



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. APPEAL NO. 8 OF 2017**

**(Formerly Civil Appeal No. 94 of 2014 - Machakos)**

**ISAAC WAMBUA NZYOKA.....APPELLANT**

**VERSUS**

**DAVID KISILU MATIVO.....1<sup>ST</sup> RESPONDENT**

**NICHOLAS MUIA MATIVO.....2<sup>ND</sup> RESPONDENT**

**BONIFACE MUTUKU MATIVO.....3<sup>RD</sup> RESPONDENT**

**TIMOTHY MALINDA MATIVO.....4<sup>TH</sup> RESPONDENT**

**AND**

**THOMAS NZIOKI KIBUA.....APPLICANT/INTERESTED PARTY**

***(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos***

***in Civil Case No. 1006 of 2008 delivered on 25<sup>th</sup> April, 2014 by***

***Hon. L. Simiyu, Ag. Snr. Resident Magistrate)***

**RULING**

1. The Ruling relates to the Application dated 25<sup>th</sup> April, 2018. The Applicant approached the court vide a Notice of Motion that was filed under Article 40 of the Constitution of Kenya 2010, Section 24 of the Land Registration Act of 2012, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law seeking for the following orders:

***a) That this Honourable Court be pleased to formally join the Applicant, Thomas Nzioki Kibua, in this Appeal as an Interested Party.***

***b) That the original Title Deed for Land Title Number Machakos/Mua Hills/288 be deposited with the Registrar-in-Charge, Machakos District Lands Registry by the Respondent; and any necessary document/s be executed by the Appellant and the Respondents; all for purposes of temporarily lifting the caution registered against the suit land and registering all such documents as may be required to enable procurement of the Title Deeds to Parcel Nos. 365 and 366 in the names of Thomas Nzioki Kibua as per the Mutation Form dated 14<sup>th</sup> December, 1993.***

***c) That the resulting Title Deeds for Parcel Nos. 365 and 366 be released to Thomas Nzioki Kibua unconditionally; and the original Title Deed for Parcel No.367 (with the caution re-registered thereupon) be released to the Respondents pending the hearing of the Appeal.***

2. The Application is supported by the Affidavit of the Applicant who deponed that vide an Agreement for sale concluded in 1992, he purchased for valuable consideration from Justus Ngila Mosa, who had purchased from the deceased, Matibo Kituu Wathome *alias* Mativo Kituu Wathome, a parcel of land measuring 20 acres that formed part of the Land title number Machakos/ Mua Hills/288.

3. The Applicant deponed that for the boundary between the twenty (20) acres plot and the land retained by the deceased to be straight, the seller offered him an additional three (3) acres which he purchased; that the deceased had the land sub-divided and obtained a mutation form dated 14<sup>th</sup> December, 1993 and that the deceased applied for the consent from the Land Control Board for sub-division of the land and obtained the consent on 3<sup>rd</sup> February, 1994.
4. It was deponed by the Applicant that it was later discovered that the Appellant had registered a caution on the suit land claiming a purchaser's interest and that he discovered that there was litigation between the parties in PMCC No. 193 of 1990 and later Machakos HCCC No. 174 of 1994.
5. The Applicant deponed that in the year 2005, the Respondent applied for the Letters of Administration in respect to the deceased Estate and obtained the Certificate of Confirmation of Grant and that the said certificate listed him as one of the beneficiaries of the Estate of the deceased.
6. It was averred that when the Respondents applied for Letters of Administration and were granted the same, they were unable to effect the transfer of the property to him because of the caution lodged by the Appellant and that as a result, they filed CMCC No. 1006 of 2008 seeking for an order lifting the caution.
7. According to the Applicant, upon learning of the existence of CMCC No. 1006 of 2008, he filed an Application to be enjoined in the suit; that he was never enjoined in the said suit and that the lower court never considered his Application for joinder.
8. It was averred by the deponent that he has suffered and continues to suffer prejudice on account of a dispute that had nothing to do with him; that he is in occupation of the twenty-three (23) acres that he bought from the deceased and that the Application should be allowed to enable him obtain a title for his portion of land.
9. The Application was opposed vide a Replying Affidavit deponed by Isaac Wambua Nzyoka, the Appellant. The Appellant deponed that the Applicant filed a similar Application dated 2<sup>nd</sup> September, 2013 which was dismissed by the trial.
10. It was deponed by the Appellant that the Applicant had not demonstrated that he has an identifiable stake in the instant suit; that the Application has been filed late in the day and that the Applicant was at liberty to file his own suit. The court was urged to dismiss the Application.
11. On record is a Replying Affidavit deponed on 21<sup>st</sup> May, 2020 by David Kisilu Mativo, one of the Respondents in the Application, who deponed that the Applicant/Interested Party's Application to be enjoined in the lower court case was duly dismissed by the trial court in Machakos RMCC No. 1006 of 2008; that the Applicant has no material interest in this matter and that the Title Deed the subject of this Appeal cannot be deposited with Land Registrar for sub-division as the cause of action will change.
12. The 1<sup>st</sup> Respondent deponed that the Applicant/Interested Party's Application does not meet the threshold of law for the grant of the orders sought. The court was urged to dismiss the Application dated 25<sup>th</sup> April, 2018.
13. The Application was canvassed vide written submissions. According to counsel for the Applicant, the issues for determination are whether the Applicant may be joined as an Interested Party in the instant matter and whether the court can grant the orders sought. Learned counsel for the Applicant submitted that the court ought to join the Applicant as an Interested Party. Reliance was placed on the case of *Francis Kariuki Muruatetu & Another vs. Republic (2016) eKLR*.
14. It was submitted that the Applicant's constitutional right to own property has been denied by the Appellant's litigious conduct. It was the argument of counsel that the court has authority to grant the orders sought.
15. In response, counsel for the Appellant submitted that the prayers sought in the Application amounted to an Appeal; that one of the prayers in the lower court was that the *caution lodged by the Appellant on land known as Machakos/Mua Hills/288 be removed, which prayer was denied by the lower court and that the lifting of the caution amounts to dealing with the substance of the Appeal*.
16. The Respondents' advocate submitted that the parcels of land stated in the Applicant's Application do not exist; that the mutation form does not show the name of the Applicant as the one who applied for the sub-division of the suit property nor does it show that the mutation was to be done in favour of the Applicant and that in granting the Application, the court will be delving into issues that are not before it.
17. Counsel submitted that the court is concerned with the Appeal emanating from the lower court; that the lower court did not deal with parcels of land Nos. 365 and 366 and that the Application dated 25<sup>th</sup> April, 2018 be dismissed with costs to the Respondents.
18. I have considered the Application, the submissions by counsel and the cited authorities. The issues that arise for determination are firstly, whether the Applicant can join the Appeal as an Interested Party and secondly, whether this court may make an order to lift the caution to enable the Applicant procure Title Deeds for parcels 365 and 366.
19. The Applicant is seeking to be enjoined in this Appeal, and for orders to have the existing caution on parcel number Machakos/Mua Hills/288 lifted to enable the registration of the sub-divisions of parcel number Machakos/Mua Hills/288 registered in his favour.
20. In *Moses Wachira vs. Niels Bruel & 2 Others (2015) eKLR*, the court quoted the Supreme Court in *Communications Commission of Kenya & 4 Others vs. Royal Media Services Limited & 7 Others (2014) eKLR* wherein the Supreme Court pronounced itself on who an Interested Party is and held as follows:

*“In determining whether the Applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s decision in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:*

*“An Interested Party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly, in the case of Meme vs. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:*

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;*
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;*
- (iii) Joinder to prevent a likely course of proliferated litigation.*

*We ask ourselves the following questions:*

- a) what is the intended party’s state and relevance in the proceedings and*
- b) will the intended interested party suffer any prejudice if denied joinder?”*

21. In *Elizabeth Nyambura Njuguna & another (suing as the Legal representatives of Njuguna Mwaura Mbogo) vs. E. K. Banks Limited & 2 others; Edward Kings Onyancha Maina (Interested Party) [2019] eKLR*, the Court stated as follows:

*“The Applicant has come before us asking to be enjoined in the appeal in his own capacity as a shareholder of Jumaa Farmers Company Ltd. As stated above, Jumaa Farmers Company Ltd has corporate status and it litigated on behalf of the applicant. It lost in its bid to be enjoined. The applicant seeks to be enjoined in spite of the dismissal of the joinder application by Jumaa Farmers Company Ltd, where he is a shareholder. In our view, Jumaa Farmers Company Ltd having lost the application for joinder, it is not open to the individual shareholders to want to distance themselves from the Company and litigate on their own behalf. We find no merit in this application. It is hereby dismissed with costs to the appellants.”*

22. In the Plaintiff that was filed in the lower court by the Respondents, the Respondents averred that the deceased was the proprietor of land known as Machakos/Mua Hills/288 (*the suit property*); that in 1994, the Appellant wrongfully lodged a caution over Machakos/Mua Hills/288 and that the said caution should be lifted by the court.

23. The Applicant has pleaded that it purchased a portion of the suit land; that the suit was sub-divided by the deceased and that the land he purchased cannot be transferred to him because of the caution that was lodged over the suit property by the Appellant. The Applicant deponed that although he filed an Application to be enjoined in the suit, the trial court did not render a Ruling in respect of the same, and that he should be joined in these proceedings.

24. The claim that the caution lodged over the suit property by the Appellant should be lifted by this court is the same claim that was before the trial court, and now before this court on Appeal. Indeed, in his Judgment, the learned Magistrate found that the Appellant has no valid claim on plot number 288, and that the caution lodged on the said land is an illegality.

25. It is the findings of the Magistrate that are before this court on Appeal. If indeed the Applicant purchased a portion of parcel number 288, then he should await the issue of the caution on the said parcel of land to be resolved by this court.

26. In the circumstances, it is my finding that the Applicant is not a necessary party in these proceedings because the Appeal relates to the finding on ownership of the suit land as between the Appellant and the Respondents, and his claim can only be as against the Respondents in the event the court disallows the Appeal.

27. In respect to the second issue, I find it rather mischievous for the Applicant to purport to deal with the very issues that are before this court on Appeal by way of a Notice of Motion Application. The issue of whether the caution registered over the suit property is legal or not has to be determined by this court, whereafter the Applicant’s claim can be considered.

28. In any event, it will appear that the issue of whether or not the Applicant is entitled to a portion of the suit land is contested by some of the Respondents, meaning that the Applicant might have to commence fresh proceedings against the party that this court will find to be the *bona fide* owner of the suit property.

29. For those reasons, I find the Application dated 25<sup>th</sup> April, 2018 to be unmeritorious. The Application is dismissed with costs.

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2020.**

**O. A. ANGOTE**

**JUDGE**