



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

MISC NO. E1 OF 2020

MBIGO KADZO TEMBO

ARNOLD KARISA MUHAMBI.....PLAINTIFFS/APPLICANTS

VERSUS

LEONARD D’ COSTA.....1ST DEFENDANT/RESPONDENT

THE LAND REGISTRAR, KILIFI.....2ND DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application brought by way of a Notice of Motion dated 23rd September 2020 by the Applicants seeking the following orders: -

- a) *That an order do issue lifting the existing caution over the land known as KILIFI.MTWAPA/11 by the 1st Defendant herein.*
- b) *That an order do issue, stopping the 1st Defendant, his assignees, representatives or any other person other than the Plaintiffs/applicants from interfering with the said property known as KILIFI/MTWAPA/11.*

Counsel agreed to canvas the application vide written submissions whereby only the 1st Defendant complied by filing the submissions. By the time of writing this ruling the Applicant had not filed any submissions.

APPLICANTS’ CASE

The applicants relied on the supporting affidavit sworn by their counsel Abdulatiff Abdalla Aboud, who deponed that vide a judgment delivered on 3rd February 2017 by Angote J in **ELC O.S NO. 88 OF 2013**, the Plaintiffs/Applicants were declared the proprietors by way of adverse possession of KILIFI/MTWAPA/11. That the Respondent in that case was one Vincent Sabastian D’ Costa who proceeded to register a caution against the suit property on 13th April 2018. That the 1st Defendant did so without filing any Succession Cause claiming any interest over the said Vincent’s estate.

Counsel urged the court to allow the application as prayed and lift the caution on the suit land.

1ST DEFENDANT’S SUBMISSIONS

The 1st Defendant opposed the application vide a Replying Affidavit on 29th September 2021 stating that he is the legal representative of the estate of Vincent Sabastian D’Costa who died in 2007 and that he was issued with a grant of letters of administration. He further deponed that the deceased is the registered owner of the suit property having acquired the same on 18th August 1981.

The 1st Defendant stated that when he learnt about the judgment in **ELC 88 of 2013**, he filed an application to set aside the judgment dated 5th March 2018 and registered a caution to secure his interest in the property. That on 5th November 2020, the court granted the order for setting aside the judgment to the effect that at the time the judgment was rendered the Plaintiffs did not bring to the attention of the court that the Defendant had been deceased for more than six years. The judgment was therefore null and void as a case cannot be brought against a

deceased person.

Counsel listed three issues for determination as follows: -

- a) *Whether the Plaintiffs have locus standi to institute the application*
- b) *Whether the 1st Defendant has a right to lodge a caution over the property, and*
- c) *Whether the caution should remain on the property.*

On the first issue whether the Plaintiffs have locus standi to bring this application, counsel relied on the cases of **G arissa Mattress Limited V Margaret Walegwa Wamwandu (2018) eKRL** and **Alfred Njau & 5 Others vs. City Council of Nairobi (1983) eKLR** where locus standi was defined as a right to appear in court. A right to bring an action or to be heard in a given forum.

Counsel therefore submitted that the Plaintiffs lack of locus standi to file this application as Vincent Sabastian D'costa is the registered owner of property, having acquired it on or about 18th August 1981. Counsel further stated that the Honourable Court, in a Ruling delivered on 5th November 2020 in Malindi Environment & Land Civil Suit No. 88 of 2013 (OS)-**Mbigo Kadzo Tembo & Arnold Karisa Muhambi versus Vincent Sabastian D'Costa** found that the judgment entered on 3rd February 2017 granting the Plaintiffs ownership of the property by way of adverse possession was issued in error and was set aside to be null and void.

It was counsel's submission that the ruling that set aside the judgment in **ELC O.S No. 88 of 2013** has not been appealed, therefore the Plaintiffs have no interest in the property and in turn lack *locus standi*.

On the second issue as to whether the 1st Defendant has a right to lodge a caution over the suit property, counsel relied on Section 71 Subsection 1(a) of the Land Registration Act, which stipulates who can lodge a caution. Counsel submitted that such person is one who claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under the Act.

Ms Lelo cited the case of **Mamut Hardware Stores Limited vs Chief Land Registrar, Nairobi & Another (2017) eKLR** where the court found that for the Respondent to be able to lodge and maintain a caution against the title to the suit property, the Respondent had to show that he had an interest in the nature described by Section 71 of the Land Registration Act.

Similarly, in the case of **Magdalene Wambui Mbugua Muhia & 2 Others v Charles King Kigwe & 3 Others (2019) eKLR** the court held that a person who lodges a caution over any property is one who claims right, whether contractual or otherwise.

Counsel submitted that the 1st Defendant has demonstrated that he is the administrator of the estate of Vincent Sabastian D'costa, who passed away on 16th June 2007 and attached copies of the death certificate and the grant of letters of administration. Hence being the administrator of the estate of Vincent Sabastian D'costa, has a right to lodge a caution over the property in order to safeguard the interest of the estate.

On the issue as to whether the caution should remain in force, counsel submitted that the same is to protect and safeguard the interests of the estate of the deceased, as such it should not be lifted. Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issues for determination are whether the Plaintiff/Applicants have locus standi to file this application, whether the caution should remain in force and who should pay the costs of this suit.

This is a matter that emanated from **ELC No 88 of 2013 (OS)** where judgment was entered in favour of the Plaintiffs to the effect that they had acquired the land vide adverse possession. The said judgment was later set aside due to the fact that at the time the judgment was entered, the Plaintiffs did not disclose to the court that the Defendant one Vincent Sabastian D'Costa was deceased. In fact, he had been deceased for more than six years. The court rightly found that you cannot sue a dead person hence the proceedings were null and void as was held in the case of **MACFOY VS UNITED AFRICA LTD (1961) 3 All F.R. 1169 Lord Denning said at p. 1172:**

“If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The judgment having been set aside, there was nothing that the Plaintiffs could hinge their claim on hence I find that they are neither owners nor have a right on the suit property.

The second issue as to whether the 1st Defendant has a right to lodge the caution, Section 71 of the Land Registration Act provides for persons who can lodge a caution as follows:

- (1) **A person who—**

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

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

(2) A caution may either—

(a) forbid the registration of dispositions and the making of entries; or

(b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution.

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

(4) The Registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under this Act.

(5) Subject to this section, the caution shall be registered in the appropriate register.

Section 73 of the Land Registration Act makes provision for the removal or withdrawal of a caution. This section provides as follows: -

(1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.

(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

(3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

(4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.

(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

(6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.

As earlier stated the Plaintiffs do not fall in any of the categories listed as persons who have a right. The 1st Defendant however falls within the stipulated persons who have a right to lodge a caution to protect the interest of the estate of the deceased.

The 1st Defendant has also annexed all the relevant documents to show the root of the transaction namely a copy of agreement for sale dated 9th April 1980, transfer dated 12th April 1980, consent of the Land Control Board and a copy of certificate of title in favour of the deceased.

The evidence and the documents corroborate the 1st Defendant's interest in the suit property and therefore find that the Plaintiffs have not made a case for removal of the caution lodged.

The upshot is that the application dated 23rd September 2021 is hereby dismissed with costs to the 1st Defendant as it lacks merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF APRIL, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

