



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

ELC CASE NO. 10 OF 2014 (O.S)

GEORGE MWANGI KANYONI.....APPLICANT

VERSUS

JAMES MAINA MWANGI.....1ST RESPONDENT

PETER MWANGI KIRAGU.....2ND RESPONDENT

RULING

1. The applicant, **George Mwangi Kanyoni**, brought the application dated **18th December, 2013** seeking the removal of a caution registered by **James Maina Mwangi** and **Peter Mwangi Kiragu** (the respondents) against Title No. **Nyandarua/Pesi/2014** (hereinafter called "the suit property").
2. The application is brought under **Section 24** and **73** of the Land Registration Act, 2012; **Order 37 Rule 8** of the Civil Procedure Rules and is premised on the grounds that the applicant being the registered proprietor of the suit property, is entitled to all the rights and privileges appurtenant thereto; that the caution registered against the suit property is an affront to the applicant's right of ownership and as such unlawful. The applicant contends that the respondents have no registrable interest over the suit land and that being the case, it is in the interest of justice to grant the orders sought.
3. The application is supported by the affidavit of the applicant wherein the grounds thereon are reiterated. In addition to the grounds on the face of the application, the applicant has deposed that the suit property is a sub division of Title No. **Nyandarua/Pesi/84**.
4. It is the applicant's case that he sub-divided and allocated the original title to his family members as follows:-
 - a) **Title No. Nyandarua/Pesi/537** measuring **13.36 hectares (approximately 33 acres)** was transferred to **Peris Wangari**;
 - b) **Title No. Nyandarua/Pesi/876** measuring **9.907 hectares (approximately 24.5 acres)** was transferred to **Joice Muthoni**;
 - c) **Title No. Nyandarua/Pesi/538** measuring **11.13 hectares (approximately 27.5 acres)** was transferred to **Mary Wanjiku Mwangi**.
5. The applicant reserved the suit property, measuring **7.96 hectares (approximately 19.6 acres)** for his own use or disposal during his lifetime.

6. Contending that the respondents are not entitled to claim any beneficial interest over the suit land during his life time, the applicant urges this court to order the removal of the caution to facilitate his unhindered use of the suit property.

7. In opposition to the application, the respondents filed the replying affidavit sworn on 27th June, 2014. In that affidavit the respondents have inter alia deposed that sometimes in the year 2012 they were approached by their mothers (the wives of the applicant) who informed them that the applicant was in the process of disposing off all or part of the suit property; that after enquiries into the matter, they established that the applicant had already received Kshs.450,000/ = being 10% deposit or part payment for 15 acres from the prospective buyer, **Mwangi King'ethu**; that after they learnt that the applicant intended to dispose off the suit property, their mothers requested them to explore means of protecting their interests in the suit property from the arbitrary actions of their father.

8. Concerning the applicant's contention that as the absolute proprietor of the land, he has sole rights of use of the land, the respondent argue that since the suit property is family land, they are recognized under the new land regime.

9. Explaining that the applicant is an old man, the respondent argue that the suit property should be protected in order to sustain the applicant during his lifetime. The respondents are apprehensive that unless the applicant is restrained from disposing off the suit property, his intended action would leave him destitute and a burden to his wives.

10. The respondents further contend that the Constitution of Kenya 2010 (chapter 5 thereof) recognizes the rights of their mothers (read wives) and specifically calls for elimination of any form of gender discrimination in law, customs and practices related to land and property in land. In this regard, the respondents referred to Section 93 of the Land Registration Act, 2012 to argue that their mothers having contributed in the development/ improvement of the suit property have rights over the suit property.

11. In view of the foregoing, the respondents argue that the applicant required the consent of his wives before he any other dealings which might adversely affect the interests of the spouses in the suit property.

12. Concerning the authorities filed by the applicant's advocate in support of the application herein, the respondents contend that the authorities ceased to be good law after the enactment of new legislations on land and in particular, the Land Registration Act, 2012.

13. Explaining that the impugned action of lodging a caution against dealings with the suit property is not malicious or aimed at denying the applicant peaceful enjoyment of the suit property, the respondents have maintained that their actions are legitimate and in pursuit of their mothers' interest therein.

14. When the application came up for hearing on **10th July, 2014**, directions were taken to the effect that the application be disposed off by way of affidavit evidence. Consequently, the parties adopted their respective affidavits as evidence.

15. From the pleadings filed herein, the Issues for determination are:-

1. Whether the respondents have registrable interest over the suit property?
2. Whether the lodging of the caution herein is an affront to the applicant's right over the suit property and as such unlawful?
3. Whether the applicant has made up a case for issuance of the orders sought?

Whether the respondents have registrable interest over the suit property?

16. According to the affidavit sworn by the respondents, they filed the caution herein on behalf of their mothers (the wives of the applicant). They contend that their mothers instructed them to explore means of protecting their interests in the suit property. Though the foregoing allegation is not contested, there being no documentary evidence annexed to the affidavits to prove that the respondents placed the impugned caution on the instructions of their mothers, I find and hold that the respondents have not proved that they placed the impugned caution on instructions of the applicant's spouses as alleged.

17. Without any evidence that the respondents lodged the caution with the authority or instructions of the applicant's spouses (their mothers) and given the fact that they claim to be pursuing their alleged mothers' unregistered interest in the suit property, I find and hold that their claim is not properly grounded in law. I say so because old age per se does not limit the capacity of a party to do the things required by law to be done personally by the said parties.

18. Since the respondents case is that they lodged the caution to protect the interest of their mothers therein, their said assertion brings into question their capacity to defend the interest of their said parents given the fact that they are not legally recognized as their mothers' agents for doing the acts they purported to do.

19. Under **Order 9 Rule 2** of the Civil Procedure Rules, only the recognized agents of parties to suit or applications may do certain things (for instance make applications, appearances or act on behalf of parties).

20. By dint of the provisions of **Order 9 Rule (2) (a)** for the respondents to qualify as agents of their mothers, for the purpose of protecting their interests in the suit property, they ought to have had powers of attorney authorizing them to lodge the caution on behalf of the mothers. The rule provides as follows:-

"2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are-

(a) subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;"

Whether the lodging of the caution herein is an affront to the applicant's right over the suit property and as such unlawful?

21. Whereas the spouses of the applicant are by dint of the provisions of **Section 93(2)** entitled to lodge a caution to protect their alleged unregistered interest in the suit property, having determined that the respondents required a power of attorney to lodge the impugned caution on behalf of their mothers, I find and hold that, in the absence of evidence that they had been appointed agents of their mothers for the purpose of defending their mothers alleged interest, I agree with the applicant's contention that the lodging of the caution was an unnecessary affront on the applicant's rights under **Sections 24 and 25** of the Land Registration Act, 2012. In any event, the respondents have not led any evidence means to the productivity, upkeep and improvement of the suit property from the time it was registered in the name of the applicant.

Whether the applicant has made up a case for issuance of the orders sought?

22. From the evidence on record, it is clear that the applicant subdivided the original suit property between his wives and himself. From the affidavit sworn by the respondents in objection to the applicant's proposed dealing with the suit property, the respondents are apprehensive that if the applicant disposes off the suit he may later on be a burden to their mothers. Although these are genuine concerns, they cannot oust the applicant's right to deal with the suit property by way of transfer as contemplated **Under Section 37** of the Land Registration Act, 2012. The section provides:-

"37.(1) A proprietor may transfer land, a lease or charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the registrar may in any particular case approve."

23. The upshot of the forgoing is that the application has merit and is allowed as prayed. Each party to bear their own costs.

Orders accordingly

Dated, signed and delivered at Nakuru this 14th day of November, 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr .Githui holding brief for Mr Gakuhi Chege for the applicant

N IA for the respondent.

Peter : Court Assistant

L N WAITHAKA

JUDGE

N IA for the respondent.

Peter : Court Assistant

L N WAITHAKA

JUDGE