



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 15A of 2004

JOHN SILVESTER CHEGE

KIHAKE.....PLAINTIFF

VERSUS

JULIA WAMBUI.....DEFENDANT

JUDGMENT

By an originating summons dated the 20th of January 2004, John Silvester Chege Kihake has sought the order of this Court under the provisions of **Order XXXVI Rule 3(f) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Sections 133(1), 133(4) and Section 135 of the Registered Land Act** to determine the following questions:-

- (i) *whether the Respondent, Julia Wambui, is entitled to maintain the caution lodged by her against land title number Nyandarua/Nandarasi/768?*
- (ii) *Whether the caution is detrimental to the Applicant?*
- (iii) *Whether the Respondent is a licensee as she claims in her caution?*
- (iv) *Whether the Respondent has filed any objection to the notice by the Land Registrar, Nyandarua?*

The summons is supported by the annexed affidavit of the Applicant, John Silvester Chege Kihake. He has deponed , in the said affidavit that he is the registered owner of all that parcel of land known as **Nyandarua/Nandarasi/768**, which parcel of land he had caused to be subdivided into several portions with a view of selling some of them. The Applicant has further deponed that he was married to the Respondent in 1975 but had been divorced from her on the 25th of May 2000. He depones that even though their marriage was blessed with children, all the children were over the age of eighteen years. He further deponed that on 2nd of June 1995, the Respondent had lodged a caution prohibiting any transaction related to the said parcel of land. The Applicant depones that the Respondent had no right to caution the said parcel of land as the said parcel of land belonged to the Applicant alone. The Applicant therefore prayed that this Court orders the said caution to be removed.

The Respondent, filed a replying affidavit opposing the Application. She deponed that she was married to the Applicant for a period of twenty-three years before she was chased out of the matrimonial home by the Applicant. She further deponed that the suit land was purchased jointly by herself and the Applicant in 1978. She further deponed that she only became aware that the Applicant had been issued with the

decree absolute in the divorce proceedings when the Applicant filed this suit before this Court. She further deponed that her marriage with the deceased was blessed with three children, one of whom (*called Veronica Muthoni Chege*) was disabled. She further deponed that she took care of the Applicant's five other children by his previous marriage. The Respondent deponed that she placed the caution on the said parcel of land to prevent the Applicant from disposing of the entire parcel of land to her detriment and that of the children. She further deponed that she would not object the said caution being removed if the Applicant set aside a portion of it to her and the children.

When the parties to this suit appeared before me on the 5th of July 2004, this Court gave directions that the Applicant and the Respondent appear personally before this Court so that further orders would be issued. When the Applicant and the Respondent appeared, they gave *viva voce* evidence. The Applicant testified that the caution was placed on his parcel of land known as *Nyandarua/Nandarasi/786* by the Respondent in 1995. It was his testimony that no claim had been filed in Court after the said caution was placed. He prayed the Court to grant his application to have the said caution removed as he had caused the said parcel of land to be subdivided into forty-two plots out of which he had sold twenty four plots. The Applicant testified that he wanted the caution removed so that he could transfer the said parcels of land sold to the purchasers. The Applicant further testified that although he had asked the Respondent to remove the caution, she had adamantly refused to accede to his request. It was his testimony that the Respondent had been issued with a Notice by the Land Registrar, Nyandarua, but had not responded to the said notice. When he was cross-examined the Applicant admitted that before the Respondent left the matrimonial home, they had sold the plots together. He testified that he has sought the consent of the Respondent and the children of the marriage before subdividing and selling the said sub-divided parcels of land.

The Respondent, Julia Wambui, testified that when she got married to the Applicant, the Applicant did not have any parcel of land. It was her testimony that the Applicant by then had five children from a previous marriage. The Respondent testified that she only agreed to sell a portion of the said parcel of land to one Mr Kairo with a view of setting up a creamery business on the said parcel of land. It was her further evidence that the sum of Kshs 400,000/= that the said parcel of land was sold to Mr Kairo did not benefit the family. The Respondent denied that she had been informed by the Applicant when he subdivided and sold the said parcel of land. She testified that her request to the Applicant to allocate part of the said subdivided parcel of land was not met with a favourable response because the Applicant's view was that there was no need to register the said subdivided portions to the children as he was not going to die soon. The Respondent testified that she wanted each of the seven remaining children to be given a plot each. She also asked the Court to order that she be given a portion of the said parcel of land. On being cross-examined, the Respondent denied that she was aware that a portion of the said parcel of land was sold to a lady called Phyllis Wairimu. The Respondent testified that the Applicant had started selling the plots when she was still living with him. It was her further testimony that the Applicant was harsh to her when she opposed the selling of the said sub-divided portions of land. She testified that she went back to her parents when she disagreed with the Applicant. The Respondent testified that although she reported the matter to the chief, she did not get any solution as the chief was a friend to the Applicant.

When the Applicant was questioned by the Court if he was willing to give any portion of the subdivided parcel of land to the children, he stated that he was willing to give the children twelve plots. The Applicant was adamant that he could not give any of the plots to the Respondent because she was no longer his wife.

I have considered the Applicant's case and the response made to it by the Respondent. The issue for determination by this Court is whether the Applicant has established his case to entitle him to the prayers sought. The issue as presented to this Court by the Applicant is straightforward; As the registered owner of all that parcel of land known as *Nyandarua/Nandarasi/768* he is entitled to deal with it in whatever manner that he deems appropriate. It is the Applicant's case that the Respondent, who is his former wife, has no business whatsoever in interfering with his ownership and possession of the said suit land. The Applicant has therefore urged this Court to order that the caution lodged by the Respondent in respect of the suit land be removed and the Applicant be allowed to proceed with the subdivision of the said parcel of land. The Applicant has also stated that the Court should find that he is free to sell the sub-divided

portions of land.

For the Respondent, the Applicant's case is not that simple. She has deponed in her replying affidavit and testified before Court that she was the wife of the Applicant for over twenty three years before the Applicant divorced her. It was her case that the parcel of land known as *Nyandarua/Nandarasi/768* was purchased by both herself and the Applicant in 1978. It was her case that the Applicant was registered as the owner of the said parcel of land in trust for herself and the children of the marriage. It was her case that she was therefore entitled to part of the said parcel of land. It was further her case that the Applicant had irresponsibly sold off the subdivided portions of land to the detriment of the family. The Respondent was apprehensive that the Applicant would sell off the entire parcel of land without providing for the family; that is why the Respondent had lodged a caution to prevent the Applicant from selling off the said parcel of land.

I have considered the case put forward by the Applicant while it is not disputed that the Applicant is the registered owner of all that parcel of land known as *Nyandarua/Nandarasi/768*, after evaluating the evidence I do find that the said parcel of land was purchased when the Applicant was married to the Respondent in 1978. While there is no evidence that the Respondent directly contributed to the purchase of the said property, the fact that she is now divorced means that she is entitled to part of the said parcel of land being part of the matrimonial property. It seems that the Applicant is labouring under a misconception that once he had obtained a decree absolute granting him divorce from the Respondent the Respondent had no business "*interfering*" with his parcel of land. After considering the evidence adduced before Court, I do find that the Applicant was within her rights to lodge a caution prohibiting any transaction related to the said parcel of land. The Respondent's concern is for the welfare of their family. The Applicant testified that he has already subdivided the said parcel of land into forty two plots out of which he has sold twenty four plots. In my view the apprehension by the Respondent that the

Applicant would sell off the entire parcel of land to the detriment of herself and the family is not misplaced. I therefore find that, in the instant case the most appropriate order to issue in the circumstances of this case is as follows:

(i) *The caution lodged by the Respondent in respect of parcel No. Nyandarua/Nandarasi/768 is hereby ordered removed.*

(ii) *The Applicant should transfer the twelve plots which he had indicated to the court that he would be willing to transfer to his family in the following manner; each of the seven children shall be registered as an owner of one plot whilst the Respondent shall be registered as the owner of five plots. The said five plots shall belong to the Respondent.*

(iii) *The Applicant shall own the remaining twelve plots.*

(iv) *There shall be no orders as to costs.*

DATED at NAKURU this 17th day of December 2004.

L. KIMARU

JUDGE