

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Misc Civil Case 239 of 2002

REPUBLIC OF KENYA..... APPLICANT

VERSUS

MILKA NYAMBURA ING'ARA

RICADER WANJIKU WACHIRA.....RESPONDENTS

ING'ARA GITHENYA.....EX-PARTE

R U L I N G

On 17th March, 2006, Ing'ara Githenya, hereinafter referred to as the applicant lodged the instant application pursuant to the provisions of section 138(2) of the Registered Land Act, section 3A and 63E of the Civil Procedure Act, seeking that the District Land Registrar, Mathioya be ordered to remove the caution lodged against L.R. No. Loc. 14/Kairo/112 and 2273 respectively by the Respondents. The application was premised on the ground that "the said caution is preventing, the enforcement of this court's orders". In support of the application the applicant swore an affidavit. In the affidavit the applicant deponed that on 29th January, 2003, this court issued an order quashing the decision of the Mathioya District Land Disputes Tribunal vide Mathioya land District tribunal case number 10 of 2002 in respect of L.R. No. Loc. 14/Kairo/112 and the proceedings in Kangema R.M. Miscellaneous Civil application number 23 of 2002 in respect of the same. That the respondents herein, Milka Nyambura Ing'ara and Ricader Wanjiku Wachira had lodged a caution against L.R. No. Loc. 14/Kairo/112 & 2273 thus preventing the applicant from dealing with the land. He therefore sought the removal of the caution.

Mr. Wahome, learned counsel appeared for the applicant and in his oral submissions in support of the application stated that a caution can only be for an interest which is registrable. That the cautioner being a daughter in law to the applicant, the registered proprietor of the subject piece of land cannot be said to have a registrable interest. That the court on 15th January 2003 had quashed the decision of the tribunal in respect of the said land holding that the cautioner being a daughter in law to the applicant, had no cause of action against the applicant in respect of which the court could come to her aid.

The application was strenuously opposed by the 2nd respondent. Apparently the 1st Respondent had passed on and although she had not been substituted it is clear that it was the 2nd respondent who had placed and or registered a caution on the subject piece of land. In her replying affidavit filed in court on 24th April, 2006, she depones that she registered the caution as a widow of the applicant's son. That the subject piece of land is a clan land and the applicant held it as a mere trustee for the family. That she registered the caution to stop the applicant from selling the subject piece of land after she had been alerted of the intended sale of the land by the District officer, Mathioya. The respondent further deponed that there is another case pending at Kangema court, being RMCC No. 23 of 2006 touching on the same issue.

In her oral submissions in opposition to the application, the respondent stated that the applicant is her father in law. That her husband (deceased) was a son of the applicant and was entitled to a share of the subject piece of land as it was clan land. That if the caution was removed, the land may be sold and she would lose her interest and have nowhere to go or take her children.

At this juncture, **Mr. Wahome** informed the court that the respondent had actually been given another

piece of land by the applicant. The respondent vehemently denied this allegation. To try and establish the truth or otherwise of the allegation, this court directed that the applicant do personally attend court to shed more light on the issue. On 21st June 2007 the applicant pursuant to the order aforesaid attended court and reiterated that indeed he had given the respondent's late husband a piece of land being **Loc. 14/Kairo/274**. He produced a certificate of official search in respect of the said piece of land in verification of the fact. In response, the respondent said that the said piece of land was not part of the clan land. That, that piece of land was in fact given to her late husband by her deceased grandmother.

I have carefully perused the certificate of official search dated 20th June, 2007 in respect of land parcel No. **Loc. 14/Kairo/274** and it appears to me that perhaps the respondent is right in her allegations. The said piece of land was registered in the name of the respondent's late husband on 21st December 1981. From a copy of the green card annexed to the verifying affidavit sworn by the applicant in support of his application for judicial review filed in court on 30th August 2003, it is clear that this land was originally registered in the name of **Wahito Ciira** as at 26th June 1962. It is this lady who subsequently on 21st December 1981 transferred the land to the respondent's deceased husband as a gift and not the applicant. The respondent's deceased husband was then registered as an absolute proprietor. The applicant could not therefore have allocated to the respondent's deceased husband that which he did not own.

From the proceedings it does appear that there were two respondents, **Milka Nyambura Ing'ara** and **Ricader Wanjiku Wachira**. The applicant in his submissions before me did not at all make any reference to the 1st respondent. It does appear however that she has since passed on going by the replying affidavit of **Ricader Wanjiku Wachira**. That deposition was not challenged and or controverted by the applicant. The order sought is against all the respondents and not **Ricader Wanjiku Wachira** alone. This court cannot make an order against a deceased person unless and until the estate of the deceased has been brought on board. The application is by the applicant and not the respondents and accordingly the 1st respondent and or her estate ought to be involved in the matter.

Again from the supporting affidavit of **Ricader Wanjiku Wachira**, it emerges that the applicant has filed suit against the respondent being Kangema RMCCC No. 23 of 2006 in which he prays that "..... **The land Registrar Murang'a be ordered to remove the caution lodged by the Defendant on parcel of land Loc. 14/Kairo/2273.**" That suit was filed on 24th April, 2006. The instant application was however filed on 17th March 2006. Knowing that he had commenced these proceedings why was it necessary for him to file those proceedings in Kangema court? Was it to harass the 2nd respondent? That possibility cannot be eliminated. Ideally the instant application should take precedence over the suit at Kangema. However considering that the issues raised in the instant application are substantially the same issues raised in the suit, it is my judgment that this application should not lie. I would rather that the matter is properly ventilated in the magistrate's court where witnesses will be called and subjected to cross-examination as to the issue whether the suit premises was clan land in which event the applicant would be holding it in trust for himself and his off-springs among whom was the respondent's deceased husband, if the decision in **Mbui Mukangu v/s Gerald Mutwiri Mbui, C.A. No. 281 of 2000 (unreported)** is anything to go by. Evidence as to whether the applicant had given a piece of land to the respondent's husband before he passed on will also have to be subjected to close scrutiny. This court is hampered in that regard. This court did set aside the award of the tribunal. However I doubt whether by that order it extinguished the respondent's right to claim a portion of the suit premises on behalf of the estate of her deceased husband who was entitled to inherit a portion thereof as a son of the applicant. If that be the case, it cannot be claimed that the respondent has no registrable interest. Even if I was to grant the application, I doubt whether there will be anything to stop the respondent from lodging yet another caution. To my mind and so as to resolve this matter once and for all it is only fair that the matter be left the way it is pending the hearing and determination of the suit pending hearing in the Kangema court. For these reasons the application is dismissed with costs to the 2nd respondent.

Dated and delivered at Nyeri this 12th day of July 2007

M. S. A. MAKHANDIA

JUDGE