what he filed is a civil miscellaneous application seeking leave to file appeal out of time.
20. In regard to the appeal filed by Grace Guitati number 79 of 2019, the same was against the decision of both Justice Rawal and Justice Musyoka from disinheriting her from the share of her father. Phylliss Njaari is also said to have filed a Notice of an intention to appeal against the decision of the court granting her a life interest instead of absolute.
21. The Respondents urge the court not to lift the cautions due to their intended appeals. After due consideration of all the arguments by the parties, this court finds that litigation must come to an end. The judgment delivered on 22<sup>nd</sup> September, 2022 indeed confirmed the grant in this cause. There is no pending appeal or orders for stay of execution against the said judgment. The administrators are duty bound to execute the judgment in a bid to complete distribution of the deceased’s estate. With the various restrictions in place, transmission this is proving to be impossible. The efforts by the Administrators to engage a surveyor for purposes of sub-division remain futile.
22. In the circumstances, and bearing in mind that litigation must come to an end and that the Administrators have a duty to administer the deceased’s estate without hindrances and further that the Respondents have not demonstrated to this court that they will suffer substantial loss which cannot be compensated by way of damages, this court is satisfied that the Applicants’ application is merited.

### **Findings and Determinations**

23. For the foregoing reasons this court makes the following findings and determinations;



- i. The application is found to have merit and it is hereby allowed;
- ii. This court hereby orders the lifting, cancellation and/or removal of all restrictions, cautions, and/or inhibitions registered on title number Kiambaa/kihara/680 to pave way for an expeditious distribution of the land to the beneficiaries.
- iii. The Kiambu District land registrar is hereby directed not to register any restrictions, cautions, and/or inhibitions on title number Kiambaa/kihara/680 without an order from this Honourable Court.
- iv. The Kiambu District land registrar is hereby directed to dispense with the production of the original title deed of land parcel no. Kiambaa/kihara/680 registered in the name of Kamukii Mwethi in order to facilitate the subdivision and transfer of the subject suit property to the respective beneficiaries.
- v. Parties at liberty to apply
- vi. Each party to bear their own costs.

Orders Accordingly

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**A. MSHILA**

**JUDGE**

**In the presence of;**

Mourice – C/A

Karoki for the Administrators

Mbirwa h/b for Ndirangu for Intended appellant.

File closed.

**A. MSHILA, J**

**23/2/2024**

