



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Miscellaneous Civil Application 163 of 2005**

**IN THE MATTER OF THE REGISTERED LAND ACT (CAP. 300)  
AND  
IN THE MATTER OF APPLICATION UNDER SECTION 128 AND 133 (1) OF THE SAID ACT**

**BETWEEN**

**ESTHER MBAIKA.....1ST RESPONDENT**

**VERSUS**

**LAND REGISTRAR MACHAKOS.....2ND RESPONDENT**

**AND**

**ZAKAYO MATHEKA MUTISYA.....1<sup>ST</sup> INTERESTED PARTY**

**WASHINGTON KARUKU KIIRU.....APPLICANT**

**RULING**

The Applicant in this case, Mr. Washington Karuku Kiiru sought orders through a Notice of Motion dated 15th June 2009 as regards land parcel Number MAVOKO TOWN BLOCK 2/8 that:

- a) “That service of the application be dispensed with in the first instance and the application be certified as urgent.
- b) Leave be granted to the applicant herein to be enjoined as the 2<sup>nd</sup> interested party.
- c) He be enjoined as the 2nd interested party in the matter
- d) Orders issued on 6th March 2009 and all other consequential orders touching on the parcel of land be set aside
- e) The interested party Mr. Zakayo Matheka Mutisya be ordered to post security of Kshs. 8,000,000 in court.
- f) *The costs of the application be borne by the interested party.”*

**The grounds in support of the application are that:**

- a) The applicant considers himself aggrieved and is indeed aggrieved by the orders sought to be reviewed
- b) The applicant bought Mavoko Town Block 2/8 from Esther Mbaika for Kshs 8,000,000/=
- c) The applicant is the registered owner of ,Mavoko Town Block 2/8

- d) The applicant is in possession of the suit properties
- e) At the time of registration of the Transfer in favour of the applicant, the suit parties did not have inhibitions or cautions.
- f) Applicant is an innocent purchaser.
- g) As between the purported interested party and Esther Mabika damages can suffice between them.
- h) The applicant is in possession of important evidence which could not be produced at the time that the order was made. the applicant was supposed to be heard but was not accorded any opportunity to be heard.
- i) The purported interested party never sought leave of the court to be enjoined
- j) Orders issued on 6<sup>th</sup> March 2009 are a nullity in Law.
- k) The orders sought herein are necessary for the ends of justice and prevent abuse of the court process.

The application was further supported by the affidavit of the applicant, who deponed in pertinent paragraphs that:

On the 28<sup>th</sup> day of September 2008, he entered into a sale agreement with the 1<sup>st</sup> respondent. He paid the full purchase price of Kshs 8,000,000/- for the Mavoko Town Block 2/8, executed a Transfer dated 22<sup>nd</sup> October and was later issued with a Title Deed dated 17<sup>th</sup> November 2008. The registered cautions were removed by a Court Order dated on 23<sup>rd</sup> September 2008 and thus when he was buying it there was no caution in place. He is currently in possession of the suit property which he is developing. He later learnt that the cautions had been reinstated and no court papers were served on him to that effect as he was not made a party to the suit. The 1<sup>st</sup> interested party did not apply to be a party in this suit and he should give security amounting to Kshs 8,000,000/- that he had paid for the property. He should not be dragged in the issues between the respondent and the interested party as HCC no. 70 of 1995 does not concern him

The 1<sup>st</sup> interested party, Zakayo Matheka Mutisya objected to the Notice of Motion by the Applicant, by filing the grounds of objection dated 24<sup>th</sup> day of June 2009 to wit:

- a) That the application was an abuse of the court process in that the applicant could not be aggrieved by the correction of wrongs borne by him.
- b) That the sale of the suit land offends the principle of *ut pendente lite nihil innovetur* (Let nothing be altered or renewed while the suit is pending) and was therefore irregular and malafide.
- c) The alleged possession by the applicant of the suit land was unlawful and untenable.
- d) That the cautions had been removed irregularly to facilitate the sale and transfer of the suit property to the applicant.
- e) The applicant was not an innocent purchaser without notice of the caution.
- f) No evidence could have validated the purported sale which was illegal in every respect.
- g) Under Order XLIV an aggrieved party need not seek leave to be enjoined as a party.
- h) It was the duty of 1<sup>st</sup> Respondent and not the interested party/ 3<sup>rd</sup> respondent to notify the applicant of the application which resulted to the reinstatement of the caution.

- i) The decrees which form part of applicant's exhibit WKK 1 are irrelevant as between the parties to this case.
- j) The purported transfer is fatally defective and incompetent.
- k) The applicant is not entitled to the orders.

Besides grounds of opposition, the respondent also filed a replying affidavit dated 24<sup>th</sup> June 2009. He deponed where pertinent that the purported sale was illegal and the alleged transfer defective. The purported Sale Agreement was not valid. That in the whole affidavit there is nothing to suggest that the applicant was not aware or privy to the removal of the cautions and that reinstatement of the cautions was justified and was not in the least irregular. That a person who considers himself aggrieved by an order of the court may apply for the review of the order and that there is no requirement that he first applies to be made party to the proceedings.

The 3<sup>rd</sup> respondent further filed a Notice of Preliminary Objection raising points of law as follows:

- a) That the Applicant's application as at the time of filing was incompetent and therefore untenable as it offended the provisions of Order XLIV Rule 7 of the Civil Procedure Rules
- b) That the said application is incurable by amendment or otherwise in view of the provision of Order 45 Rule 6 of the Civil Procedures Rule 2010.

It would appear that the other respondents, Esther Mbaika and the Land Registrar, Machakos did not file any papers in opposition to the application. The stem of this case begins in the said HCC No. 70 of 1995 where the applicant Esther Mbaika invoked section 133 of the now repealed Registered Land Act and filed a Notice of Motion seeking orders that the cautions registered on 23<sup>rd</sup> February 1995 against the parcels known as Mavoko Town/Block 2/8 and Mavoko Town Block 2/112 be removed. The cautioner was David Mutisya Muma who at the time had passed on. His son, the respondent, took out a grant of letters of Administration and proceeded with the suit on his behalf. The Land Registrar had however failed to respond to the said Notice of Motion and on 23 September 2008, the honourable **Lenaola J** ordered the cautions be removed. However, on 31<sup>st</sup> September 2008, the Respondent successfully sought a review of the same orders. The Cautions were reinstated by **Lenaola.J** on 3<sup>rd</sup> March 2009 for reasons that:

***“The suit was filed in the year 1995 and the cautions registered in the same year and it is completely and obviously an act of mischief for Esther Mbaika in 2005 to file another application in a separate proceeding to have the cautions removed”.***

This application came before me on 25<sup>th</sup> April 2012, the learned counsels for the parties, **Kahuthu of Kahuthu & Kahuthu Advocates and Kimeu of F.M. Mulwa Advocates** agreed to canvass the application by way of written submissions. Subsequently parties filed and exchanged written submissions. I have carefully read and considered them. What I have to grapple with in this application is prayer 3, 4 and 5 of the application. That is, whether I should set aside the Orders of 6<sup>th</sup> March 2009, whether the respondent should deposit as security Kshs 8,000,000/= and the issue of costs. Prayer 2 seeking to have the applicant enjoined in the proceedings was by consent granted on 22<sup>nd</sup> February 2012.

I wish now to address the Preliminary Objection. Order XLIV Rule 7 of the Civil Procedure Rules is no longer in existence. I have however, considered Order 45, rule 6 which Bars subsequent applications. No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained. The 3<sup>rd</sup> respondent through his Notice of Motion dated 31<sup>st</sup> December 2008, through prayer 2, sought that the Court Order given on 23<sup>rd</sup> September 2008 for the caution to be lifted, be reviewed and set aside. The application was heard by the **Honourable Lenaola J.** who through his ruling dated 3<sup>rd</sup> March 2009 reviewed and set aside the said Orders thereby reinstating the cautions

registered on title numbers Mavoko Town Block 2/8 (being the suit premises herein) and Mavoko Town Block 2/112. The instant application seeks to review an order made on an application for review this is not allowed in law. See **Zacharia Mbugua Kariuki vs Catherine Wambui Kariuki (2006)**;-

***“The provisions of Order XLIV Rule 7 are clear beyond peradventure. The rule is couched in the mandatory terms and no matter how justified the resultant Orders were, the trial court simply had no discretion in the matter and had no business entertaining the application in the 1<sup>st</sup> place. Where express provisions of the Law prohibit the filing of certain applications in given situations, if a court contravenes such express and mandatory provisions it acts without jurisdiction and any orders that it may issue as a result thereof cannot stand. This is sufficient to dispose off with the entire appeal and it would be superfluous for me to consider the other grounds of appeal.”***

The same situation obtains.

As such, I allow the preliminary objection and dismiss the application in its entirety. Each party to bear their own costs.

**RULING DATED, SIGNED and DELIVERED at MACHAKOS, this 15<sup>TH</sup> day of OCTOBER 2012.**

**ASIKE- MAKHANDIA**

**JUDGE**