REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 48 OF 2004

THOMAS WECHENJE LIVASIA :::::::::: PLAINTIFF/APPLICANT

VERSUS

AVALINA HOLDINGS LTD :::::::::: DEFENDANT/RESPONDENT

R U L I N G

This application was filed before this court under a certificate of urgency on 28/4/2004. The court nonetheless ordered that the same be served on the respondents and the matter be heard inter-partes.

The same was heard interpartes on 27/5/2004. The same is brought under OXXXV1 C.P. Rules, and section 57(J) of the Registration of Titles Act.

Basically, the applicant is asking the court to withdraw or remove a caveat registered in LR. 1936/3 and marked as entry No. 12.

The application is supported by the affidavit of the applicant one Thomas Wichenje Livasia.

The respondent one Oscar Mulamula has shown a replying affidavit of 51 paragraphs to oppose the application. He has also filed grounds of objection which are nonetheless not dated and which counsel for the respondent has asked the court to capunge from the record.

I am in agreement with counsel for the applicant that the said grounds should have been dated.

Although in my view this is not an incurable defect, I note that under OLV 16(1), the respondent only needs to file either a replying affidavit or a statement of grounds of opposition. Even if I was to ignore that statement of grounds of opposition, the replying affidavit on its own would still be sufficient response to the supporting affidavit.

I do not infact intend to go into great detail into the contents of these averments as most of the issues raised go to the root of the main suit and cannot be determined at this preliminary stage.

At this point, I wish to respond to Mr. Wafula's objection that the affidavits sworn by the respondents should be struck out as the jurat is on a separate page. I agree that the position in law is that the jurat must not be on a separate page from the rest of the affidavit. In this case however, the jurats are not on separate pages entirely.

In the replying affidavit date 7/5/2004, 6-pg 10, the main body of the affidavit flows over from the previous page. The last paragraph is clearly indicated as paragraph 51 and so one can clearly see it is a continuation from page 9.

The same case applies to the further replying affidavit dated 25/5/2004. These two affidavits are therefore properly before the court and cannot be struck out.

The other preliminary issue raised was that a similar application like the one in court had been dismissed in Bungoma High Court and the applicant should not have filed a similar application here.

I have seen the order by Justice Sergon (attached to the application). The same says that the summons before him was struck out for being incompetent. This dues not therefore stop the applicant from filing a proper application before the same court or before another court of competent jurisdiction.

This originating summons is therefore properly before this court.

Having disposed of those preliminary issues, I now come to the main application.

As stated earlier, the main issue here is whether the caveat in question should be removed or not. I will try as much as possible not to make any findings that might affect the main suit in one way or another.

Most of the issues herein are not disputed and I will not therefore need to expound on them. it is not disputed for example that the respondent herein purchased 50 acres of land from the appliant herein.

It is not disputed either that the said 50 acres have not been demarcated or surveyed and given a separate Title Deed and LR number. The same therefore continues to be described as LR. No. 1936/33 clearly therefore the respondent has an interest in the said plot prima facie. Whether or not he will prove that claim as against the applicant is a matter for determination in the main suit.

It is that interest which I find exists, that made the respondent herein register the said caveat at the lands office. He did so in order to protect this interest in the 50 acres which he is claiming from the applicant herein.

The applicant does not at this stage deny the existence of that interest.

What he is telling the court however is that the caveat should be removed as it affects his rights on the other 250 acres of land in which the respondent has no interest. He says his would like to charge the rest of the land with AFC to enable him get a loan. He cannot do so however because the caveat affects the whole property. The respondent on the other hand is asking the court not to remove the caveat as this would bring his interest in the 50 acres into jeorpardly. He says he was not able to lodge the caution against only the 50 acres because they are fused in the 300 acres and it has not Title number.

If the 50 acres had a separate Title Deed, he would have lodged the caution against that Title. He has no interest whatsoever on the other 250 acres belonging to the applicant herein.

The applicant in his application is relying on the case of **BOYES VS GATHURE (1969)EA 385**. At page 390, it was held as hereunder.

> ***"As it is not possible to distinguish even generally that part of the property against which a claim is made, th e entry of the caveat as a whole mustbe struck out ……."***

The East African court of Appeal found that it was unfair for the caveat to affect event that part of the land that the caveator had no interest in. In this case however, the respondent's interest is clearly defined.

According to the respondent however, his interest on the property herein is restricted to 50 acres which are defined on the ground and which the applicant is at liberty to curve out so that the caveat is only restricted to the 50 acres. His contention is that if the caveat is withdrawn, then his interest on the 50 acres will not be protected and he has no other way of protecting the same pending the determination of the main surf.

I have considered the pleadings before me very carefully and the deponements by both parties.

There appears to be a silent consensus that it is actually not fair that the applicant should be stopped from utilizing his 250 acres in anyway he likes – as this will not affect the caveator's rights. The question however is how can he do this with the caveat against the whole Title in place.

On the other hand, how does the respondent herein protect his rights over the 50 acres of the same Title unless the caveat is left in place? If the court were to remove the caveat today, there will be nothing to stop the applicant herein from disposing of not only his rights on that property but also those of the respondent/caveator.

Whereas it is unfair to have the caveat on the whole Title, it is also unfair to leave the rights of the respondent unprotected. This is what would happen if the orders granted were sought.

Only one party has a solution to this paradox – i.e. the applicant. In all fairness, if he wants to be allowed …… pg 8 used of his 250 acres, then let him make it possible for the respondent to protect his interest in the 50 acres pending the determination of the main suit.

The caveat has been in force for 14 years. The applicant herein has done nothing to curve out the 50 acres claimed by the respondent so that the caveat would be restricted to the same.

He could even have had the 2 Title Deeds in his name. That would ensure that his 250 acres are not affected by the caveat in the other 50 acres.

If therefore he is unable to make full use of his 250 acres because of the caveat, then he is the only person to blame for it.

The court will leave the respondent herein unprotected if it orders that the caveat in question be vacated. It is the courts duty to preserve the rights of both parties herein until the issue of the transfer of the 50 acres to the respondent is resolved.

The applicant should not be allowed to use the court to transfer on the rights of the respondent. If he were to have the 50 acres registered under a different Title, then I would not hesitate to vacate the caveat on the property.

As matters stand now, the court finds that the applicant has not come to court with clean hands. He holds the solution to his problem yet he does not wish to pursue that option

The applicant has failed to convince the court that it is in the interests of justice that the said caveat be removed. Consequently, I find his application not merited.

I dismiss the same with costs to the respondent. It is so ordered.

WANJIRU KARANJA

AG. JUDGE

14/6/2004

DELIVERED THIS ……. DAY OF JUNE, 2004 IN OPEN COURT IN

THE PRESENCE OF:-