



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. MISC. APPLICATION NO. 235 OF 2017

FRANCIS MWANGI KIMANI.....APPLICANT

=VERSUS=

DANIEL KIMANI NJIHIA.....RESPONDENT

RULING

1. On 23/11/2017, Francis Mwangi Kimani (the **applicant**) brought a miscellaneous application by way of notice of motion dated 22/11/2017 seeking the following orders:

- a) *That the order of inhibition registered against Title Number Loc.1/Mukarara/960 be removed.*
- b) *That costs of this application be provided for.*

2. The application was premised on the grounds set out in the application and supported by the applicant's supporting affidavit sworn on 22/11/2017. He contended that the material inhibition was registered against the above title to protect the interest of the respondent pending the hearing and determination of **Nairobi High Court Civil Case Number 6085 of 1990** (now **Nairobi ELC Civil Case Number 6085 of 1990**). He added that the said suit was heard and dismissed by the High Court on 7/6/2006. He further contended that the respondent's attempt to appeal to the Court of Appeal and to the Supreme Court were similarly dismissed. He added that the continued existence of the inhibition in the parcel register was not serving any useful purpose because the suit was heard and determined.

3. The application was opposed by the respondent through a replying affidavit sworn on 30/5/2018. He contended that the said application was an abuse of the process of the court because it ought to have been filed in ELC Civil Case Number 6085/1990. He added that an action for removal of a caution or inhibition ought to be commenced by way of a plaint so that the plaintiff can prove on a balance of probabilities why the caution or inhibition should be removed. He urged the court to dismiss the application.

4. At the hearing of the application, the applicant who acted in person reiterated his case and urged the court to dismiss the application. Mr Otieno, counsel for the respondent urged the court to dismiss the application, contending that the inhibition order automatically lapsed on dismissal of the case in which the inhibition order was issued. He further argued that the applicant ought to have moved the court by way of an originating summons.

5. I have considered the tenor and import of the said application. There is common ground that the material inhibition order was issued to preserve the suit property pending the hearing and determination of Nairobi HCCC No 6088 of 1990 (now ELC 6085 of 1990) which was determined in favour of the applicant herein through a dismissal order. The only ground upon which the application is opposed is procedural. The respondent contends that the applicant should have filed an application in the dismissed suit. He also argues that the applicant should have filed an originating summons.

6. My view is that the land registrar should have vacated the inhibition upon being served with the decree of the court showing that Nairobi HCCC No 6085/1990 (now Nairobi ELC 6085/1990) was dismissed. Secondly, ideally, in the absence of any action by the land registrar, the applicant should have filed a motion within that suit as an ideal mechanism for vacating the inhibition. I am however not persuaded that failure to pursue that ideal procedural mechanism renders the applicant's application fatal. To the contrary, Article 159 of the Constitution provides appropriate safeguard against reliance on technicalities to defeat substantive justice.

7. Moreover, it has not been contended nor demonstrated that the respondent stands to suffer any unanticipated prejudice as a result of the procedure adopted by the applicant. On account of Article 159 of the Constitution, I will grant prayer (a) in the Notice of Motion dated 22/11/2017. The application is accordingly granted in terms of prayer (a). There shall be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2019

B M EBOSO

JUDGE

In the presence of:-

Ms Kithinji holding brief for Mr Gachau advocate for the respondent

Francis Mwangi Kimani - applicant present in person

June Nafula - Court Clerk