



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE 557 OF 2011**

**CHARLES REUBEN GITAU .....1ST APPLICANT**

**ESTHER WAMBUI GITAU ..... 2ND APPLICANT**

**VERSUS**

**ELIZABETH WANJJIRU NGIGI ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT MARATHIA NGIGI As the Legal Representative of**

**The Estate of FRANCIS NGIGI MATATHIA ..... 2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF TITLES ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

Charles Reuben Gitau the 1<sup>st</sup> Applicant and Esther Wambui Gitau the 2<sup>nd</sup> Applicant has filed a Notice of Motion dated 13/10/2011 brought under order 40 rule 1 of the Civil Procedure Rules and Section 63(e) of the Civil Procedure Act seeking the following orders;

1. **THAT** pending the hearing and determination this application the honorable court be pleased to order the registrar to preserve temporarily the caveat lodged on 11.55 hours on the 5<sup>th</sup> September 1991 and registered as number I.R 46123/12 against L.R 14702/9.
2. **THAT** pending the hearing and determination of this suit the honorable court be pleased to order the registrar to preserve the caveat lodged on 11.55 hours on the 5<sup>th</sup> September 1991 and registered as number IR 46123/12 against L.R 14702/9
3. **THAT** cost of this application be provided for.

The application is premised on the affidavit of Charles Reuben Gitau dated 13/10/2011 on the following grounds.

1. **That** the registrar intends to withdraw a caveat lodged against Title L.R 14702/9 I.R 46123/12.
2. **That** the registrar has written to applicant informing of the intended removal of the caveat by the advocates of the caveatee/Respondent.
3. **That** there is an appeal from the judgment and decree of the high court of Kenya in the H.C.C.C No

1354 of 1993 to the court of appeal being Civil Appeal No. 201 of 2005 between the parties over the same parcel of land and the same is still pending.

4. **That** if the caveat is not extended and the respondents are allowed to sell the property the appeal by the applicants will be rendered nugatory.
5. **That** if the caveat is removed and the applicants appeal is allowed, they will not enjoy the fruits of the judgment as the subject matter will have been lost.
6. **That** it will be prejudicial to the applicant if the caveat is not extended as prayed
7. **That** this application is meant to safeguard the ends of justice.

The 2nd Respondent Robert Matathia Ngigi is the administrator of the Estate of the late Francis Ngige Matathia together with his mother who has not been enjoined to this suit.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of objection as follows;

- a. The Applicant deliberately conceals that there is no stay of execution of the decree dated 29<sup>th</sup> June 2005.
- b. The bringing of another action during the existence of HCCC No. 1354 of 1993 for preservation of a caveat is an abuse of the court process.
- c. That the application violates Order 37 Rule 5 of the Civil Procedure Rules and should be dismissed in limine.
- d. The applicants have been indolent in seeking for any stay since lodging the appeal in 2005
- e. The titles emanating from L.R. No. 14702 were shared out, sold and/or transferred by the joint tenants in common in equal shares being HIRAM KINUTHIA BERE & FRANCIS NGIGE MUTATHIA (now deceased) Pursuant to a court order in HCCC No. 2917 of 1997.
- f. The statutory period pursuant to Section 57 (6) of the Registration of Titles Act Cap 281 of 45 days has since expired. The court thus lacks jurisdiction to hear this matter.
- g. The present application is a replica of HCCC Misc. App. No. 374 of 2011 and therefore is an abuse of the court process.
- h. The Applicant is guilty to material non-disclosures of the existence of HCCC Misc. App. No. 374 of 2011 and proceedings before Justice Mwera on 13<sup>th</sup> October, 2011 culminating with the withdrawal of the suit with costs to the Objector/Respondents.
- i. The bringing of another suit is thus *res judicata*
- j. The applicant's suit should be stayed until the costs of HCCC MISC. No 374 is paid

The 1<sup>st</sup> Respondent filed a supporting affidavit dated 7/9/2011 together with further affidavit dated 15/11/2011. The 1<sup>st</sup> applicant filed a further affidavit dated 22/11/2011.

I have read and considered the affidavits filed in support of the application together with the annexures. The background of this application is that the Applicants in this case filed HCC No. 1354/1993 against the HIRAM KINUTHIA BERE & FRANCIS NGIGE MUTATHIA (now deceased). The suit was heard and a judgment delivered by Hon. Lady Justice Joyce Alouch on the 29<sup>th</sup> June 2005. A notice of appeal by the applicants was filed on the 5<sup>th</sup> July 2005. The suit premises L. R. No. 14702 was the subject of

dispute in the said suit. The appeal has not been heard. The Registrar of Titles has served the applicant with a Notice dated 12/7/2011 stating that pursuant to Section 57(6) of the Registration of Titles Act (Cap 281) of the Revised Edition of the Laws of Kenya, he has received an application from the advocates of the caveatee to remove the caveat lodged by the applicant at 11.55 hours on the 5<sup>th</sup> September, 1991 and registered as number IR 46123/12. That in the said letter the Registrar gave the applicants a notice to withdraw the caveat within 45 days, hence this application.

The applicants in the affidavit of Charles Reuben Gitau gave a background of how they were involved in the suit premises at paragraphs 2 to 10 of the supporting affidavit dated 13<sup>th</sup> of October 2011. I will not repeat the said facts in this ruling. The applicant states that they have not been able to pursue their appeal as they were informed by the deputy registrar that the appeal has not been reached in the pending list. The Applicant argues that if the caveat is removed the appeal will be rendered nugatory and that they will not be able to enjoy the fruits of their judgment if the appeal succeeds.

The Respondents opposed the application. Their grounds of objection are on record and I need not to repeat them. In opposing the application they raised the following; that the application is fatally defective as the original caveat was lodged on the main title being L. R. No. 14702 being Title No. IR 46123 and has no bearing at all to L.R. No. 14702, that the court lacks jurisdiction to hear the application as the caveat was removed on 6<sup>th</sup> June 2011, the applicant lost the case on 29<sup>th</sup> June 2005 seeking for parcel plot No. 17, never filed for and/or obtained a stay of execution but wants now to litigate on a caveat as a separate suit, that what the applicant is doing is tantamount to revisiting the judgment or seeking to upturn the same and the judgment was directed against one Hiram Bere and not the Late Francis Ngige Matathia. The respondents referred the case the parties have heard in court.

I have carefully considered all that is before me and I find as follows; the provisions of order 37 rule 5 are clear but I will not penalize the applicant for a technicality bearing in mind the provisions of article 159 (1) (d) of the Constitution which state that the justice shall be administered without undue regard to procedural technicalities. On the issue of the Court lacking jurisdiction to deal with the matter I find that this has not been proved by the respondent as a notice was issued and was to take effect. There is a dispute as to whether it took effect. The applicant drew the court attention to the letter served on them dated 12/7/2011 and the entry made in RMN 3 which entry is dated 12/6/2011 a month before the letter was written and involves the caveat in issue.

On the merits of the application the applicant has brought his application under order 40. It is upon the applicant to ensure that he complies the provisions of ***Geilla Vs. Cassman Brown and Company Ltd 1973***. The applicant lodged an appeal which has not been prosecuted for reasons he has stated. A judgment was given against the applicants in 2005. A caveat was lodged by the applicants. The applicants did not obtain a stay of execution from the Court of Appeal. The respondents have also raised the issue that the caveat does not relate to the suit premises. I agree with the respondent that in granting the order sought this court will be revisiting the judgment of Justice Alouch of 29/6/2005 as there were specific orders that were given on the applicants entitlement, which I will not repeat in this ruling, hence I find that they have failed to show that they have a *prime facie* case with a probability of success. I find further that the applicants have failed to show what irreparable damages they will suffer if the caveat is removed, as I note that they have no title to the suit premises. I therefore find no merit in the application and dismiss the application with costs to the respondents.

Dated and delivered this 3<sup>rd</sup> Day of February 2012

**R. OUGO**

**JUDGE**

In the Presence of:-

Mr. Mukira Holding brief for Kibet      For the Applicant

Mr. Ngure Mbugua holding brief for Mr. Mwaniki For the Respondent

Sheila Court Clerk