



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

SUCCESSION CAUSE NO. 54 OF 2010

IN THE MATTER OF THE ESTATE OF KAKUA KIOKO (DECEASED)

KANINI KAKUA.....PETITIONER

AND

JOSEPH NTHENGE KAKUA.....APPLICANT

VERSUS

KENNETH ONSARE MAINA.....RESPONDENT

YES HOUSING COOPERATIVE SOCIETY LTD.....INTERESTED PARTY

RULING

1. In the summons dated 5.8.2020, the Applicant is seeking the following orders;

a) Spent.

b) That the order made on 18.9.2018 of stay of execution of the ruling dated 18.7.2018 be vacated.

c) That the Machakos County Land Registrar be directed to remove the caution placed on 19.4.2017 against land title No Donyo Sabuk/Komarock Block 1/65002.

d) That the costs of this application be awarded to the applicant.

2. The application was supported vide affidavit deponed on 5.8.2020 by Andrew Nduva Gitonga who is stated to be the advocate conducting the instant matter on behalf of the applicant. It was averred that on 18.9.2018 this court granted leave to the respondent to appeal against the ruling that was delivered by this court on 18.7.2018 and that the court further made an order of stay of execution of the ruling dated 18.7.2018. It was averred that since 18.9.2018 the respondent had not served the applicant with documents of appeal to date. It was further pointed out that on 15.9.2017 the applicant learnt that the Machakos County Land Registrar had registered a caution on 19.4.2017 against the suit land in favour of the interested party who was claiming a purchaser's interest. According to the deponent, since 18.9.2018 the respondent had continued to enjoy the order of stay of execution to the detriment of the applicant. It was further pointed out that the failure by the respondent to serve any appeal documents on the respondent since 18.9.2018 was an abuse to the order of stay of execution as the applicant is anxious to enjoy the benefit from the ruling dated 18.7.2018. Attached to the affidavit was a copy of the certificate of search dated 11.9.2017 and marked ANK1.

3. In reply to the application was an affidavit deponed by George Gakungu on 9.9.2020, indicated as the administrator of the interested party. It was averred that the suit property was purchased for a consideration of Kshs 40,164,000/-, and that a sum of Kshs 26,500,000/- was paid to the respondent. It was averred that the applicants were innocent purchasers for value and should not suffer for the ills of 3rd parties. The deponent admitted that a restriction was placed against the title claiming purchasers interest on 19.4.2017. It was averred that the property was not part of the estate of the Late Kakua Kioko (deceased) but belonged to the vendor respondent.

4. The deponent admitted receipt of the notice of appeal and maintained that the application was brought to frustrate the interested party from completing the sale and purchase of the suit property with full knowledge that there was an appeal underway with existing stay orders.

5. The application was canvassed vide written submissions. In his submissions, the applicant's advocate cited the case of **Murungi M'Twaruchiu & Another v Equity Bank Ltd & 2 Others (2012) eKLR** where it was stated that;

*"In the case of **Mobile Kitale service Station V Mobil Oil Kenya Limited & Another (2004) 1 KLR 1***

Hon. Justice Warsame held:-

"An interlocutory injunction is given on the court's understanding that the defendant is trampling on the rights of the plaintiff.

An interlocutory injunction, being an equitable remedy, would be taken away(discharged) where it is shown that he person's conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.

The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only mean for a specific purpose-to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it."

6. Counsel submitted that the respondent is misusing the orders for stay to the detriment of the applicant as the applicant is unable to execute the judgement that he had obtained. It was submitted that the interested party has no interest in the suit land and therefore the application ought to be allowed as prayed.

7. On their part, the interested party's advocate framed two issues for determination being firstly whether the stay orders issued on 18.9.2018 should be lifted and whether the interested party will suffer substantial loss if the stay of execution orders are lifted before the appeal is heard and determined and secondly whether there is an arguable appeal. In respect of the 1st issue, it was submitted that there was an appeal that was pending and vacation of the stay orders would be premature as the appeal had not been heard and determined. In respect of the 2nd issue, it was submitted in placing reliance on the case of **Kenya Commercial Bank Ltd v Nicholas Ombija (2009) eKLR** that there is an arguable appeal that is yet to be heard and determined.

8. I have gone through all the pleadings and submissions and the two issues for determination are whether the application has merit and whether the applicant is deserving of the orders sought. The caution clearly provides in the following terms "19.4.2017, Caution....claiming purchasers interest." As on the date of writing this ruling, I have not received any information that the mentioned issue by Yes Housing Cooperative Society Limited as per the terms of the caution has been resolved.

9. I find it rather mischievous for the applicant to purport to dispense with the caution by way of a notice of motion application. This is because sections 73 and 78 of the Land Registration Act, 2012 provides in material part 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."

10. There is no evidence to demonstrate that the applicant made the application contemplated in sections 73 and 78 of the Land Registration Act cited above.

11. In this regard, I agree with the findings in the case of **Mwangi Rukwaro & Another v Land Registrar (2019) eKLR** that **"Whilst this court has power to order for removal of the caution/restriction herein, it cannot do that through a process where the cautioner or his legal representative has not been given an opportunity to participate. In the special circumstances of this case, I am of the considered view that the applicant should invoke the process provided in section 73(2) (3) (4) of the Land Registration Act, 2012 as it is only through that process that it may be determined that there is no person with an interest in maintenance of the caution."**

12. The removal of cautions under the repealed Registered Land Act was contained in section 133 and the same specifically excludes the use of Originating Summons; Similarly, Order 37 Rule 8 of the Civil Procedure Rules as amended on 26.2.2020 is to the same effect meaning that the instant remedy being sought ought to have been made by Plaint and not by way of summons.

13. In the premises, I find that the application by way of summons seeking prayer 3 is fatally defective and is incompetent before the court.

The same is also lacking in merit and smacks some dishonesty on the part of the applicant who seems to want to put the cart before the horse.

14. In respect of prayer 2, it is trite law that unless the court improperly exercised its discretion, then an order issued by the court cannot be vacated. The applicant seeks to have the stay order reviewed averring that the intended appeal has not been filed and that he had been left in abeyance hence unable to realize the fruits of his judgement. I am not satisfied that there are grounds to grant the order sought because it has not been shown that the respondent had failed to meet the conditions for grant of an order of stay. In any event the applicant is at liberty to move the appellate court to dismiss the appeal for want of prosecution if it is shown that the interested party has deliberately refused to prosecute their appeal. That would be one method as well as resorting to the provisions of section 73 and 78 of the Land Registration Act 2012 regarding removal of the caution placed on the property by the appellant and his agents.

15. The upshot is that the Applicant's application dated 5.8.2020 lacks merit and is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 3rd day of November, 2020.

D. K. Kemei

Judge