



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 218 OF 2016**

**Alice Kariuki.....PLAINTIFF/RESPONDENT**

**VERSUS**

**TELCOM KENYA LIMITED.....DEFENDANT/APPLICANT**

**AND**

**LAND REGISTRAR NAKURU.....INTENDED DEFENDANT/RESPONDENT**

**R U L I N G**

1. The plaintiff instituted the present suit vide a plaint dated 14<sup>th</sup> June 2016 seeking injunctive orders restraining the defendant from alienating disposing or in any manner dealing with **L.R No. Nakuru Municipality Block 6/29 and LR No. 7935/5 Eburu** (the suit property"). The plaintiff further sought an order of specific performance of the transaction entered into between the parties, and damages. Simultaneously with the plaint, the plaintiff filed a Notice of Motion application seeking interlocutory injunctive orders pending the hearing and determination of suit.

2. The interlocutory application was heard interpartes and the Court delivered a considered ruling on 16<sup>th</sup> May 2017 dismissing the application holding that the plaintiff had failed to demonstrate a *prima facie* case with a probability of success to warrant the grant of a temporary order of injunction pending the hearing of the suit. The ruling /order of the Court was not appealed from.

3. Against the foregoing background the defendant/applicant filed the Notice of Motion application dated 20<sup>th</sup> December 2018 which is the subject of this ruling . The application is expressed to be brought under Section 1A,1B & 3A of the Civil Procedure Act, Section 73(1) of the Land Registration Act, 2012 and Order 51 Rule 1 of the Civil Procedure Rules. The Defendant/Applicant prays for the following orders:-

1. That the Court be pleased to enjoin the Land Registrar Nakuru County as a party to the suit.

2. That the Court do grant an order directing the Land Registrar Nakuru to remove the caution registered by the plaintiff on 25<sup>th</sup> May 2016 from the title register of the applicant's property LR No.Nakuru Municipality/block 6/29 (the property") pending the hearing and determination of the suit.

3. That the costs of the application be provided for.

4. The application was supported on the grounds set out on the body of the application and on the supporting affidavit sworn by Robert K Irungu, the Legal Advisor of the Defendant/applicant. The fulcrum of the application was that the suit was founded on the sale agreement entered into between the parties on 15<sup>th</sup> December 2015 and which was not completed as provided in the agreement within a period of 90 days from the date of execution of the same. The Defendant/applicant averred that the plaintiff failed to complete the transaction inspite of being served with the requisite completion notice resulting in the Defendant/applicant's issuance of a cancellation Notice dated 20<sup>th</sup> May 2016. The Plaintiff consequently lodged a caution against the defendant's title on 25<sup>th</sup> May 2016 claiming a purchaser's interest. Subsequently the plaintiff filed the instant suit vide the plaint dated 14th June 2016 and at the same time filed an application for an interlocutory injunction. On 21<sup>st</sup> June 2016 the Court issued an interim order of injunction restraining the applicant from in any manner dealing with the property pending the hearing and determination of the application.

5. After hearing the plaintiff's application for injunction the Court dismissed the application on 16<sup>th</sup> May 2017 and ordered the interim order of injunction vacated and discharged. The applicant made an application to the land registrar for the removal of the caution but the land

registrar declined to remove the same holding that the ruling of the court delivered on 16<sup>th</sup> May 2017 did not expressly order for the removal of the caution. The applicant contends the caution was lodged based on the facts and circumstances arising from the non-completion of the agreement of sale which the Court considered and declined to grant the plaintiff the injunction she sought in the interlocutory application. The applicant argues the plaintiff's caution having regard to the court's ruling of 16<sup>th</sup> May 2017 has no validity and that the same ought to be removed.

6. The Plaintiff filed grounds of opposition to the applicant's application dated 29<sup>th</sup> March 2019. The plaintiff contended that the application is an abuse of the Court process on account that the Land Registrar has been irregularly dragged into the application with the object of misleading the Court.

7. The plaintiff further averred she registered the caution to protect her interest as a purchaser and that the application if allowed would interfere with substratum of the subject matter of the suit before the suit is heard and determined. That the defendant intends to alienate the suit property to 3<sup>rd</sup> parties once the caution is removed to the prejudice of the plaintiff.

8. It is evident that the plaintiff registered the caution over the suit property on the strength of the sale agreement dated 15<sup>th</sup> December 2015. It is also common ground that the sale agreement was not completed within 90 days as provided and that although the plaintiff was given notice to complete the transaction that did not happen prompting the defendant to issue cancellation notice. It is against that background that the plaintiff went ahead and lodged a caution against the suit property claiming purchaser's interest on 25<sup>th</sup> May 2016. Soon thereafter the plaintiff filed the instant suit on 17<sup>th</sup> June 2016. The plaintiff vides the interlocutory application filed simultaneously with the plaint prayed for an order of injunction on the following terms:-

3. That an order of injunction do issue restraining the defendant its officers, servants agents or any other person whatsoever acting on its behalf from alienating, disposing, selling and/or dealing with properties known as Nakuru Municipality Block 6/29 and LR 7935/5 Eburu in any manner prejudicial to plaintiff's interests as purchaser pending reference to Arbitration/mediation and determination thereto or until the hearing and determination of the main suit.

9. There can be doubt that the interlocutory application for injunction was based on the same facts that the plaintiff put forth in applying for the registration of the caveat/caution. Munyao, J upon evaluating the facts upon which the application for injunction was founded determined that the facts and allegations against the defendant were unsubstantiated leading him to hold the plaintiff had failed to demonstrate a *prima facie* case with a probability of success and on that account the Court dismissed the plaintiff's application for injunction. This ruling by the Court was not appealed against by the plaintiff.

10. The effect of the Court's ruling was that the Court found no basis to encumber the defendant's title. The plaintiff had sought to have the defendant restrained from alienating, disposing, selling and /or dealing with the properties in any manner prejudicial to the plaintiff's interest as purchaser. This plea was refused by the Court meaning the Court allowed the defendant to deal with its property howsoever it desired.

11. I am persuaded that the plaintiff having failed to obtain an order of injunction from the Court and the caution having been registered by the Land Registrar on the strength of the agreement of sale between the plaintiff and the defendant which essentially the Court found to have been breached by both parties there can be no basis to sustain the same.. The order of the Court dismissing the plaintiff's application for injunction superseded the act of the Land Registrar of registering the caution. In lodging the caution the plaintiff was claiming a purchaser's interest as he was when he presented the application for injunction before the Court. The Court made its decision which as per the record was not appealed from and therefore stands. Accordingly, I find this a proper and fitting case for the Court to order the withdrawal of the caution registered against title **Number Nakuru Municipality Block 6/29**.

12. The defendant applicant in the application had prayed for the joinder of the Land Registrar Nakuru as a party to these proceedings. In my view the joinder of the Land Registrar as a party is unnecessary. The Land Registrar in registering the caution was executing his statutory mandate and the affected parties by his actions were the plaintiff and the defendant and any of them could apply to the Court to seek the withdrawal or extension of the caution without necessarily making the Land Registrar a party. The Land Registrar would be bound by any order that the Court would make. The Land Registrar is not a necessary party in the proceedings and need not to be enjoined.

13. The upshot is that I allow the defendant's application in terms of prayer (3) of the Notice of Motion dated 20<sup>th</sup> December 2018. I make no order for costs of the application. Each party will bear their own costs of the application.

14. Orders accordingly.

**Ruling dated signed and delivered at Nakuru virtually this 24<sup>th</sup> day of September 2020.**

**J M MUTUNGI**

**JUDGE**