



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
ENVIRONMENT AND LAND COURT DIVISION

ELC CAUSE NO. 110 OF 2014

NTHIGA CIGANA.....PLAINTIFF/RESPONDENT

VERSUS

NYAGA TITIMA.....DEFENDANT/APPLICANT

RULING

NYAGA TITIMA the applicant herein is the registered proprietor of land parcel No. NTHAWA/RIANDU/1942 (the suit land). The respondent **NTHIGA CIGANA?** had filed this suit against him on **21ST MAY 2013** claiming a share of the suit land on the ground that he had paid the applicant Ksh. 3,000. That claim was however dismissed in a judgment delivered by this Court on **24TH OCTOBER 2013**.

The applicant who was acting in person has now instructed the firm of **KAMUNDA NJUE & COMPANY ADVOCATES** to file this Notice of Motion dated 19th September 2014 seeking the following substantive remedies:-

1. Spent

2. That this Honourable Court do grant leave to KAMUNDA NJUE & COMPANY ADVOCATES to represent him herein after judgment.

3. That this Honourable Court do issue an order authorizing the District Land Registrar Mbeere District to lift the caution on parcel No. NTHAWA/RIANDU/1942 in which a judgment was entered on 24th October 2014/2013 in favour of the applicant in this matter against the respondent herein.

4. That the costs of this application be provided for.

The application is supported by the applicant's affidavit and based on the grounds set out therein. What I glean from the said application is that the applicant is the registered proprietor of the suit land and judgment was entered for him against the respondent on 24th October 2013 when the respondent's claim to the same was dismissed. That notwithstanding, the respondent has placed a caution on the suit land thereby denying the applicant the right to deal with it and it is only fair and in the interest of justice that the said caution be lifted. Annexed to the supporting affidavit is a copy of the judgment dated 24th October 2013, a copy of another judgment in Civil Appeal No. 70 of 2007 and subsequent decree and a copy of the official certificate of search showing the caution placed on the suit land – Annexures **NT1, NT2, NT3** and **NT4** respectively.

In opposing the application, the respondent filed a replying affidavit in which he deponed, inter alia, that the application is an abuse of the process of the Court and should be dismissed with costs as it is brought in bad faith. That there is another suit No. **70 of 2007 at EMBU HIGH COURT** in which a similar application is pending and the caution should remain in place until justice is done or seen to be done.

I have considered the application.

It is not in dispute that this Court delivered a judgment on 24th October 2013 dismissing the respondent's claim to the suit land. It is also not in dispute that the applicant is the registered proprietor of the suit land and the respondent has placed a caution on it. The issues for determination are whether:-

(a) Counsel for the applicant should be allowed to represent him

(b) The caution placed on the suit land should be lifted.

Order 9 Rule 9 of the Civil Procedure Rules provides as follows:-

“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court –

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.

The applicant herein was previously acting in person. He has only instructed Counsel after judgment. I do not think there was any need for counsel to move the Court under **Order 9 Rule 9 of the Civil Procedure Rules** to come on record. This is because, the principle behind that provision was to give notice to previous advocates and those of the opposite parties, that a new advocate was now on record or that one of the parties is now acting in person. The mischief intended to be arrested was the conduct of litigants who, in an attempt to avoid their fiduciary obligations to counsel, drop them without notice as soon as they obtain judgment. In this case, both the parties were previously acting in person and counsel could properly come on record without involving **Order 9 Rule 9 of the Civil Procedure Rules**. That prayer was really superfluous. It is however granted as no prejudice is caused to either of the parties.

With regard to the prayer seeking the lifting of the caution, it is clear, firstly, that the suit land has always been registered in the names of the applicant. Secondly, this Court delivered a judgment on 24th October 2013 recognizing and affirming the applicant's absolute ownership of the suit land in terms of **Sections 27 and 28 of the now repealed Registered Land Act** under which it is registered. Similar provisions are found in **Sections 24 and 25 of the new Land Registration Act**. No appeal was preferred against that judgment which dismissed the respondent's claim to the suit land. Notwithstanding all the above, the applicant's land continues to be encumbered by the caution placed thereon by the respondent. The result is that the applicant cannot enjoy his rights under the law or deal with the suit land as he may wish. While the **Land Registration Act** permits a party to lodge a caution on land, that option can only be properly exercised where the party claims any of the interests recognized by **Section 71 (1) of the Land Registration Act** with respect to the suit land. In the circumstances of this case, the respondent's claim, if any, to the suit land, was extinguished by this Court's judgment dated 24th October 2013 and from which no appeal has been filed. Therefore, the continued caution of the suit land does not serve the interest of justice and is an unnecessary interference with the applicant's rights to the enjoyment of all the rights that are appurtenant to his ownership of the same. This Court must therefore interfere and ensure that his state of affairs does not continue to the detriment of the applicant. **Section 73 (1) of the Land Registration Act** empowers this Court to remove a caution. It states:-

“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” emphasis added

Article 40 of the Constitution protects one's right to acquire and own property while **Article 60** recognizes the security of land rights as one of the principles of land policy in Kenya. The applicant's Constitutional rights are therefore being unduly restricted by the respondent who has no known rights or claims over the suit land. It is therefore in order that the said caution be lifted.

Ultimately therefore, the applicant's Notice of Motion dated 19th September 2014 is allowed. Costs to the applicant.

B.N. OLAO

JUDGE

9TH JUNE, 2016

Ruling delivered, signed and dated in open Court this 9th day of June 2016.

Ms Ndorongo for Mr. Kamunda for the Applicant present

Respondent present in person.

B.N. OLAO

JUDGE

9TH JUNE, 2016