



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 49 of 2005

CHARLES WANJOHI WATHUKU.....PLAINTIFF

Versus

MWANGI GITUNDU.....DEFENDANT

J U D G M E N T

Charles Wanjohi Wathuku hereinafter referred to as “*the plaintiff*” commenced this action against Mwangi Gitundu, hereinafter referred to as “*the defendant*” by way of a plaint dated 4th June, 2005. In the said plaint he prayed thus;

a) “The caution put by the defendant in land parcels Muhito/Mbiu-ini/689, Muhito/Mbiu-ini/654, Muhito/

Mbiu-ini/1062 and Euaso Nyiro/Suguroi/Block VIII/186 be removed by the District Land Registrar Nyeri from the aforesaid parcels.

b) That the defendant be condemned with the costs of this suit.

c) Interest on (b) above at court rates.”

The said prayers were hinged on the following uncontested facts; the plaintiff in or about the year 1997 filed a succession cause number 60 of 1997 in this court with regard to his father’s estate. The defendant and one **Githinji Ngure** filed an objection in the said cause and expressed the wish that they be made administrators of the estate of the deceased instead. The objection was heard and by an order made on 18th October, 2001, the plaintiff was confirmed the sole heir and administrator of the estate of the deceased. Dissatisfied with the ruling the duo filed an appeal in the court of appeal against that ruling being Civil Appeal number 337 of 2002. They contemporaneously also filed an application for stay of execution of the order aforesaid. Consequent upon the application a consent order for stay was recorded on condition that the defendant would return various properties that he had unlawfully taken possession of belonging to the estate. The defendant was unable to comply with the terms of conditional stay aforesaid and the court of appeal was compelled to rescind and vacate the said order of stay on 31st October, 2001. On 30th may, 2003, however the defendant unknown to the plaintiff proceeded to register cautions on land parcel numbers **Muhito/Mbiu-ini/689, 654, 1062 and Euaso Nyiro/Suguroi Block VIII/186**

hereinafter referred to as “*the suit premises*” respectively claiming beneficial interest. The plaintiff maintains that defendant having failed to establish and or honour the conditional stay aforesaid he could not have a legal right to use the said appeal as a basis for the cautions and the court of appeal having vacated the conditional stay, the defendant could not use the Land Registrar, Nyeri to put a restriction on the suit premises aforesaid. Accordingly the actions aforesaid were unwarranted and totally without any basis in law. Hence the suit.

The defendant was served with the suit papers but failed to enter appearance nor file a defence. As a consequence of that failure, the plaintiff applied for judgment in default of appearance and the same was granted. However in entering the default judgment, the Deputy Registrar did so as though it was a final judgment yet the plaintiff’s claim was not liquidated. Ideally what the Deputy Registrar should have done was to enter an interlocutory judgment and follow it up with an order that the suit proceeds for formal proof. Because of this omission on the part of the Deputy Registrar, the defendant by a chamber summons application dated 26th January, 2007 sought to set aside that ex-parte judgment. On 5th October, 2007 **Kasango J** allowed the application and directed that the defendant do file a defence within 14 days of the ruling.

On 8th October, 2007 the defendant filed his defence. In the main he claimed that he had a legal right to lodge the cautions on the land parcels even though the conditional stay was vacated by the court of appeal as the appeal was still pending and that was reason enough for the status quo with regard to the suit premises to be maintained.

When the case came up for hearing before me on 23rd September, 2009, **Mr. Mahan** stated that the defence would not be offering any evidence. Instead he should be allowed to submit at the close of the plaintiff’s case. Thereafter the plaintiff testified. His evidence was as per the uncontested facts already set out elsewhere in this judgment. It is therefore not necessary to reharsh his evidence. Suffice to state that the plaintiff had severally demanded that the Land Registrar, Nyeri removes the cautions to the suit premises on the grounds that the conditional stay had been vacated by the court of appeal to no avail. He therefore wanted this court to order the removal of the cautions as he was the sole beneficiary of the deceased’s estate.

Having closed his case, **Mr. Mukunya** and **Mr. Mahan** learned counsel for the plaintiff and defendant respectively applied to put in written submissions. Their plea was accepted. On 14th and 16th October, respectively the two filed and exchanged their written submissions which I have carefully read and considered.

It is common ground that the defendant has registered cautions on the suit premises aforesaid. It is also common ground that the defendant in registering those cautions was claiming beneficial interest. It is also common ground that the alleged beneficial interest was anchored on the appeal he had filed in the court of appeal. It is also common ground that when he filed the appeal, the defendant sought a stay of execution order. It is also common ground that the stay order was eventually by consent granted but on terms. It is common ground that the defendant failed to comply with the terms of conditional stay and accordingly the conditional stay was vacated by the court of appeal. Finally it is common ground that after the lifting of the conditional stay the applicant rushed and registered the cautions aforesaid. To my mind these acts of the defendant smacks of mischief. In essence, the defendant got another stay of execution unprocedurally and through the back door. Placing the caution on the suit premises as aforesaid had the same effect as the conditional stay which had been granted by the court of appeal and later vacated. The plaintiff was thus not at liberty to deal with the suit premises freely as he thought fit though he was the sole beneficiary of the estate of the deceased as a result of the said cautions.

It is even apparent that the defendant in lodging the cautions did not bother to disclose to the Land Registrar the fact that the court of appeal had in fact vacated or lifted the conditional stay. Had he done so I have no doubt at all that the Land Registrar would have declined to register the cautions thereof. As correctly submitted by **Mr. Mukunya**, the act of the Land Registrar to refuse to remove the cautions subsequently at the urging of the plaintiff and when the order of the court of appeal lifting the conditional stay was brought to his attention by the plaintiff smacks of gross insubordination, disrespect of court

process and indeed unmitigated assault on our judicial system.

The defendant was unable to comply with the terms of conditional stay. He thereafter rushed to the Land Registrar and registered cautions effectively obtaining another stay through the back door. He cannot therefore be heard to claim that he is protected by the provisions of *section 133 (1)* of the Registered Land Act and in particular *subsection 2 (c)* thereof. The actions of the defendant aforesaid amounts to an abuse of the court process and he cannot therefore be allowed to benefit from his own mischief by insisting that the process of removing the caution set out in *section 133 (1)* of the Registered Land Act aforesaid be exhausted first. I do not agree with **Mr. Mahan's** submissions that since that procedure has not been exhausted, this court has no jurisdiction to deal with the matter. This is a High Court. It has inherent, unfettered and unlimited jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court – see *section 3A* of the Civil Procedure Act as well as *section 60* of the constitution. This is one of those cases where the saving or inherent powers of the High Court as aforesaid must invoked as clearly the defendants actions aforesaid amounts to affront to the judicial process.

The defendant offered no evidence at the hearing. Accordingly the plaintiff's evidence is uncontroverted and unchallenged. There is no reason why the plaintiff's claim should not succeed. On a balance of probabilities therefore I find the plaintiff's claim proved. I therefore grant *prayers (a), (b) and (c)* in the plaint.

Dated and delivered at Nyeri this 30th day of November, 2009.

M.S.A. MAKHANDIA

JUDGE