



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Suit 45 of 2003

MWATHI WANYOIKE 1ST APPLICANT

REBECCA WANJIRU IKINU 2ND APPLICANT

VERSUS

EDWARD ODERA ONGONDO 1ST RESPONDENT

LAND REGISTRAR KISUMU 2ND RESPONDENT

RULING

In the application dated 17th October 2005 the applicants are seeking for that

(a) The cautions registered against the suit Lands Kisumu/Manyatta A 2698 and Kisumu/Manyatta /2699 be ordered removed, cancelled and lifted.

(b) Costs of this application be provided for.

On 17th March 2003, this court granted an ex parte order of temporary injunction restraining the present applicants from transferring or interfering with the suit premises in any manner. And upon inter partes hearing the court declined to give the orders of injunction and on 12th March 2004, the ex parte order of injunction was vacated or lifted.

On 21st March 2003, the Land Registrar registered in the proprietorship section of the two (2) parcel, inhibitions and/or restriction to inhibit and/or restrict any dealings or transactions in the suit premises pending final determination of the dispute, which was then pending before the High Court. Upon lifting of the interim ex parte injunction, it is alleged the Land Registrar refused to act. The applicants went to court and obtained an order removing the inhibitions from the two (2) parcels. The order of inhibitions and restriction was then removed by the land registrar on the strength of the court order.

The respondent again went to the Land Registrar and applied for Registration of cautions against the two (2) parcels. Again cautions were registered on the suit land on the strength of the application made by the respondents. The respondent claim an interest as a beneficiary and he prayed for a caution to bar transfer or any dealings with the title until the suit is heard and determined.

It is clear in my mind that the respondent had the same reasons to seek for cautions against the suit premises as the ones used in the injunction, which was rejected. The caution is in my view an abuse of the process of justice and makes nonsense of the court, especially

(a) ***The order refusing the grant of a temporary remedy of injunction and***

(b) ***The order regarding the removal of the restrictions and inhibitions.***

On applying for the Registration of a caution against the suit premises, the respondent does not mention the previous orders made by the court. The respondent in his declaration to seek registration of a caution materially withheld vital and important information from the land Registrar. And in doing so the respondent acted in bad faith to the detriment of the interest of the applicants. It does not matter whether the suit premises are ancestral land, as the respondent had the opportunity to bring before court the matters currently put forward in an attempt to achieve what was lost in the earlier two (2) attempts. The respondents plea for an injunction was rejected way back on 12th March 2004 but made no attempt to salvage that lost interest. There is no indication of any steps taken by the respondent after his application for injunction was dismissed. The main suit could be pending for hearing but urgent intermediary measures were to be undertaken by the respondent, to ensure during the subsistence of the suit, the suit premises would not have been lost.

It is my decision that the refusal by the Land Registrar to remove the caution is not based on the strict compliance and appliance of the law, bearing in mind the facts that were presented and available to him. The Land Registrar exercised his powers in a prejudicial manner and there was no reason to enable him exercise his power to the way he did. It has no support of the law and facts as presented by the parties. The conduct of the respondent and the land registrar is in my view unjust and irregular. It is meant to circumvent the orders of the court in a manner detrimental to the interest of the applicants.

In the premises the application dated 17th October 2005 is allowed with costs.

Dated and delivered this 23rd January 2006.

M. WARSAME

JUDGE

23/1/06

Warsame J

Mr. Karanja for the applicant

Mr. Mwamu for the respondent

Court Clerk Olivia

Court: Ruling read in Chambers in the presence of both Advocates.

M. WARSAME

JUDGE

Mr. Mwamu: I pray for leave to appeal

Mr. Karanja: I have no objection

Court: Leave to appeal is granted. Certified copy of the ruling be supplied on payment of the requisite fees .

M. WARSAME

JUDGE

MW/aao