



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC 766 OF 2017

NYAMBURA NGANGA.....PLAINTIFF

VERSUS

TIMOTHY NDUMIA GATHUA.....DEFENDANT

KABURA NGANGA.....INTERESTED PARTY

JUDGMENT

1. The Plaintiff sued the Defendant seeking orders that;

- a. The Land Registrar Thika, Lands office be ordered to remove the caution lodged by the Defendant in parcel No RUIRU/RUIRU EAST BLOCK 2/9(suit land).
- b. Costs of the suit.
- c. Any further order or alternative as the Court may deem fit to grant.

2. The Plaintiff avers that she is the registered owner of the suit land and that the Defendant has unlawfully and without any colour of right lodged a caution on her land depriving her of her quiet and peaceful enjoyment of the suit land and occasioning her loss damages and irreparable harm.

3. Whilst denying the Plaintiffs claim, the Defendant contends that he lodged the caution on the land to protect his right as a purchaser of the suit land.

4. The Interested Party was enjoined to the suit and in her defence to the Plaintiff's claim, raises a claim of inheritance as the wife of the late Nganga Kahungura, deceased, the original registered owner of the suit land. That there are pending cases in Court with respect to the suit land being; Succession cause No 541 of 2012 and CMCC No 890 of 2015. She accuses the Plaintiff of having fraudulently obtained confirmation of grant in the estate of her late Husband. That the Court issued a stay of execution of grant of administration on the 8/7/19 in Succ. cause No 541 of 2012. That she has an equal share of the suit land together with the Plaintiff being the surviving wives of Nganga Kahungura, deceased.

5. At the hearing the Plaintiff led evidence and adopted her statement dated the 14/9/16 and produced documents marked as PEX No 1-4 being the copy of title deed, official search dated the 1/8/2016, the demand letter dated 7/9/2016, certificate of confirmed grant dated the 20/4/2015.

6. She stated that she is 82 years and the registered owner of the suit land having inherited it through transmission from the estate of her husband Nganga Kahungura, deceased. That the Defendants and Interested Party have no interest in the suit land and have no justification of cautioning her land.

7. She admitted that the Interested party is her co-wife but averred that she was provided for during the life of their husband where the lands were distributed amongst his family, the Interested Party included.

8. The Defendants and the Interested Party's Advocate on record elected to call no witnesses and asked the Court to adopt the witness statements on record.

9. I have read and considered the written submissions of the parties on record.

10. The single key issue for determination is whether the caution should be removed.

11. It is not in dispute that the suit land is registered in the name of the Plaintiff effective 14/7/2015. As per the confirmed grant dated the 20/4/15 the suit land devolved to the Plaintiff absolutely.

12. The Plaintiff did not place any evidence to show the lodgment of caution on the title. The official search dated the 1/8/16 does not show any caution. The Defendant also did not find it necessary to display the same. However, from the evidence on record the said caution is said to have been registered on the 10/8/16. That notwithstanding the parties admit the presence of a caution on the suit land in their pleadings and evidence. In the absence of any dispute on the same I shall proceed to determine the dispute accordingly.

13. Section 2 of the Land Registration Act defines a caution to include a notice in the form of a register to the effect that no action of a specified nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave the notice.

14. Section 71 (1) of the Land Registered Act Cap No. 3 of 2012 states as follows; -

“A person who—

(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;

(b) is entitled to a licence; or

(c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge,

may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge”.

Section 73 states as follows;

“(1) A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar.

(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

(3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

(4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.

(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee’s power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

(6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under Section 74 shall not be affected by the cancellation”.

15. The Defendant avers that he purchased the suit land from the beneficiaries of the estate of Nganga deceased and lodged a caution on the land to protect a purchaser’s interest. From the reading of the above provision a purchaser’s interest is an interest that arises from a contract.

16. I have perused the agreement of sale the basis upon which the Defendant has lodged the caution. The agreement is dated the 27/8/2013 and is expressed to be between the Interested Party, Margaret Wanjiru Nganga and Stephen Kinuthia Nganga and the Defendant. The interest being sold is the suit land at the consideration of Kshs 1.7 million.

17. The uncontested evidence of the Plaintiff is that the Interested Party and her children sold her parcel of land while they had been awarded land separate from hers. It is not clear when Nganga died but following the chronology of events by the date of the agreement of sale the estate of the said Nganga was yet to be administered from the scanty evidence placed before me on record. The land devolved to the Plaintiff on the 14/7/15 pursuant to the confirmed grant issued on the 20/4/15.

I 18. have seen the orders of stay of execution of the grant issued on the 8/7/16 by which time the land had devolved to the Plaintiff by way of transmission and a title issued in her name. The Court has been informed of pending succession causes challenging the grant but no orders were placed before the Court to that effect.

19. It is my conclusion based on the evidence placed before me that the Vendors of the suit land being the Interested Party and her children sold the suit land that was yet to be administered under the Law of Succession. Section 45 of the Law of Succession Act states as follows;

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no

person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

20. Going by the provisions of the law set out above the Interested Party and the Defendant committed acts of intermeddling with a deceased person's land which amounts to an illegality.

21. It follows that the caution having been procured out of the illegal acts of the Defendant and Interested Party cannot be allowed to stand. In any event the Defendant despite lodging a caution since the 10/8/16 has not taken any action to advert his claim against the Plaintiff, if any. Cautions cannot be allowed to be a permanent fixture on the land because they are an affront to the rights of a proprietor of land given under section 24 and 25 of the Land Registration Act which gives a land owner indefeasible and absolute title subject only to the permitted limitations and restrictions provided in the Act.

22. The Court notes that the Defendant and the Interested Party did not defend the suit. It is trite that adopting the statements of the Defendant and the Interested Party is not akin to giving evidence. Evidential value is tested through cross examination to gauge its veracity. Statements on record remain mere statements and not evidence.

23. In the absence of evidence as to why the caution should be left to subsist the Court finds in favour of the Plaintiff and grants orders as follows;

a. The Land Registrar Thika, Lands office be and is hereby ordered to remove the caution lodged by the Defendant in parcel No RUIRU/RUIRU EAST BLOCK 2/9.

b. The Plaintiff shall have the costs of the suit.

24. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT THIKA THIS 21ST DAY OF JANUARY 2021.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mungai HB for Tumu for the Plaintiff

Defendant: Absent

Interested Party: Absent

Lucy: Court Assistant