



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO.201 OF 2000

NDWIGA WAINAINA & OTHERS.....PLAINTIFFS

VERSUS

EMBU COUNTY COUNCIL.....DEFENDANT

R U L I N G

The applicants pray for orders that the caution lodged against L.R.No.GATURI/NEMBURE/3072 by Victor Alloys Njagi and Njiru Wainaina be removed and that Embu County Council do effect transfer to the Wainaina family as per the award dated 23rd April, 2003 adopted as the judgment in Nyeri High Court.(O.S) No.201 of 2000 Nyeri. Further they pray for orders that persons utilizing L.R.GATURI/NEMBURE/3072 do give vacant possession to the plaintiffs forthwith. Lastly, that the land Registrar Embu be estopped from registering any caution or restriction until the defendant effects the court order herein.

The application is grounded on the allegation that the Cautioners are neither licensees, purchasers or beneficiaries as the claim was never presented at the hearing of the dispute in court and that the cautioners were parties to the suit. Litigation has come to an end hence orders of the court ought to be executed.

In the supporting affidavit of Ndwiga Wainaina he states that on 1st August, 2003 the court entered judgment in terms of the award of the Tribunal chaired by the Provincial Commissioner Embu. On 31st July, 2012, the High Court Embu in civil case No.14 of 2004 declared that suit Res judicata and struck it out with cost to the defendants. On receipt of the order he proceeded to the District land Registry Embu and on presenting the same was informed that there were cautions lodged and hence he obtained an official search which confirmed the existence of cautions. He confirms that one of the cautioners victor Alloys Njagi had lodged two cautions,in one he claims to be a licensee and the other a beneficiary. The deponent claims that the said Victor Alloys Njagi was a party in HCCC No.14 of 2004 which has been determined in favour of the plaintiffs herein and the caution therefore should be removed. The other cautioner Ferdinand Njiru Wainaina died on the 17/4/2013. He submits that it would be fair and just for the applicants to enjoy the fruit of the judgment/order granted in their favour in Nairobi High Court Civil case No 1369 of 1970 , Nyeri High Court (O.S) 201 of 2000 and Embu High Court Civil Case No.14 of 2004 That the people in possession of the suit premises are agents and/or servants of the plaintiffs in Embu High Civil Case no No.14 of 2004 and he seeks the court to order them to give vacant possession forth with. The Land Registrar be ordered not to register any caution and/or restriction until the respondent herein effects the order of this Honorable Court.

Victor Alloys Njagi through Eddie Njiru & Co. filed grounds of opposition whose basis is that the capacity in which the said Victor Alloys Njagi is sued in the application has not been disclosed. He is not the defendant in the original suit and no application to have his name joined to the suit has been filed and no joinder orders have been obtained against him and therefore he is a stranger to these proceedings and no orders can be granted against him as sought in the application dated 4/7/2013. He argues that prayer (a) in the application can only be canvassed in a full trial where full evidence and “**cross examined testimony**” ought to be recorded to determine the merits and demerits of the caution and states that prayer (b) in the application is “**executory**” in nature and can only be entertained in execution proceedings filed in the Nyeri High Civil(O.S) No.201/200 and not in the unprocedural manner sought in the application dated 4/7/2013.

He believes that prayer (c) in the application is vague,ambiguous and misconceived because the so called persons utilizing L.R. Gaturi/Nembure/3072 are “ghosts” who have not been disclosed and named as respondents or defendants in the main suit or in this application.

According to the respondent prayer (d) is equally misconceived because the Land Registrar has not been enjoined as party in the proceedings and therefore no orders can be directed against the Land Registrar, Embu without first hearing the Attorney General on behalf of the Registrar and therefore the application is frivolous, vexatious, prejudicial and/or otherwise an abuse of the process of the court. Lastly,that Section 73(1) of the Land Registration Act 2012 is irrelevant to prayers (b) to (d) of the application hence there is no proper legal provision disclosed under which the court may grant prayer (b) to (d) aforesaid.

The genesis of this matter is full of twists and turns. In 1970, Ndwiga Wainaina and others filed suit No.1369 of 1970 against Traticiu Kanjana and others. They sought orders that a declaration be made that the judgment in Nembure African Court Civil Case No.241 of 1943 was still valid and prayed for vacant possession. Moreover, a declaration that the defendants fraudulently had their names registered as owners of the suit land. Alternatively they prayed for specific performance of the agreement made on 9/11/1964.

The amended plaint was struck out by Justice Khamoni on the 7/11/1996. On 28/6/2000 Justice Visram ordered that the caution lodged on land parcel GATURI/NEMBURE/3072 be removed and the plaintiffs were to pay costs of the application.

On the 18/10/2000, Ndwiga Wainaina and 11 others filed the suit herein by way of originating summons claiming to be beneficiaries of the trust in which the defendant is trustee of land reference GATURI/NEMBURE/3072 for determination of the following issues;

- a. Whether there is any legal ground to forestall the dissolution of the trust in relation to land parcel Gaturi/Nembure/3072 bestowed on the respondent.
- b. Whether the applicants are the beneficiaries of the trust relating to land parcel Nembure/Gaturi/3072 and should they be registered as the registered owners of the land as indicated in the supporting affidavit of Ndwiga Wainaina.
- c. Whether the respondent would bear the costs of this application.

The originating summons was supported by the affidavit of Ndwiga Wainaina stating that the respondent was the local authority of Embu County Council under the Local Governments Act.(repealed) That in 1961 the respondent was registered as Trustee of the Muthiga Clan L.R.GATURI/NEMBURE/3072 during land consolidation due to disagreement by the clan members.

That the applicants herein are the clan members who as per minute 25 of 1964 of Embu County Council held on 10th November 1964 are entitled to the land parcel GATURI/NEMBURE/3072. The applicants had been sued in HCCC 1369 of 1970 (NBI) which suit was dismissed on 7/11/1996. The High Court further ordered that the caution registered on the suit premises be removed. The respondent's minute No.25 of 1964 indicates the applicants as the beneficiaries and their respective shares. He wrote to the respondent on behalf of the applicants on the 25/8/2000 seeking for transfer to the beneficiaries and

indicating the agreed acreage and the names appearing on the identity cards. That the change in the acreage was necessary due to inclusion of one Nicholas N. Kemuti Mwenda whose interest was that of a purchaser. The respondent sat on 3/10/2000 and found that there were conflicting interested parties due to the letters written by the first applicant and his advocates on record on one hand and one victor Alloys Njagi on the other hand.

In the replying affidavit of Abel Mwaniki Njeru, chairman of the respondent, he admits that the respondent holds the suitland in trust for Muthiga Clan. He disputes the allegation that the applicants are the clan members who are entitled to the suitland as per the minutes of the respondent dated 10/11/1964 as some of them do not appear in the said minutes.

And states further that the respondent was unable to transfer the suit land to the applicants as a result of receipt of a letter dated 23/8/2000 from one victor Alloys Njagi claiming that he is a member of the Muthiga Clan and that he is entitled to the suitland as it belongs to his family. That consequently on 3/10/2000 the respondent resolved that the matter of transfer of the suitland to the applicants be stayed pending the determination of the rightful beneficiaries by either a competent court of law or by the agreement of all the parties concerned. That the resolution contained in the said minutes effectively nullified the contents of the minute number 25 of 1964 and that the respondent is ready and willing to transfer the suitland to the rightful beneficiaries once determined by the Honorable Court.

On the 7/5/2002, when the matter came for hearing before Justice J.V.S Juma, he referred it to the Provincial commissioner for determination of the people entitled to be registered owners of the land known as Gaturi/Nembure/3072. The Provincial Commissioner's decision was to be final. No party appealed against the decision to refer the matter for arbitration as the order was made by the consent of the parties.

The Provincial Commissioner appointed three members comprised of a chairman, one member and the secretary to hear the dispute.

This committee found that the allegations in the affidavit of Victor Alloys Njagi that the Provincial Administration might be interfering with the case was undated and not signed and therefore was not valid. Wainaina going to the court to file a case against Embu County Council was justified. The ruling of Civil Case No.1369/1970 before the High Court Nairobi gave Wainaina an okay to go to the Embu County Council to get the land Gaturi/Nembure/3072 registered with his family members and that it had been proved beyond reasonable doubts that Makuria Block is presently the Gaturi/Nembure/3072 and that there is no other Makuri block in Gaturi location of Embu District in Kenya.

Moreover the committee held that it was proved beyond reasonable doubts that the two families in dispute belong to one ancestor called **Mwea** who was father to Nthiga and Nthiga was father to Kabi. Kabi who had two sons Njeru and Ithaga. The committee came to the conclusion that Muthiga Clan met on 8/8/1960 and allocated the two families land as follows:-

- i) Francis Muchiri head of Karukenya family was allocated 5 blocks with a total of 117 acres.***
- ii) Wainaina Nguchugwa was allocated 5 blocks with a total of 110.66 acres Mukuria block included.***

The committee ruled that the land in dispute should be transferred to Wainaina family by the Embu County Council who would allocate the same to people listed in sheet No.2 attached to the findings. The proceedings were forwarded to the Registrar Nyeri High Court on 23/4/2003 by the P.C Eastern Province as he then was. The award was read and adopted as the judgment of the court.

The cautioners attempted to go round the decision of this court in the matter in Embu HCCC No.14 of 2004 but the same was struck out for being res-judicata.

I have carefully considered the application, supporting affidavit, replying affidavit and rival

submissions and do find that this matter came to a conclusion with the reading of the award filed in court by the P.C Eastern Province, as it then was, and the adoption of the same as the judgment of the court put the last nail on the matter. I agree with the submission of Jane Wangari that the cautioner became a party to the proceedings when he participated in the proceedings of the Tribunal constituted by the P.C upon reference by the High Court. He became bound by the award when it was read as a judgment of the court. He has not taken any action to review the award. Moreover the cautioner chose to file grounds of opposition as opposed to a replying and therefore raising procedural technicalities. I do find that upholding the issues raised in the grounds of opposition will be going contrary to the authority of the court to do justice and not to put undue regard on procedural technicalities. Victor Alloy Njagi was given an opportunity to be heard by this court at the hearing of the suit and the application but chose to rely on technicalities and therefore cannot argue that the matter can only be resolved through full hearing where he can give evidence. He already did give evidence before tribunal and a decision made.

I do not find substance in the submissions of Victor Allows Njagi and hold that litigation in this matter must come to an end and do order that the caution lodged against Land reference No.Gaturi/Nembure/3072 by Victor Alloy Njagi and Njiru Wainaina be removed. The Embu County government do effect the transfer to the Wainaina family as per the award dated 23/4/2003 adopted as judgment of the Court in Nyeri HC.(O.S) No.201 of 2000. The persons utilizing L.R.GATURI/NEMBURE/3072 do give vacant possession to the plaintiffs forthwith. The land registrar Embu is hereby restrained from registering any caution or restriction unless the court orders so.

Each party to bear his own costs. Orders accordingly.

Dated, signed and delivered on 18th day of July 2014.

A. OMBWAYO

JUDGE