



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CASE NO.38 'B' OF 2012

MUMBUA NDUNGE MUTISO & OTHERS..... PLAINTIFF

VERSUS

ROMAN MUTUKU KISINI DEFENDANT

RULING

1. By a **Plaint** dated **16.11.2012** the Plaintiffs/Applicants filed a suit on the 16.2.2012 seeking the following reliefs:
 - a. An Order for the caution be removed on **Title No. MAVOKO TOWN BLOCK 2/1198**.
 - b. A permanent injunction restraining the defendant in any way whatsoever interfering with the Plaintiffs' administration of the estate of DAVID MUTISO MUMO *alias* DAUDI MUTISO MUMO.
 - c. Costs of the suit and other or further relief that the court deems fit to grant.
2. Contemporaneously with **Plaint**, the Plaintiffs/Applicants filed a Notice of Motion dated 16.2.2012 seeking specifically:
 - i. (1 spent)
 - ii. That this Honourable Court do issue an Order that the caution lodged by the Respondent/Defendant against **Title No. MAVOKO TOWN BLOCK 2/1198** be removed.
 - iii.(3 spent)
 - iv. That the Defendant/Respondent by himself, his agents and or servants be restrained from interfering in any manner whatsoever with the Applicants'/Plaintiffs' administration of the estate of one DAVID MUTISO MUMO *alias* DAUDI MUTISO MUMO now deceased pending the hearing and final determination of this suit.
 - v. That costs of this application be provided for.

The Motion is supported by the affidavit and grounds namely;

1. That the Applicants/Plaintiffs are the registered proprietors of the **Title No. MAVOKO TOWN BLOCK 2/1198** in their capacity as the administrators and legal representatives of the estate of one DAVID MUTISO MUMO *alias* DAUDI MUTISO MUMO now deceased as per a grant confirmed in Machakos High Court Succession Cause No.397 of 2008.
2. That Applicants/Plaintiffs are unable to administer the estate of the deceased and account to the court for the benefit of the beneficiaries of the estate of the deceased including **Title No. MAVOKO TOWN BLOCK 2/1198**.

3. That it is in the interest of justice that the caution on the **Title No. MAVOKO TOWN BLOCK 2/1198** be removed.

and the supporting Affidavit sworn by Julius Wambua Mutiso on 16.2.2012 and a further affidavit sworn on 21.5.2012.

3. The Respondent filed a replying affidavit sworn on 10.5.2012 and a defence dated 28.3.2013.
4. The Applicants' case is that the subject matter was registered in the names of their father David Mutiso Mumo, but via the grants on 17.11.09 it changed to their names. However, they thereafter discovered that the Defendant had cautioned the land. The matter went to the Registrar of Land who heard the dispute over removal of caution but to date no ruling has been rendered or delivered.
5. The Respondent's case is that the 1st Plaintiff's husband and father of the 2nd and 3rd Defendant (now deceased), sold 8 acres subject of this suit between 1997 and 1998 to the KASIBE LAND DEVELOPERS a partnership in which the Defendant is a partner. Full price was paid and relevant consents from Land Control Board to subdivide obtained. The original title was also given to buyers. The deceased vendor died thereafter without transferring the portion of land sold.
6. The 2nd and 3rd Defendants had prior to their father's death obstructed him from attending a Land Board to effect transfer of the sold portion. The Defendant despite knowing the Defendants had original title deed did obtain a new title deed on pretext that their original title was lost.
7. The Defendant avers that if caution is removed he will lose the purchased portion. The purchase agreements were made by the deceased David Mutiso Mumo on 10.6.1997, 28.10.1997 and 24.6.1998, and KASIBE Land Developers a partnership registered on 3.1.1996 comprising John Musyoki Kala, Ms Benedette Mbithe Mutuku and Roman Mutuku Kisini.
8. In the defence the Defendant claims that the caution is lodged to safeguard his interest. There is no counter claim and also that the claim is over 12 years. The Defendant has not enjoined his co-partners in the suit or even demonstrated how agreements of over 16 years will be enforced. There is no action taken to enforce the agreement within the prescribed period nor is there Land Board consent for transfer alleged to have been acquired.
9. The agreements in the instant suit are apparently void for want of Land Board consent vide section 6 (1) (a) of Cap 302 Laws of Kenya. The claim which is yet to be lodged for the 8 acres is apparently time barred by dint of section 4 (1) (a) of Cap 22 Laws of Kenya.
10. In absence of any possible legal claim over the subject matter, the existence of the caution remains unjustified. The registrar of Land seems to have abdicated his role of ruling on the same caution and thus the court herein will not hesitate to invoke section 73 (1) of Land Registration Act No.3 of 2012.
11. On the issue of interim injunction sought, the Applicants have not placed any material before the court to demonstrate any interference with subject matter by the Defendant to warrant the issuance of the order. All the materials tendered are geared towards demonstrating the invalidity of the agreements entered into by the Defendant partnership and the 2nd and 3rd Plaintiffs' deceased father.
12. The upshot is that the court makes the following orders:
 1. The Caution placed on **Title No. MAVOKO TOWN BLOCK 2/1198** be removed forthwith.
 2. The prayer on interim injunction is rejected.
 3. Costs in the cause.

Signed and Delivered at Machakos, this 5th day of December, 2014.

CHARLES KARIUKI

JUDGE