



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**HC MISC. APPLICATION NO. 73 OF 2013**

**JAMES MISIKO WALUBAYI .....APPLICANT**

**VERSUS**

**ALBERT MASINDE LIBONDA .....RESPONDENT**

**RULING**

1. The applicant Albert Masinde Libonda is asking this court for an order to remove a restriction placed on his title E. Bukusu/S. Kanduyi/15897. He claims according to his papers that he has had no dealings with the respondent James Misiko over this land and that the respondent has absolutely no right to restrict his dealings on this parcel. He went further to state that the respondent ought to have restricted parcel no. E. Bukusu/S. Kanduyi/1951 but he failed to do so hence he is guilty of laches.

2. The respondent has opposed the application by his affidavit in reply. He deposes that Fred Nyongesa Libonda who is a brother to the applicant sold to him one acre of land comprised in E. Bukusu/S. Kanduyi/1951 for the construction of a church. That E. Bukusu/S. Kanduyi 15897 was the new number for their church portion. The applicant even stated he had transferred the land to the church and gave title to the people he sent which statement was not true. On doing a search, he discovered the land was already transferred and registered in the name of a rival church, Kenya Church of Christ Namisi.

3. I have perused the certificate of official search dated 6<sup>th</sup> June 2012 annexed to the applicant's affidavit. It shows the restriction was placed by Namisi church of Christ c/o pastor J. Misiko. The second certificate of official search dated 8<sup>th</sup> May 2014 shows Kenya Church of Christ – Namisi as current owner of the suit title as at 22<sup>nd</sup> October 2013 and free of any encumbrances. The transfer it seems was effected as soon as I had allowed the application of 1<sup>st</sup> October 2013 which was allowed *ex parte* on that date. The applicant cannot therefore claim not to have any more interest on this title yet the order which he used to remove the restriction has subsequently been set aside. The effect of setting aside the orders imply the title is in same status it was before the order was given.

4. In the chief's letter that formed the basis of putting the restriction on the title no. 15897 by the respondent, the chief had asked the parties to sit down and resolve the dispute. The applicant states he was the registered owner of parcel no. E. Bukusu/S. Kanduyi/1951 as at 2005 and so any sale done without his blessings was illegal. There was nothing put to court to confirm this averment. However the issue at stake is whether the applicant has any iota of claim on this land and not whether there was a valid sale of land. In answering this, I think he does otherwise the local administration (chief) would not have written the letter (*JWMC*). There is also a sale agreement annexed as *JWM (b)* in the replying affidavit which the applicant doubts its authenticity. Under section 71 (a) of the Land Registration Act any person who claims a right whether contractual or otherwise can lodge a caution.

5. In an application for removal of a restriction, the validity or otherwise of a sale agreement cannot be determined. It would be necessary for such issues to be raised in a proper suit. Secondly the respondent ought to file a suit to prove his claim if any and not lodge a restriction and sit back. I agree with the applicant that the respondent was indolent in not taking steps to acquire title from date of sale in 2005. Be that as it may, it is necessary to give the respondent an opportunity to present his case. The application is allowed conditionally that the title to remain restricted for ninety (90) days (within which) to allow the respondent place a restriction obtained on basis of an existing suit. If he does not do so within these timelines, this restriction stands removed. Costs of the application be born by each of the

parties.

**Dated and Delivered** in Bungoma this 15<sup>th</sup> day of October, 2014.

**A. OMOLLO**

**JUDGE**