



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION 22 OF 2007 (JR)**

**PERMINUS SIMON NDWIGA..... APPLICANT/PLAINTIF**

**VERSUS**

**CHAIRMAN EMBU LAND DISPUTE TRIBUNAL.....RESPONDENT**

**ANASTASIA MURANGI NDWIGA.....INTERESTED PARTY**

**RULING**

This is a ruling on an application dated 8/12/2014 brought by way of chamber summons seeking for the following orders:-

1. *That the restrictions lodged against land parcel No. Ngandori/Kirigi/7488 and Ngandori/Kirigi/7489 be removed/ lifted.*
2. *That the costs of this application be provided for.*

The application is supported by the affidavit of Perminus Simon Ndwiga sworn on the 8/12/2014. He states that he is the registered owner of parcel number Ngandori/Kirigi/7488 and Ngandori/ Kirigi/7489. The tribunal decision in the award was quashed by Embu High Court. The orders having be quashed, the applicant prays for orders for removal of the restriction lodged against the two parcels. He asks the court to order that the Embu Land Registrar removes the said restrictions.

Anastasia Murangi Ndwiga, the interested party states in her replying affidavit that she is the mother of the former registered owner of Ngandori/Kirigi/7488 and 7489 the late John Kathuri Njiru. The two children of the said John Kathuri Njiru are in her custody and that she caters for their maintenance. She states further that the parcels were sold without the knowledge and the consent of the children. She faults the registration as illegal and argues that the consent for transfer was illegally obtained. The children shall be rendered landless if the restriction is removed and the land is sold. The interested aprty further contends that the Land Disputes tribunal had jurisdiction to hear and determine the dispute over registered land contrary to the clims of the applicant.

The counsel for the applicant Ms. Muthoni orally submitted that the award was quashed and the restriction remains in force to date. The interested party is the mother to the late John Kathuri Njiru who sold the land to the applicant. The interested party has never moved to court to apply for nullification of the transaction.

It is not I dispute that the respondent was served with the application but did not file a replying affidavit.

The proceedings show that the decision of the Embu Land Disputes Tribunal dated 25/7/2006 was quashed by this court on 23/2/2009. The award ordered the District Land Registrar Embu to cancel the

titles of Ngandori/Kirigi/7488 and Ngandori/Kirigi/7499 and to consolidate them into one parcel and transfer them to the interested party. This decision was never appealed against.

In the Kisii ELC 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 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 or a person who is entitled to a licence over the land or a person who has presented a bankruptcy petition against the proprietor of land, lease or charge..... the respondent has to show that he has an interest in the property against which a caution has been lodged.*

The court further held:-

*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 for removal of caution against LR No. Ngong/Ngong/ 2141 in a situation where the cases in respect of the land had been finalized. The court held that the right procedure for placing a caution was not followed and declared the caution as illegal and unjustifiable.

In view of the foregoing authorities, the onus is on the applicant to prove that the restriction is illegal and not justifiable. The award of the tribunal which favoured the interested party was quashed by the court. The interested party did not appeal against that decision and has not filed any suit claiming interest in the said parcels. The applicant has therefore demonstrated that the caution against the titles is not serving any useful purpose.

The interested party has the onus to justify why the restriction should not be removed. There is also no pending case filed by the interested party warranting to keep the keep the restriction in force.

Having found that the interested party has no valid claim against the applicant, this court finds the application merited. The restrictions placed against LR. Ngandori/ Kirigi/ 7488 and 7489 be and are hereby removed.

Each party to meet their own costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF OCTOBER, 2015.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Ms. Muriuki for Muthoni for plaintiff/applicant**