



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC APPLICATION NO. 496 OF 2017

DAGRAS KARUTHI KING'ORI.....PLAINTIFF/ APPLICANT

-V E R S U S-

DISTRICT LAND REGISTRAR NYANDARUA....1st DEFENDANT/RESPONDENT

PETER KING'ORI KIRUTHI.....2nd DEFENDANT/RESPONDENT

JOSEPH KIRUTHI MIUGO.....3rd DEFENDANT/RESPONDENT

NJUGUNA JESSE KURIA.....4th DEFENDANT/RESPONDENT

RULING

1. Before me is a Notice of Motion dated 4th October 2017 and filed on the 5th October 2017 pursuant to Section 1A,1B, 3A of the Civil Procedure Act, Order 37 Rules 1,2 and , order 40 Rules 1 and 2, order 50, Rule 1 of the Civil Procedure Rules, Sections 78 (2) and 93 of the Land Registration Act, No.3 of 2012 and all other the enabling provisions of the Law, where the Applicant sought for orders compelling the Defendants to lift the restriction placed on parcel of land No. Nyandarua /Ol Kalou West/182 and further for orders restraining the Defendants from interfering with the Plaintiff's quiet use, occupation, title to and quiet possession of four (4) acres out of parcel of land No. Nyandarua /Ol Kalou West/ 182 pending the hearing and determination of the suit.

2. The Applicant finally prayed that the court do grant leave to the Applicant to sub-divide, charge, mortgage, sell, advertise for sale and deal in any manner, subject to proprietary rights as the registered owner thereof, with four (4) acres of land out of all that parcel of land known as No. Nyandarua /Ol Kalou West/182 despite failure to obtain and or procure spousal consent. He also prayed for cost of and incidental to this application.

3. The application was based on the grounds on the face of it and on the sworn affidavit of Dagrass Karuthi King'ori dated the 4th October 2017.

4. The Application was not certified as urgent and the court directed for service to be effected upon the Defendants for inter party hearing. Counsel for the Plaintiff then sought for direction that the Application be disposed of by way of written submissions wherein save for the 1st and 3rd Defendants the rest of the parties filed their respective written submissions.

Plaintiff's submission.

5. It was the Plaintiff/Applicant's submission that he was the registered proprietor of parcel of land No. Nyandarua /Ol Kalou West/ 182. That the 2nd and 3rd Defendants herein were related to each other by virtue of the fact that they were sons of the Applicant. That on the 30th June 1995 the 2nd and 3rd Defendant/Respondents without cause or basis placed a caution on the said parcel of land and another was lodged by one Mary Wairimu Kiruthi on the 10th November 1998, thereby encumbering the Plaintiff right from dealing with the same for a period spanning two (2) decades.

6. That the Applicant's desire to sell part of the suit land to cater for his need and medical care for his sickly wife has been thwarted by the presence of the caution therein.

7. The Applicant submitted while referring to Section 71 of the Land Registration Act that since he was the registered proprietor of the suit land, the Respondents had no interest in the suit property that could be protected by a caution. That a beneficiary/son's interest is not protected by a caution.

8. He further submitted the under Section 24(a) of the Land Registration Act, confers absolute right of ownership to the proprietor. That

further that Section 25 of the same act provides for instances when a right of a proprietor can be defeated. There was no claim in the 2nd Respondent's replying affidavit or any evidence adduced to the effect that the Applicant's title to the suit land was obtained through fraud or misrepresentation.

9. To buttress the Applicant's submission, the Applicant relied on the decided cases of;

i. **Daniel Njagi Muramiti vs Peter Ndwiga Daniel & 3 Others [2014] eKLR**

ii. **Ahmed Ibrahim Suleiman 7 Another vs Noor Khamisi Surur [2013]eKLR**

iii. **Kanyi vs Muthiora 1984 KLR 712**

iv. **Nairobi Permanent Market Society &11 others vs Salima Enterprises &2 Others [1977]eKLR**

10. On the caution lodged by Mary Wairimu Kiruthi on the 10th November 1998, it was the Plaintiff's submission that it was not in despite that she was a wife to the Applicant and that they bore 8 children, the 2nd and 3rd Respondents inclusive. That the said Mary Wairimu Kiruthi was now ailing and was not in a position to either remove the caution or give spousal consent due to her mental incapacity.

11. The Applicant submitted that the court had inherent jurisdiction to lift the caution upon being satisfied that the stated cautioner's interest are well taken care of as per the proposal for subdivision fronted by the Applicant at paragraph 9 and 10 of the supporting affidavit.

2nd Respondent's submission.

12. The 2nd Respondents submission was to the effect that he and the 3rd Respondents were sons to the Applicant herein. That since the year 1969 to date they have been having wrangles with the Applicant in a bid to stop him from selling his parcel of land.

13. From this manmade submissions, what the court can make out is to the effect that the Respondents placed the Caution on the suit land to stop the Applicant from disposing it because thereon lived his grandchildren and great grandchildren who were all orphaned and who would be destitute if the land was sold.

14. The 2nd Respondent's further submission was to the effect that the Applicant had already disposed of another parcel of land No. 883 Mawingo/ silent and has been threatening to sell the suit land once the caution was lifted.

15. That indeed the Applicant was not keen in distributing the suit land to his children and had temporary settled them that without legal documents he was likely to evict them from his land.

16. The Applicant further sought for an order directing counsel for the Applicant to return the Title deed to the suit land, that he was holding, back to the Applicant.

Analysis and Determination.

17. I have considered application herein as well as the submissions by the Applicant and the 2nd Respondent herein. Briefly, the submission put forward is to the effect that the parties herein are a father and his sons.

18. That whereas the Applicant herein was the registered proprietor of parcel of land namely No. Nyandarua /Ol Kalou West/182, on the 30th June 1995 the 2nd and 3rd Respondents herein registered a caution on the said parcel of land yet they had no recognizable interest on the same. On the 10th November 1998, Mary Wairimu Kiruthi, the Applicant's wife placed a second caution on the same parcel of land. That the said Mary Wairimu Kiruthi was now mentally incapacitated and was not in a position to lift the caution. The Applicants application was therefore to have the cautioned removed.

19. The Respondent's response was to the effect that as sons of the Applicant, they had placed a caution on the suit land to protect their interest, the applicant having had tried to sell if off.

20. It is not in dispute that the parties herein are a father and his sons and that the suit land was registered in the Applicant's name.

21. It is also not in dispute that the Respondents and their mother Mary Wairimu Kiruthi reside on the said parcels of land and being apprehensive that the Applicant might dispose the same without their consent, registered a caution over the same to protect her interest.

22. The certificates of official search dated the 29th September 2017 confirm that caution was registered against the title of the suit property in favor of the Respondents and Mary Wairimu Kiruthi.

23. I am satisfied that the Appellant is the registered proprietor of the suit property as he has annexed to his affidavit in support of the application a copy of the titles deed which show that he was registered as the proprietor of the suit properties on 16th January, 1995.

24. Upon the Respondent's action, the Applicant filed a Miscellaneous Application before this court under Section 78(2) and 93 of the Land

Registration Act, to have the said caution removed.

25. I find the issue for determination herein is whether the Applicant could commence proceedings on a removal of a caution by way of a Miscellaneous Application.

26. Section 71 of the Land Registration Act provides for persons who can lodge a caution;

(1) A person who—

(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;

(b) is entitled to a licence; or

(c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.

(2) A caution may either—

(a) forbid the registration of dispositions and the making of entries; or

(b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution.

(3) A caution shall be in the prescribed form, and the Registrar may require the cautioner to support the caution by a statutory declaration.

(4) The Registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under this Act.

(5) Subject to this section, the caution shall be registered in the appropriate register.

27. Section 73 of the Land Registration Act makes provision for the removal or withdrawal of a caution. This section provides as follows:-

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

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

(3) If a 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 fit, and may in the order provide for the payment of costs.

(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

(6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.

28. Under Order 3 Rule 1 of the Civil Procedure Rules the same requires that:

Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

29. The "other manner" prescribed in Order 3 is the Originating Summons which may be taken out in respect of matters stipulated in that Rule. The removal of a caution is not however one of the specified 'manner' under the provisions of Order 37.

30. The precursor to the Land Registration Act (LRA) is the Registered Land Act (RLA). Order 37 Rule 8, provides that applications under the Registered Land Act (RLA) other than under Sections 120, 128, 133, 138, 143, and 150 shall be made by originating summons. The removal of cautions under the RLA was contained in Section 133 of the statute. It will be noted that Section 133 is not one of the sections in which applications could be made by way of Originating Summons.

31. The above rule specifically excludes the use of Originating Summons for applications under Section 133 of the Registered Land Act,

which is the Section under which the Appellant filed his application for the removal of the Caution.

32. Section 107 of the Land Registration Act, which contains savings and transitional provisions, preserves certain rights which were exercisable immediately prior to the commencement of the said statute. It states as follows :-

(1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

33. Section 133 of the Registered Land Act having been expressly excluded from the use of Originating Summons, the only other way that application could have been made was by way of a Plaint. It could not have been made by way of Notice of Motion.

34. In the case of **Joseph Kibowen Chemjor vs William C. Kisera [2013] eKLR**, Justice Munyao Sila observed as follows;

I am alive to the provisions of Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be “pleadings”, goes beyond a mere technicality. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of “suit by a letter” which Mr. Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party.

If I am to allow the current “pleadings” to stand, I do not see how this matter will be determined without prejudice being caused to the defendant. Even if no prejudice will be caused to the defendant I would rather strike out this application at this stage, which will only invite minimal cost, rather than to allow the proceedings to stand, and thereafter be at a loss on how to thereafter proceed with the matter. The former action will benefit all parties and is certainly the lesser of the two evils.

35. I associate myself with these sentiments. Accordingly, I find that the application by way of the Notice of Motion dated 4th October 2017 and filed on 5th October, 2017 is fatally defective and is incompetent before the court.

36. The application is struck out, with costs to the 2nd Respondent.

37. Parties to comply with the provisions of Order 11 of the Civil Procedure Code within the next 21 days to enable the matter proceed for hearing of the main suit herein.

Dated and delivered at Nyahururu this 29th day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE