



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 146 OF 1999

WILFRED MURANDI MAINGI.....APPLICANT

VERSUS

STEPHEN MURIMI MWANGI.....RESPONDENT

AND

THE LAND REGISTRAR KERUGOYA.....THIRD PARTY

RULING

1. The application has been brought under the provisions of Section 3A Civil Procedure Act and Order 49 Rule 1 of the Civil Procedure Rules; the applicant is seeking for the following orders;

(i) The Honourable Court be pleased to authorize the Land Registrar to remove the caution registered on 18/03/1980 against Land Parcel No. **KIINE/RUIRU/86** by one Samuel Mwangi Njoroge (now deceased);

(ii) The costs of the application be provided for.

2. The applicant relied on the grounds on the face of the application and on his Supporting Affidavit made on 16/12/2019 and Further Affidavit made on 18/12/2020, hereunder is summary of the applicant's case.

APPLICANT'S CASE

3. The applicant's case was that the court decreed vide a judgment delivered on 25/01/2019 that the property **Land Parcel No. KIINE/RUIRU/86** to devolve to the applicant herein; but upon presenting the RL.19 and RL.7 documents at the Lands Office for registration the same were rejected due to the subsisting caution against the subject property lodged by Samuel Mwangi Njoroge (now deceased).

4. Samuel Mwangi Njoroge died on 15/05/2011 a copy of the Death Certificate was annexed to support the fact of death; that the deceased had no registerable claim over the subject property.

5. The applicant prayed that the Land Registrar be directed to remove the caution to enable him register the RL.19 and RL.7 to enable him deal with the property as he so desires.

ISSUES FOR DETERMINATION

6. After having heard the presentation made by counsel for the applicant this court has framed only one issue for determination which is whether the applicant has presented sufficient material to merit the orders sought.

ANALYSIS

Whether the applicant has presented sufficient material to merit the orders sought:

7. The applicant has brought the instant application under the provisions of Section 3A of the Civil Procedure Act and Order 49 Rule 1 of the Civil Procedure Code; notably in Succession proceedings the applicable law would be found at Rule 49 of the Probate and Administration Rules as opposed to '**Order 49 Rule 1 of the Civil Procedure Rules**'.

8. Rule 49 of the Probate and Administration Rules contemplates such instances where a party seeks to move the court on an application that is not specifically prescribed for under the Act; it would appear that there might have been a typographical error in the applicant's application when he cited '**Order 49 Rule 1 of the Civil Procedure Rules**' this court will in the interest of justice disregard and overlook this technical error in the title in order to deal with the substantive issues so as to do substantive justice. this court will therefore consider the application as having been brought under the correct provisions of Rule 49 of the Probate and Administration Rules which reads as follows;

'A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by an affidavit.'

9. In this instance Samuel Mwangi Njoroge lodged a caution against the subject property on the grounds that he had a beneficial interest in the said property; the caution was lodged on 18/03/1980 thereafter he proceeded to file a succession cause in 1985.

10. On 25/01/2019 the trial court rendered its judgment dismissing the protest lodged by Samuel Mwangi Njoroge and the court's finding was that Samuel Mwangi Njoroge had no beneficial interest in the estate herein;

11. With the caution still in place the applicant has been unable to effect the transmission of the subject property, the question that arises is which law to apply in this instance so as to remove the caution;

12. One way of removing the caution and the applicable law for its removal is clearly provided for at Sections 71 - 73 of the Land Registration Act 2012. Section 73 reads as follows;

'(1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to sub-section (2) by order of the Registrar.

(2) The Registrar on the application of any person interested may serve Notice on the Cautioner that the caution will be removed at the expiration of the time stated in the Notice.

(3) If the cautioner has not raised any objection at the expiry of the time stated the Registrar may remove the Caution;

(4) If the cautioner objects to the removal of the caution the cautioner shall notify the Registrar in writing of the objection within the time specified in the Notice and the Registrar shall after giving the parties an opportunity of being heard make such order as the Registrar considers and may in the order provide for payment of costs.'

13. The above method would then place the matter under the jurisdiction of the Environment Court, but this being an existing succession cause brings it under the province of the High Court, thus the other method for removal of cautions in matters succession ought to be provided for under the Law of Succession Act.

14. As stated in the forgoing paragraph the applicable law is found under the provisions of Section 49 (**supra**) and 47 of the Law of Succession Act which gives this court the power to exercise its discretion to make such orders which are in the interest of justice for a just conclusion of the cause which relates to the estates of a deceased person.

15. Section 47 of the Act reads as follows;

'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.'

16. The material placed before this court is the existence of the judgment rendered that Samuel Mwangi Njoroge had no beneficial interest in the subject property, further the court ruled that the applicant was the sole beneficiary of the subject property. In the case of in the case of **Joseph Kibowen Chemjor vs William C. Kiseru [2013] eKLR** the court held that there were three (3) ways in which a caution can be removed which are as follows;

'Thus cautions may be removed in three ways;

(a) By withdrawal of the same by the cautioner.

(b) By removal by order of the court.

(c) By removal by order of the Registrar.

'These three ways are independent of each other such that it is not necessary for one to demonstrate that he has attempted to have the caution removed by the Land Registrar before moving the court to remove the caution. It is however always advisable to have the court arbitrate the matter as a last recourse.'

17. Due to the demise of Samuel Mwangi Njoroge he therefore cannot be called upon to remove the caution. It is noted that the applicant has not indicated that the legal representatives of the deceased were served with the instant application so as to be given a chance to state their case, the lack of service notwithstanding from the material on record this court is satisfied that there is no valid reason found to prevent the removal of the caution and finds that this a suitable case for it to exercise its inherent discretion in granting the orders sought on condition that the Land Registrar duly notifies the legal representatives at the last known address.

FINDINGS AND DETERMINATION

18. From the foregoing reasons this court makes the following findings and determination;

(i) This court finds that the application is found to be meritorious and it is hereby allowed.

(ii) The Land Registrar Kerugoya is directed to give the requisite notice for the removal of the caution registered against Land Parcel **KIINE/RUIRU/86** to the legal representative of the deceased;

(iii) The applicant shall bear the costs of the application.

It is so Ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 10TH DAY OF SEPTEMBER, 2021.

HON.A.MSHILA

JUDGE



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