



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 422 OF 2016

JOHN KIRUI MUTHIORA.....PLAINTIFF

VERSUS

STEPHEN WAWERU MUTHIORA.....DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit against the Defendant who is his brother on 27/4/2016 seeking an order for the removal of the cautions lodged and maintained by the Defendant against parcel numbers Dagoretti/Riruta/3851, 3855, 3856, 3857 and 3858; and general damages for lodging and maintaining cautions against these parcels of land. The Plaintiff pleaded that the Defendant had maintained the cautions against his parcels of land from 13/5/2008 without any lawful cause.
2. The Plaintiff had previously filed **Nairobi HCCC No. 972 of 2005** against the Defendant seeking an injunction to restrain the Defendant from interfering with the Plaintiff's quiet possession and rights over Dagoretti/Riruta/3851; and a mandatory injunction to compel the Defendant to pull down the structures he had erected on the Plaintiff's land. The court gave judgement in favour of the Plaintiff in that case.
3. The Defendant filed his defence on 6/6/2016 under protest. He averred that the cautions were put in place when the previous suit was pending in court as a safety measure to ensure that no interest adverse to his was registered while the suit was pending for determination. The Defendant averred at paragraph 5 that he had started the process of withdrawing the cautions and pleaded at paragraph 6 that the cautions were no longer in place and the Plaintiff's suit was therefore misplaced. The Defendant further argued that this case was *res judicata*.
4. In his reply to the Defence filed on 13/6/2016 the Plaintiff contended that despite the court delivering its judgement in **HCCC No. 972 of 2005 on 31/7/2011**, the Defendant had not caused the cautions to be withdrawn which left the Plaintiff with no option but to file the instant suit.
5. The Defendant filed an application on 5/7/2016 seeking to strike out the suit on the basis that it was *res judicata* and disclosed no reasonable cause of action. The application was also made on the ground that the suit is a waste of court's time, is fatally defective and that the court is *functus officio* having conclusively addressed the matter in question. The Defendant further contended that litigation must come to an end. The Defendant did not disclose in his supporting affidavit when the cautions against the Plaintiff's parcels of land were removed. He attached a copy of the ruling of the Deputy Registrar dated 16/12/2015 in relation to the taxation of the Bill of costs in **HCCC No. 972 of 2005 on 31/7/2011**.
6. The Plaintiff filed another application on 22/7/2016 seeking to have the defence struck out and judgement entered for him as prayed in the plaint. The main ground for the application was that the Defendant had failed to show that the cautions registered against the Plaintiff's parcels of land had been withdrawn prior to the filing of the suit. The Plaintiff further urged that the plea of *res judicata* by the Defendant was misconceived as this suit raised different issues from those which were determined in Nairobi HCCC No. 972 of 2005.
7. In order to establish whether the cautions lodged by the Defendant against the Plaintiff's parcels of land had been removed or not, the court issued summons to the Land Registrar on 12/10/2017 to attend court and produce documents relating to the Plaintiff's parcels of land held in the Nairobi Lands Registry.
8. Mr. Edwin Wafula, the Chief Land Registrar attended court on 5/2/2018. He confirmed that cautions were placed against the parcels of land known as Dagoretti/Riruta/3855, 3856, 3857 and 3858 on 13/5/2008 by Stephen Waweru Muthiora claiming beneficial interest. The cautions were removed on 19/4/2016 by Stephen Muthiora. Stephen Muthiora presented an application to withdraw the cautions on 14/10/2015 which was rejected at the lands registry. He presented another application to withdraw the cautions on 19/4/2016, the land registrar removed the cautions on the same day. The registrar produced a copy of the application for registration lodged at the lands registry which confirms that the application to withdraw the caution was filed on 19/4/2016 in relation to land reference numbers

Dagoretti/Riruta/3858, 3856, 3851 and 3855.

9. Parties appeared in court on 4/4/2018, 8/5/2018 and 10/7/2018. Mr. Ondabu Advocate, who appeared for the Defendant submitted on 10/7/2018 that the general damages sought by the Plaintiff were not payable since the Defendant did not reside on the suit land, it is the Plaintiff who resides on the land. He urged the court to strike out the suit arguing that the court was being asked to sit on appeal against the judgement of Msagha Mbogholi J in Civil Suit No. 972 of 2005. The Plaintiff's Advocate, Mr. Ndurumo maintained that the Plaintiff was seeking damages against the Defendant for placing a wrongful caution against his land pursuant to Section 75 of the Land Registration Act. He urged the court to assess the damages payable.

10. The court delivered a ruling on 24/9/2018 to the effect that the only outstanding issue pending for determination was whether general damages were payable or not. Parties were given an opportunity to file submissions. The Defendant filed submissions on 28/9/2018 urging the court to allow its application dated 4/7/2016 with costs arguing that by the time this suit was filed, the cautions had been removed.

11. The court has looked at the submissions of both parties and the judgment in **HCCC No. 972 of 2005**. The suit was in relation to the subdivision of L.R. No. Dagoretti/Riruta/217 which was registered in the names of the parties' father. The court allowed the Plaintiff's suit and found that the Defendant was in charge of the subdivision process and he caused the land to be subdivided into four portions instead of being subdivided into three portions. That suit did not deal with the issue of the cautions lodged by the Defendant against the Plaintiff's parcels of land.

12. The judgement in HCCC No. 972 of 2005 was delivered on 31/7/2011. It was not until 19/4/2016 that the Defendant withdrew the cautions he had lodged against the Plaintiff's land. No explanation was given as to why the Defendant left these cautions in place long after the court had given its judgement in HCCC No. 972 of 2005 on 31/7/2011. The Plaintiff filed the present suit seeking removal of the cautions eight days after the cautions had been removed. There is no evidence that the Defendant made the Plaintiff aware that he had removed the cautions which he had lodged against his parcels of land.

13. The court is of the view that the Plaintiff is entitled to the costs of this suit against the Defendant for his failure to notify the Plaintiff that he had removed the cautions which necessitated the filing of this suit. By the time this suit was filed, it had been overtaken by events. The court declines to award the Plaintiff the general damages he sought in the sum of Kshs. 25 Million as the Plaintiff has been in occupation of the Suit Property. The Plaintiff is awarded the costs of the suit against the Defendant.

Dated and delivered at Nairobi this 8th day of February 2019.

K. BOR

JUDGE

In the presence of: -

Mr. K. Ndurumo for the Plaintiff

Mr. Kiluva holding brief for Mr. Ondabu for the Defendant

Mr. V. Owuor- Court Assistant