



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC. APP. NO. 238 OF 2014

SRK..... APPLICANT

=VERSUS=

RW.....RESPONDENT

RULING

1. This is the Notice of Motion dated 16th July 2014 brought under section 73 (1) of the Land Registration Act 2012, section 1A and 3A of the Civil Procedure Act, the inherent jurisdictions of the court and all other enabling provisions of the law.
2. It seeks orders:-
 1. *Spent.*
 2. *That upon hearing the application interpartes, this honourable court be and is hereby pleased to lift the caution registered against the parcel of land known as LR Number Karai/Karai/xxxx by the respondent.*
 3. *That the respondent herein be and is hereby compelled to surrender the original title deed to LR Number Karai/Karai/xxxx to the applicant herein.*
 4. *That in the alternative to prayer 3 hereinabove, the honourable court be and is hereby pleased to grant an order directing the Kiambu Land Registrar or any other necessary authority to dispense with the production of title deed to LR Number Karai/Karai/xxxx for purposes of registering a transfer in favour of any third party who may purchase a portion to be excised from the subject parcel of land.*
 5. *That the costs of this application be provided for.*
3. The grounds are on the face of the application and are set out in paragraphs (i) to (vii).
4. The application is supported by the affidavit of SRK, the applicant herein sworn on the 9th July 2014 and a supplementary affidavit sworn on the 11th December 2014.
5. The application is opposed. There are grounds of opposition filed by the respondent dated 24th July 2014. She has also sworn a replying affidavit on the 2nd October 2014.
6. On the 17th December 2014, the court with the consent of the parties directed that the application be canvassed by way of written submissions.

The Applicant's Submissions

7. They are dated 18th February 2015. The applicant inherited the suit property from the estate of his late father as an absolute proprietor in the year 2005. The applicant's meagre salary cannot support the expensive scans as he still servicing the loans he borrowed to pay school fees for their children and meeting the medical expenses for their daughter. The applicant has no intention of disposing off the entire parcel of land as he resides within the same parcel of land.

8. The applicant has demonstrated that he is in need of about Kshs.1.5 million to enable him cater for the expensive medical expenses. The applicant is entitled to the suit property exclusively having inherited from the estate of his late father.

9. There is no specific procedure provided for bringing an application such as the one before court. The applicant has rightly invoked Section 3A of the Civil Procedure Act. The application is properly grounded in law. He prays for the orders sought.

The Respondent's Submissions

10. They are dated 10th April 2015. To protect her interest and that of her children in the various matrimonial properties and given that the title documents were in the applicant's custody, she lodged caution barring any disposition of interests in properties, the suit property included.

11. The reliefs sought in the application cannot be granted in a miscellaneous application. The suit property is matrimonial property and the respondent's rights and interest in the property are yet to be determined. It is only fair that the same be determined before the caution is lifted. She has contributed by her labour and other means of productivity, upkeep and improvement of the property. She has put forward the case of **Z. W. N vs P. N. N** where the court cited the decision of **Nderitu vs Nderitu (1995-1998) 1EA 235**.

12. The applicant has failed to prove that he is severely ailing. He was diagnosed with hypertension in the year 2000 which severity the respondent contests. She prays that the application be dismissed.

13. I have considered the notice of motion and the affidavits in support. I have considered the grounds of opposition and the replying affidavit. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.

14. **Section 73(1)** of the Land Registration Act 2012 provides that:-

“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”.

15. It is not in dispute that the suit property herein is matrimonial property. It is not in dispute that the applicant and the respondent are married though separated.

16. I have gone through the applicant's affidavit in support and I do not find any plausible reasonable to order that the caution registered by the respondent be removed. The respondent has a beneficial interest in the suit property. Her interest is yet to be determined. I find no merit in this application and the same is dismissed. As this is a matter between husband and wife, I make no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kabue for the Applicant

No appearance for the Respondent

Steve - Court Assistant