REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMNETAL AND LAND CASE NO.62 OF 2013

UMMER SULEIMAN KARA.....APPLICANT

VERSUS

MAA ZABEEN SIDIK.....RESPONDENT

R U L I N G

The orders sought in this OS dated 22nd February, 2013 are:

1. The matter be certified urgent and be heard on priority basis.
2. That the respondent be ordered to show cause why the caution lodged in respect of NTIMA/IGOKI/3965 should not be removed.
3. That court do order for immediate removal of caution placed on land parcel NO.NTIMA/IGOKI/3965.
4. That costs be provided for.

The OS lists that it is predicated upon the following grounds.

(a) The applicant herein advanced the parents of the Respondent herein Kshs.12 million on security of the subject herein which is jointly registered in their (her parents) names.

(b) The said owners executed an irrevocable power of attorney and an agreement and deposited same with the applicant together with original title deed empowering the applicant to transfer, sell or whatsoever deal with the subject herein in event the amount advanced is not paid.

(c) The **payment has fallen due and the Applicant who needs finance urgently intends to enforce the agreement and utilize the Power of Attorney donated to him but the respondent has without any justification cautioned the land.**

(d) That it is only fair that the caution be removed to enable the applicant enforce the power donated and agreement herein entered in respect of the subject herein.

The OS is supported by the Affidavit of the Plaintiff/Applicant Umer Suleiman Kara.

The Applicant's case is that he advanced a friendly loan amounting to Kshs.12 million to the respondent's parents who were joint proprietors of Land Parcel No. Ntima/Igoki/3965. The 2 parents of the respondent executed a Loan Agreement and an irrevocable Power of Attorney, a transfer and application for consent to transfer so that in default of payment of the loan, the applicant would be able to realize his security in terms of the Loan Agreement and the Power of Attorney. The applicant says that sometimes in 2007 the defendant's parents and the plaintiff agreed on a repayment schedule commencing on 23.2.2007 where

Kshs.50,000/= would be paid per month. He proffers that the parents of the respondent paid instalments totalling to the sum of Kshs.2,350,000/= leaving a balance of Kshs.9,650,000/= which is still outstanding. After stoppage of the repayments by instalments on 3.6.2011, the respondent placed a caution the suit parcel of land claiming beneficial interest. The applicant argues that this action by the respondent was intended to forestall the realization of the recovery of the security.

The respondent's father died on 29.12.2012 and was survived by his wife, the mother of the respondent. The applicant states that the money owed to the applicant was reflected in the proceedings of the Khadhi Court in Nairobi vide Civil Case No.28 of 2013. The applicant postulates that in accordance with Section 60 of the Land Registration Act and Section 49 of the Land Act, on the death of a joint tenant/proprietor, any apposite property vests in the surviving joint tenant/proprietor. The argument is supported by a quotation from Law of Succession by W. M. Musyoka at page 2013 as follows:

"Property which does not devolve upon personal representations.

(a) Property held by the deceased as a joint tenant:- This is because property held under a joint tenancy is subject to the rule of survivorship."

According to the applicant, this disentitles the respondent of rights to claim beneficial ownership either via will or intestacy and for this reason, the respondent should not be allowed to mount a road block to the realization of the applicant's security. It was argued that the respondent's mother, via a document annexed to the applicant's affidavit, had acknowledged the debt owed to the plaintiff and had directed that Land Parcel No. Ntima/Igoki/2743 be disposed of and the applicant be paid his debt. The applicant stated that the respondent had not rebutted by evidence his assertion that the debt was still outstanding and that he still held the securities.

The applicant urged the Court in the spirit of the National values and principles of governance applicable when applying the law and the constitution in accordance with Article 10 (2) (b) to do equity and justice and allow his application. The applicant said that allowing this application would expedite justice in accordance with Article 159 (2) (a) (b) (d) of the Constitution. It was also opined that this would vindicate the property rights enshrined in Article 40 of the Constitution.

The respondent opposed the application and admitted that she had cautioned the suit land as it was family land which needed protection from being sold or transferred to third parties. She also opposed the application on the following other grounds:

1. As the alleged Loan Agreement was signed on 1st November, 2002, this application was time barred as decreed by Section 4 of the Limitation of Actions Act.
2. The applicant had not obtained the apposite Land Control Board Consent within the time stipulated by law. In any case, it was argued, the applicant being not a citizen of Kenya, the Land Control Board could not grant consent for the suit land to be transferred to him unless there was presidential exemption in terms of Section 24 of the Land Control Act.
3. The alleged irrevocable Power of Attorney was not properly attested in terms of Section 91 of the Evidence Act, Cap 280, Laws of Kenya.
4. The alleged Power of Attorney was not registered as was required by the Land Registration Act, 2012 and was not executed in terms of Section 116 of the Registered Land Act. As it was not in the prescribed form and was not certified by the registrar, it was void.
5. It was against public policy to give effect and recognition to an illegal contract.
6. The respondent laconically proffered that the alleged debt had been fully repaid and this explained why the applicant had not sent a single demand letter before the defendant's father died. On her behalf, her lawyer wondered why this application was done so soon after the death of her father.
7. The respondent insisted that the suit land was still jointly registered in the names of her deceased father and his widow, her mother, as the process to have the land registered in the name of the surviving proprietor had not been followed through.

The respondent proffered the following authorities:

1. The Land Control Act, Cap 302
2. Hirani Ngaithe versus Wanjiku Munge (1979) KLR 50.
3. Meru HCCC No.24 of 2012

- John Mugambi M'Mwambi versus

Joseph Karuti Mikwa and Another

4. The Law of Contract, Chesire and Fifoot, 6th Edition, Page 287

5. The Registered Land Act, Cap 300, Sections 110, 111, 116 and 118.

6. The Evidence Act Section 91.

7. Civil Appeal No.96 of 1997, Court of Appeal at Kisumu – Angeline Akinyi Otieno versus Malaba Malakisi Farmers Co-op. Union Ltd.

8. Civil Appeal No.64 of 1985, Patel Versus Singh [1987] KLR 585.

I have carefully considered the pleadings, averments, submissions and the authorities proffered by the parties.

I will first of all deal with the issues raised by the parties. One of them was a claim by the respondent in her replying affidavit dated 5.3.2013 where at paragraph she deponed:

"that the applicant here is dead and it is my said brother who is forging documents."

At paragraph 4 of the same affidavit she had deponed:

"That since our father died on 29th day of 2012 leaving nothing to my brother in his <u>WILL</u> he has been using all maner of illegalities and irregularities to take away the family property (annexed is a copy of my late father's will marked "MZI"

Through a further replying affidavit dated 22nd March, 2013 at paragraphs 3,4, 5 and 6 the respondent deponed:

"3. That before making the application I was wondering why the applicant had suddenly started asking for the Land and intending to make use of the security and I called a family friend to send him to talk to him but the friend who has now refused to be involved in the matter told me that the applicant had died.

4. **That I believed him and I think it was a mixture of names.**
5. **That I could not lie intentionally that somebody had died because it is a fact which can easily be disapproved or proved.**
6. **That I am sorry about that mix up but that notwithstanding I strongly oppose the applicant's application.**

The applicant was examined by the advocate for the respondent on 22.5.2013 regarding this issue. He told the Court that he lived in Dubai and London. He said that he was a property developer but was also involved in importing and exporting of oil products, especially lubricants. As I had noted earlier, the respondent had before this day when the applicant came to court, already filed her further replying affidavit and admitted that the applicant was indeed alive and apologized to the Court for what she called a **"mix up"**. The parties did not follow this matter further. This issue is therefore deemed closed.

The parties have made assertions and counter assertions regarding the repayment of the money the applicant had advanced to the respondent's father as a friendly loan. I am unable to make any finding

regarding this issue.

Regarding the alleged irrevocable Power of Attorney, I will juxtapose the applicant's position against the respondent's position.

In common law jurisdictions, it is generally accepted that a Power of Attorney is of the generic nature of forms of agency. The legal consequences of the creation of an agency will equally be applicable to the appointment of an attorney in fact. This being the case, the death of the principal has the effect of instantaneously terminating the agency by operation of the law. As an agent can only perform such duties as may be effected by his principal, he is precluded from effecting duties for which he is merely a substitute. When the principal dies, the substitution dies by operation of the fact of death and the law.

To explain the position of a power of attorney, I quote from Porter versus Herman, 8 Cal 619, 625 (1857) as follows:

"All agents are not necessarily attorneys in fact. Agent, is the general term which includes brokers, factors, consignees, ship masters and all other classes of agents. By attorneys in fact are meant persons who are under a special power created by deed."

As an agent of the principal, I find in this case that the power of attorney expired with the death of the principal, the respondent's father. It can not therefore be employed as a basis to establish legal duties.

Having so found, I will now quickly look at the other issues.

I find that the Loan Agreement having been signed on 1.11.2002, this application which seeks to enforce the said agreement is time barred in terms of Section 4 of the Limitation of Actions Act. I note that Land Control Board Consent was not obtained within the time stipulated by law. This to me is a question of substantive law and not a mere technicality. Public policy will not allow the court to participate in the effectuation of illegal contracts. The Loan Agreement, can, therefore, not be countenanced by this court.

I further find that the alleged irrevocable Power of Attorney had not been properly attested in terms of Section 91 of the Evidence Act. I find that it had not been registered as required by the Land Registration Act, 2012 and in terms of Section 116 of the defunct Registered Land Act. I find that it is void.

Regarding proper authentication of documents, I am in agreement with the opinion of the Zimbabwe High Court in the case of Tawanda versus Ndebele, Bulawayo High Court [2006] ZWBHC 27 which said:

"**There should be no compromise by seeking to accept a questionably authenticated document either for academic or expedience purposes. The rules of this court have listed certain officials who are authorized to authenticate documents and those rules should be applied in toto."**

There are situations where there are no statutory provisions regarding how powers of attorney should be authenticated. An example maybe how a person in the diaspora may want his donee to represent him in matters where there are no statutory procedures regarding the representation. However, where there are statutory provisions regarding authentication, as in this case, those provisions must be fully followed. This is a substantive question of law.

Regarding the transmission of the suit property to the surviving proprietor, I find that it is necessary that the process required by the law be followed. In this case, this has not been done. This has the effect that the suit land has not legally devolved to the mother of the respondent, the surviving proprietor.

I do not agree, as submitted by the applicant, that the respondent has no rights to claim beneficial ownership to her parents property either through a will or through intestacy. The respondent is the daughter of her deceased father and her mother, the surviving proprietor. As the determination of this matter is primarily predicated upon the integrity and validity of the caution the respondent placed upon land parcel No. NTIMA/IGOKI/3965, I wish to say something about this issue. the caution which spawns

this suit was placed on 3.6.2011. This was before the enactment of the Land Registration Act, 2012. This caution was, therefore, governed by the provisions of the now repealed registered Land Act whose section 131 says:

"1. Any person who -

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

(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 land, lease or charge concerned and the making of entries affecting the same.

2. .....

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

The respondent lodged the caution which is the subject of this suit as a beneficiary. The caution has not been challenged on account of having not been lodged in the prescribed form. I find that the caution was properly lodged and that its validity has not been impeached.

I do note that Section 133 of the repealed Registered Land Act contains the substantive law regarding the withdrawal and removal of cautions under the RLA regime. It says:

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. **(a) The registrar may, on the application of any interested person serve notice on the cautioner warning him that his caution will be removed at the expiration of the time stated in the notice.**

(b) If at the expiration of the time stated the cautioner has not objected, the Registrar shall remove the caution".

I do not find that this procedure should be followed before a party brings his/her case to Court. But I would prefer a situation where the procedure provided under section 133 of the Registered Land Act is exhausted first before a party brings his/her case to court. This opinion, however, has no bearing whatsoever on the outcome of this dispute.

In the circumstances,I find that this application/suit brought to this court by way of Originating Summons has no merits. It is, therefore,dismissed.

I award costs to the Respondent.

It is so ordered.

Delivered in Open Court at Meru this 18th day of June, 2014 in the presence of:

Cc Lilian/Daniel

Rimita for Respondent's

No representation for Applicant

P. M. NJOROGE

JUDGE