



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. APPLN. NO. 95 OF 2017

ANTHONY MWENGA MAVUA.....APPLICANT

VERSUS

MAGDALENE MUKAMI MWENGA.....1ST RESPONDENT

ANASTASIA KALONDU MWENGA.....2ND RESPONDENT

PIUS MUTUA MWENGA3RD RESPONDENT

MATHEW KINYANJUI MWENGA.....4TH RESPONDENT

JUDGMENT

1. The Applicant in this suit was acting in person. The Applicant commenced this suit by a Miscellaneous Application dated 1st November, 2017. In the said Application, the Applicant is seeking for the following orders:

a. This Honourable Court be pleased to grant an order removing the restriction placed by the Respondents on title number Mitaboni/Mutituni/2173 on 1st August, 2017 vide a letter dated 31st July, 2017.

b. The costs of this Application be provided for.

2. The Application is premised on the grounds that the Applicant is the registered owner of land parcel number Mitaboni/Mutituni/2173; that the Respondents are the children of the Applicant and that the Respondents placed a restriction on the suit land claiming that there was a family dispute over the land, which is not true.

3. In his Affidavit, the Applicant deponed that he is sickly and currently needs urgent medical attention; that he has no other means of livelihood which he can use to access funds to seek medical attention other than selling the suit property and that as his children, the Respondents do not support him despite having paid for their education.

4. In response to the Application, the Respondents filed a Notice of Preliminary Objection. In the said Notice of Preliminary Objection, the Respondents averred that the Application is incompetent as drawn and an abuse of the court process.

5. In his oral submissions, the Applicant submitted that the Respondents are all grown up men and women; that the suit land is his; that he bought the suit land before he married the Respondents' mother and that the Respondents have unlawfully leased the suit land to Safaricom Limited.

6. The Applicant submitted that the suit land has fourteen (14) rooms and that the said land is about 400m away from his matrimonial home. The Applicant submitted that he is not earning any income from the suit land and that he should be given back the land. It was the submissions of the Applicant that the divorce case he had with his late wife has since abated.

7. In his submissions, the Respondents' advocate submitted that the order for removal of a restriction from the register is a substantive prayer; that the Application offends the provisions of Section 19 of the Civil Procedure Act, Section 78 of the Land Registration Act and Order 3 of the Civil Procedure Rules.

8. The Respondents' counsel submitted that the procedure on how suits should be commenced must be followed; that no notice was given to the Registrar for removing the Restriction and that the Preliminary Objection should be allowed.

9. It is not in dispute that the Applicant is the registered proprietor of land known as Mitaboni/Mutituni/2123. According to the copy of the

official search annexed on the Applicant's Affidavit, the suit land was registered in his favour on 20th August, 1984. The said search further shows that a Restriction was registered against the title by the Registrar of Lands on 18th February, 2017 in the following terms:

“Restriction no dealings until dispute between the registered owner and his children namely; Magdalene Mukami Mwenga, Anastasia Kalondu Mwenga, Pius Mutua Mwenga and Mathew Kinyanjui Mwenga is solved vide a letter from Gladys Gichuki Associates Advocate Ref. No. GG/DIV/JW/117/2015 dated 31st July, 2017.”

10. The letter dated 31st July, 2017 that compelled the Registrar of Lands to register the Registration against the title document was not produced in court. Indeed, the nature of the dispute between the Applicant and the Respondents was not disclosed by the Respondents or their advocate.

11. The Respondents have opposed the lifting of the Restriction on the ground that the suit should have been commenced by way of a Plaintiff and not a Miscellaneous Application. The Respondents' counsel relied on the decision of Munyao J. in the case of ***Joseph Kibowen Chemjor vs. William C. Kiseru, (2013) eKLR*** where the Judge held as follows:

“It is therefore my considered view that an action for the removal of a caution needs to be commenced by way of a Plaintiff in which suit the Plaintiff needs to prove on a balance of probabilities why the Defendant has no right to place the caution on his title and why the caution placed by the Defendant needs to be removed.”

12. Although the above statement of the law is true, especially in view of the provisions of Section 19 of the Civil Procedure Act which provides that every suit shall be instituted in such manner as may be prescribed by the rules, there are times when the court can determine a matter even when commenced by way of a Miscellaneous Application. The instances when such a scenario is acceptable were clearly stated by the court in the ***Joseph Kibowen case (supra)*** as follows:

“Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such persons to file a Miscellaneous Application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. At this level, the court is not adjudicating on any rights. Where there is a call to adjudicate on rights of parties then it must be said that there is a “civil action” and this must be commenced in the manner prescribed by the Rules.”

13. The question that arises then is this, if the Registrar or an individual registers a Restriction or a Caution on a property without stating the reasons for such an entry, must the registered owner file a Plaintiff and go through the motions of trial? That is the most ideal procedure. However, in a situation where on the face of a Caution or a Restriction, there is no discernable or legal reason for why a Caution or Restriction was registered, the court can determine the suit summarily by way of a Miscellaneous Application.

14. Therefore, not all matters where a party wants a caution or restriction lifted must be commenced by way of a Plaintiff. The court must be satisfied that indeed, on the face of the restriction or caution, an “action” has arisen that must be investigated by way of a full blown trial. In instances where cautions are registered by busy bodies, or by people who have no known interest in the suit land at all, the court should proceed and determine the Application summarily. That is an opinion that the court ought to form on a case by case basis, and upon examining the impugned caution or restriction.

15. The copy of the official search in respect of parcel number Mitaboni/Mutituni/2173 shows that the same was registered by the Registrar of Lands on the basis of a letter by the Respondents' advocates. Although the letter by the Respondents' advocate referred to a dispute between the Applicant and the Respondents, it did not quote any court matter that was pending between the two parties.

16. Indeed, the Respondents did not file an Affidavit to state clearly the dispute that they had with the Applicant, who is their father, to necessitate the registration of the restriction against the suit land. There is also no evidence to show that the Applicant was notified of the said Restriction by the Land Registrar pursuant to Section 77(1) of the Land Registration Act which provides as follows:

“(1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.”

17. In the absence of evidence to show the Respondents' interest in the suit land, and being satisfied that the suit land is registered in favour of the Applicant, I shall allow the Applicant's Application dated 1st November, 2017.

18. If indeed the Respondents have any known legal claim over the suit land, they should file a suit to enable the court determine those rights. However, the court cannot allow them to injunct the Applicant to use or dispose the suit land by using the powers of the Land Registrar without a justiciable cause.

19. For those reasons, I allow the Applicant's Application dated 1st November, 2017 as follows:

a. The Restriction which was placed by the Registrar of Lands on the basis of the Respondents' advocate letter dated 31st July, 2017 be and is hereby lifted.

b. The Respondents to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE