



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. APPLICATION NO. 144 OF 2011

IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 159 OF CAP 300

AND

**IN THE MATTER OF REMOVAL OF CAUTION ON PLOT PARCEL NO. MUPUTI/KIIMA
KIMWE/2750**

BETWEEN

KASWII MUNGUTI KYENYEKA APPLICANT

AND

- 1. MACHAKOS DISTRICT LAND REGISTRAR**
- 2. GREGORY KYENGO MAWEURESPONDENTS**

R U L I N G

1. The **Notice of Motion** dated 6/6/2011 and amended on 6/3/2012 seeks the following orders:-

- 1. THAT, the caution lodged by Gregory Kyengo Maweu on the 21st day of January, 2002 on Plot No. Muputi/Kiima Kimwe/2750 be henceforth removed.**
- 2. THAT, the costs of this application be in the cause.**

2. The application is supported by the affidavit sworn on 6/10/2011 by the Applicant, **Kaswii Munguti Kyenyeka**. A further affidavit was filed by the Applicant on 22/2/211 exhibiting the grant of Letters of Administration of the estate of her late husband **Kaswii Munguti Kyenyeka**. The Applicant's position is that she is the Administrator of the estate of her late husband. The Applicant's complaint is that the 2nd Respondent who is a person not known to her lodged a caution on 21/1/2002 on her late husband's Land Parcel **No. Muputi/Kiima Kimwe/2750** claiming a purchaser's interest. The Applicant has further contended that the 2nd Respondent has never substantiated his claim and never made any claim as a purchaser in the succession cause.

3. The application is opposed. A replying affidavit was sworn on 7/3/2012 by the 2nd Respondent, **Gregory Kyengo Maweu**. The 2nd Respondent deponed that on or about the 29th September 1998, he

entered into a sale agreement with the Applicant and her late husband, **Munguti Kyenyeka** for the sale of a portion of the suit property at a consideration of Kshs. one hundred thousand (100,000/=). That on 21/1/2002 the 2nd Respondent received information that the Applicant wanted to sell the suit property. The 2nd Respondent then moved to lodge the caution to protect his interest. The 2nd Respondent further stated that he was not aware that the Applicant had applied for Letters of Administration in her late husband's estate otherwise he would have applied to be enjoined in the proceedings as a purchaser. The 2nd Respondent urged the court to compel the Applicant to subdivide the land and give the 2nd Respondent his 142ft x 156 ft plot.

4. The application was canvassed by way of written submissions which I have duly considered. The 1st Respondent did not file any papers though served.

5. It is not in dispute that the 2nd Respondent has lodged a caution on the suit property. It is also not in dispute that the suit property is registered in the name of the late **Munguti Kyenyeka** whose estate is being administered by the widow who is the Applicant herein. The bone of contention is whether the 2nd Respondent has a purchaser's interest over a portion of the suit property.

6. On the one hand, the Applicant denies that any portion of the suit land was sold to the 2nd Respondent. The 2nd Respondent on the other hand, has averred that he entered into a sale agreement on 29/9/1998 when the Applicant and her late husband and has exhibited the sale agreement dated 29/9/1998 and a further agreement dated 31/10/2001.

7. Although the 2nd Respondent has stated that he was not aware of the succession cause which was filed in the year 2008, it is noteworthy that the 2nd Respondent registered the caution in the year 2002 then went on a slumber until the year 2011 when he was woken up by the application herein. There is no evidence to show that the 2nd Respondent took any steps to secure his interests in the succession cause or in any other suit. The 2nd Applicant's request in his replying affidavit for the court to compel the Applicant to subdivide the land and give him his share is misplaced.

8. There is no evidence from the 2nd Respondent who alleges the purchaser's interest to show whether he has been in possession of the portion of land that he claims. Under **section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya**, an action to recover land cannot be brought at the end of twelve (12) years. The 2nd Respondent's claim is founded on a 1998 contract. The contract lapsed at the end of six years (*See section 4 (i) of the Limitation of Actions Act Cap 22 Laws of Kenya*).

9. The 2nd Applicant's case is distinguishable from the decisions cited by his counsel. In **Wagiciengo – vs- Gerrard (1982) KLR 336**, the Caveator had registered a caveat against the land in addition to filing a suit for specific performance. Likewise, in **Mawji -vs- International University & Another 5 – 13 (19760) KLR 185** the Plaintiff therein had filed suit.

1. With the foregoing, this court is not satisfied that the 2nd Respondent has a substantial point in his favour that requires to be protected by the caution. The 2nd Respondent slept on his rights. Equity does not aid the indolent. The application has merits and I allow the same with costs.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **26th** day of **June 2014**.

.....

B. THURANIRA JADEN

JUDGE