



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC SUIT NO. 111 OF 2013

CHRISTIAN WAFULA OMUSOLO.....1ST APPLICANT

GEORGINA AONI ORODING.....2ND APPLICANT

ESTHER NJERIMWANGI.....3RD APPLICANT

VERSUS

PAULINE JEROTICH.....1ST RESPONDENT

JOSEPHAT KIPROP MAIYO.....2ND RESPONDENT

RULING

This ruling is in respect of a notice of motion dated 7th May 2019 by the respondents seeking for the following orders:

a) Spent

b) THAT pursuant to the Honourable court's Judgement and decree dated 24th January 2019 dismissing the originating summons dated 15th August 2012, this Honourable court be pleased to remove the restriction and/or caution and all pending Applications noted and/or registered in the register for the suit parcel of land to wit L.R. No. UASIN GISHU/KIMUMU/107 measuring 3.2 Hectares.

c) THAT costs of this application be provided for.

Counsel agreed to canvass the application vide written submissions which they duly filed. It was the Applicant's Counsel's submission that the application is brought under sections 74, 75 and 78 of the Land Registration Act of 2012. It was his submission that the application is pursuant to the Judgement delivered on 24th January 2019 where the Honorable Court dismissed the Applicant/Respondents Originating Summons dated 15th May 2012.

Counsel further submitted that there has never been a dispute even prior to the filling of the said Originating Summons on 15th May 2012 that the suit subject parcel of Land L R No. UASIN GISHU/KIMUMU SETTLEMENT SCHEME/ PLOT NO. 107 measuring approximately 3.2 hectares (8 acres) has been part and parcel of the Estate of KIMINING ARAP BUIGUT that the purported land sale transaction between the 1st Respondent/Applicant in the year 1993 in respect of any portion of the suit parcel of land to wit L.R No. UASIN GISHU /KIMUMU SETTLEMENT SCHEME/ PLOT NO. 107 has never until to date been sanctioned by a consent of either sub-division or transfer from the relevant Land Control Board.

Counsel submitted that a caution is a minor interest in land which is not a permanent transferable interest as it is only meant to stall any entries or dealings on the register in the interim . Counsel submitted that there being no appeal preferred by the respondents after the delivery of judgment it follows that the caution should be removed.

Counsel therefore urged the court to grant the application as prayed.

Reponent's Submission

Counsel for the plaintiff/respondent opposed the application and listed the following issues for determination by the court:

- a) Whether the 1st Respondent has a reasonable cause to maintain a caution filed over the said land?
- b) Whether the caution is hindering the Applicant use of the land?
- c) Whether the caution should be lifted.
- d) Who should bear the costs of this Application?

Counsel submitted that the 1st respondent has a reasonable cause to maintain the caution as filed over the suit parcel of land due to the fact that the plaintiff respondent had annexed a copy of a sale agreement of purchase of part of the suit land. The respondents hold purchasers interest so the caution should not be removed.

Counsel submitted that the respondent herein lodged a caution pursuant to Section 71 of the Land Registration Act which provides for persons who can lodge a caution:-

"(1) 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."

Counsel further submitted that in light of the provisions of Section 71 of the Land Registration Act therefore the Respondents due to purchaser's interest lawfully registered the caution herein due to the fact that the Applicants are on a selling spree of the suit property and have sold part of the parcel. Counsel also submitted that cautions are registered by the Land Registrar and whom the Applicant failed to enjoin so that he could also respond on the allegations that there are double cautions on the suit parcel herein.

Counsel cited the provisions of Sections 73 and 78 of the Land Registration Act, which provide as follows:-

"73. (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 the 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 payment of costs.

"78(1) The Registrar may, at any time and on an application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.

(2) upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or otherwise order as it deems fit, and may make an order as to costs."

Counsel therefore submitted that the application should be dismissed with costs to the respondents.

Analysis and Determination

This is an application for removal of a caution lodged on the suit parcel of land in terms of the implementation of the Judgement delivered by the court on 24th January 2019 whereby the court dismissed the plaintiff's originating for a claim of adverse possession.

The issue for determination is whether the continued existence of a caution on the suit land after determination that the plaintiff has not acquired the suit land by way of adverse possession is tenable.

The plaintiffs filed an Originating Summons claiming that they had acquired the suit land by adverse possession of which the court heard and determined that they had not proved adverse possession. The plaintiffs did not prefer any appeal and therefore the judgment is still in place. They further did not apply for stay of execution of the judgment.

What the applicant is asking for is the court to assist in the implementation of the judgment by removal of the caution. The submissions of both Counsel for the applicant have gone beyond the application and seems to me like they are arguing an appeal and reopening the case that has been determined.

I have considered the application, submission of Counsel and find that the applicant is entitled to the removal of the caution as it does not serve any purpose judgment having been delivered dismissing the plaintiff's originating summons. I therefore allow the application and direct that the Land Registrar removes the caution lodged on L.R. No. UASIN GISHU/KIMUMU/107. Each party to bear their own costs.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF OCTOBER, 2019.

M. A. ODENY

JUDGE

RULING READ in open court in the presence of Miss.Chege holding brief for Juma for Plaintiff/Respondent and in the absence of Mr.Komen for the Defendant/Applicant.

Mr.Mwelem – Court Assistant