



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO. 128 OF 2017**

**HARRISON KAMORE KAGUTU.....PLAINTIFF /APPLICANT**

**VS**

**HARRISON MURAGURI NDONGA NEPHAT...DEFENDANT /RESPONDENT**

**RULING**

1. This Ruling relates to two pending motions filed on the 11/4/19 and 23/10/19 by the Applicant and the Respondent respectively.

**The Notice of Motion dated the 11/4/19 filed by the Defendant/Applicant**

2. I shall commence with the Notice of Motion dated the 11/4/19. This motion seeks orders for stay of execution of the judgement and decree of this Court issued on the 10/5/18 pending the hearing and determination of the Appeal No 225 /2018 filed on the 3/12/18. In addition, the Applicant sought orders of restraint against the Respondents his servants and agents from selling the suit land LOC15/KIGONGO/1426 or alter the ownership of the same pending the hearing and determination of the Appeal.

3. This application was supported by the grounds annexed thereto and the supporting affidavit of the Applicant dated the 11/4/19 and filed on the 25/4/19. That he is aggrieved by the judgement of the Court and has filed an Appeal in Nyeri Court of Appeal vide ELC Appeal No 226 /2018. That unless the application is granted, he will suffer irreparable damage and loss.

4. The Respondent filed a response vide a replying affidavit dated the 30/1/2020 wherein he contends that the application for stay has been brought after a long delay and the Applicant suffers from laches having filed the application 11 months after the delivery of judgment. That the Applicant has not demonstrated substantial loss that he stands to suffer if the application is not granted. That as long as he is denied the enjoyment of the fruits of his judgement, he continues to suffer emotional anguish. That the Applicant resides at Kamacharia Location with his family and therefore would not suffer any prejudice if stay is not granted. That the sole aim of the Applicant in delaying to prosecute the application and the intended Appeal is to frustrate the Respondent in enjoying the fruits of his judgement.

5. He urged the Court to dismiss the application.

6. When the application came for hearing on the 3/3/2020, the Applicant as well as his learned Counsel were absent with no reasons given for their absence. Upon application by the Respondent, the application was dismissed with costs to the Respondent for want of prosecution and or non-attendance under Order 12 Rule 1 of the Civil Procedure Act.

**The Notice of motion dated the 11/4/19 filed by the Plaintiff /Applicant**

7. I shall now look at the application dated the 23/10/19 in which the Plaintiff is the Applicant. The application is expressed to be brought under Article 40 of the Constitution of Kenya , Section 73(1) of the Land Registration Act, order 9 Rule 9 order 51 Rule 1 of the Civil Procedure Rules, section 1A 3A and section 63 of the Civil Procedure Act.

8. The Applicant sought the following orders;

- a. That the firm of SM Gioche & Co Advocates be granted leave to come on record for the Applicant after judgement in place of Ikahu Nganga & Co Advocates.
- b. That the Honourable Court be pleased to grant orders directing the Land Registrar Muranga to withdraw the caution lodged by Lucy Wambui Kamanga in respect to the one acre only on LOC 15/KINGONGO/1426 registered in the name of the Respondent.
- c. That the cost of this application be awarded to the Applicant.

9. The application is supported by the grounds and the Supporting Affidavit of HARRISON KAMORE KAGUTU who deponed that the Applicant successfully obtained title by way of adverse possession in respect to one acre out of the suit land LOC15/KIGONGO/1426 registered in the name of the Respondent. That he had duly extracted a decree in readiness for execution. Pursuant to the judgement of the Court the Deputy Registrar of the Court has executed all the documents to facilitate the subdivision and transfer of one acre in his name out of the suit land. That the Land Registrar has informed him that there exists a caution on the suit land lodged by one LUCY WAMBUI KAMANGA, the wife of the Respondent, lodged on the title on the 16/4/14. That in view of the judgement of the Court the said caution is now rendered spent and should be removed.

10. He urged the Court to order the removal of the said caution to facilitate the execution of the decree as no prejudice shall be suffered by the respondent.

11. The Respondent HARRISON MURAGURI NDONGA NEPHAT in his Replying Affidavit dated the 6/12/19 and filed on the 9/12/19 opposed the application and deponed that application is misconceived and bad in law and should be dismissed. He faulted the Applicant for not complying with the provisions Order 9 Rule 9 of the Civil Procedure Rules in respect to obtaining leave of the Court to change his Advocates. That the application should be filed against the cautioner LUCY WAMBUI KAMANGA and served upon her as the Court cannot make orders against a party that is not a party. *Interalia*, he contended that the application is resjudicata.

12. At the hearing of the application on the 3/3/2020 the Defendant/ Respondent and his Counsel were absent in Court and therefore the application was heard *ex parte*. The hearing date was taken by consent of the parties in open Court on the 16/1/2020.

13. The Applicant through his Counsel on record Mr Gioche made oral submissions and relied on the Supporting Affidavit dated the 23/10/19 filed on record and reiterated the grounds of the application. Relying on section 73 (1) of the Land Registration Act he urged the Court to order the removal of the caution on the title. He relied on the case of **Juliet Cionjoka Mutegi Vs Hildah Karimi Njeru (2019) EKLR** to expound the point that the Court has power to remove a caution post judgment. That the orders sought are to facilitate the implementation of the decree and the judgement of the Court. The caution in respect to the 1 acre should be removed and thereafter the said caution may continue to subsist on the balance of the suit land.

14. The issue for determination to my mind is whether the caution lodged on the title of the suit land on the 16/4/16 should be removed.

15. The power to remove a caution is given to this Court vide section 73(1) of the Registration of Lands Act which states as follows;

“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”.

16. The section gives three ways in which a caution can be removed; it may be withdrawn by the cautioner or removed by the Court or by the order of the Registrar.

17. The question is whether this is a separate cause of action or an action that forms part of the execution of the decree. This suit was filed in 2016 while the caution was lodged in the 2014 by one Lucy Wambui Kamanga claiming licensees’ interest. Even before the suit was filed it follows that an encumbrance subsisted on the suit land in form of a licensee’s interest in favour of the cautioner. The said cautioner was not made a party to the suit. The caution remains an encumbrance on the suit land that continues to bind the land until it is withdrawn or removed by orders of the Court. The Applicant ought to have enjoined the cautioner in the suit. Having failed to do so, his remedy is to file a fresh action against the cautioner in Court or file an application for removal of caution before the Land Registrar as provided for under section 73 of the Land Registration Act.

18. Removing the caution in the circumstances of this case means the cautioner will not have been given the right to be heard on the question of the caution. The tenets of Art 48 and 50 of the Constitution would be flouted if the Court were to grant the application.

19. I have had the benefit of reading the case in **Juliet Cionjoka Mutegi** cited above and I wish to distinguish it from the facts herein on the ground that, in that case, the cautioner had passed away and therefore there was no need for the cautioner to be showed cause why the caution should not be removed. It is therefore not relevant to the case at hand.

20. In the end I find the application is unmeritorious and I proceed to strike it out with no orders as to costs.

21. **It is so ordered.**

**DATED, SIGNED & DELIVERED THIS 14<sup>TH</sup> DAY OF MAY 2020**

**J G KEMEI**

**JUDGE**