



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 4 OF 2018 (ORIGINATING SUMMONS)**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT CIVIL APPEAL NO. 13 OF 2015 (FORMERLY HCCA 10 OF 2012)**

**IN THE MATTER OF THE CHIEF MAGISTRATES CIVIL CASE NO. 256 OF 2010 AND THE CHIEF MAGISTRATES CIVIL CASE NO. 258 OF 2010**

LAWRENCE MUGAMBI RUTERE.....APPLICANT

**VERSUS**

NELLY WACHIRA.....1<sup>ST</sup> RESPONDENT

MILKAH WANGUI MATHENGE.....2<sup>ND</sup> RESPONDENT

**AND**

DISTRICT LAND REGISTRAR MBEERE.....INTERESTED PARTY

**JUDGEMENT**

1. By an originating summons dated 29<sup>th</sup> January 2018 brought under the provisions of **Sections 79 & 80 of the Land Registration Act, 2012, Order 37 Rule 8 of the Civil Procedure Rules** (hereinafter *the Rules*) and **Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (Cap. 21)** the Applicant sought determination of the following questions:-

*a. Was the judgement passed by the Chief Magistrate in the CMCC No. 256 of 2010 successfully appealed against by the Plaintiff in the ELC Appeal No. 13 of 2015 (formerly HCCA No. 10 of 2012)?*

*b. What was the Appellate courts decree as far as Land Parcel Number Mbeti/Gachoka/2651 is concerned?*

*c. Under what circumstances was the caution lodged by the Plaintiff/Applicant on 9<sup>th</sup> March 2012 against the suitland removed?*

*d. Under what circumstances was the 2<sup>nd</sup> Respondent registered as the proprietor of the suitland on 30<sup>th</sup> May 2012?*

*e. Since the Environment Land Court has reversed the judgement of the Chief Magistrate dated 16<sup>th</sup> January 2012, shouldn't this honourable court give the Appellate court's decree dated 11<sup>th</sup> May 2017 effect by ordering the cancellation of the 2<sup>nd</sup> Respondent's name as the proprietor of the suitland?*

*f. Shouldn't this honourable court, thereafter order the Land Registrar to issue a new title deed in the name of the Applicant?*

*g. Who should bear the costs of this summons?*

2. The said originating summons was supported by an affidavit sworn by the Applicant on 29<sup>th</sup> January 2018 and the annexures thereto. The Applicant contended that he had obtained a decree in his favour in *Embu CMCC No. 358/2010 Lawrence Mugambi Rutere V Nancy Muriithi* whereby he was declared the lawful owner of *Title No. Mbeti/Gachoka/2651* (hereinafter *the suit property*). He further contended that later on, the 1<sup>st</sup> Respondent obtained a decree in *Embu CMCC No. 256 of 2010 Nelly Wachira Vs Nancy Muriithi* allowing her to sell the suit property as a "chattel" pursuant to a chattel's mortgage.

3. He contended that on or about 30<sup>th</sup> May 2012 the suit property was transferred by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent, who was her

daughter, despite the subsistence of a caution entered in the register. He, therefore, wanted the court to nullify or cancel the said transfer to the 2<sup>nd</sup> Respondent and to have the suit property restored to him since he was the successful party in *Embu ELCA No. 13 of 2015* whereby the court held that the suit property could not be sold pursuant to a chattel's mortgage.

4. The 1<sup>st</sup> Respondent filed a replying affidavit sworn on 21<sup>st</sup> February 2018 in opposition to the said originating summons. She stated that upon obtaining a decree in her favour in *Embu CMCC No. 256 of 2010* she immediately sold and transferred the suit property to the 2<sup>nd</sup> Respondent. She contended that there was no stay of execution at the material time and that the caution which had been registered at the instance of the Applicant was removed. She denied any fraud, illegality or irregularity in the transfer of the suit property to the 2<sup>nd</sup> Respondent whom she denied was her daughter. The 1<sup>st</sup> Defendant therefore asked the court to dismiss the said originating summons.

5. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 18<sup>th</sup> May 2018 in opposition to the originating summons. She stated that she was not party to the previous proceedings involving the suit property and that she had no notice thereof at all material times save for the decree in *CMCC No. 256 of 2010* pursuant to which the suit property was sold to her. She further stated that she was a purchaser for value of the suit property who had no notice of any prior claims by the Applicant. She further contended that there was no order for stay of execution of the decree at the time the transaction took place.

6. It was the 2<sup>nd</sup> Respondent's contention that the Applicant had failed to inform the appellate court that the suit property had already been sold and transferred to her at the time of the hearing of the appeal. It was her further contention that she had already settled upon and developed the suit property and that should her title be nullified she would suffer unquantifiable loss or damage.

7. When the said originating summons was listed for directions on 6<sup>th</sup> February 2019, all the concerned parties agreed to canvass it through written submissions. The parties also consented to have the summons determined on the basis of the affidavits, statements and documents on record.

8. The Applicant was to file and serve his written submissions within 30 days whereas the Respondents and the Interested Party were to file and serve their respective submissions within 30 days upon the lapse of the period granted to the Applicant. The record shows that the 2<sup>nd</sup> Respondent filed her submissions on 15<sup>th</sup> April 2019, the 1<sup>st</sup> Respondent filed hers on 22<sup>nd</sup> May 2019 whereas the Applicant filed his on 29<sup>th</sup> May 2019. There is no indication on record of the Land Registrar, Mbeere, who was joined as an Interested Party having filed any response or submissions in this matter.

9. The court has considered the Applicant's originating summons dated 29<sup>th</sup> January 2018, the Respondents' affidavits in response thereto as well as the respective written submissions of the parties. The court has also perused the various authorities relied upon by the parties and found that none of them really matches the peculiar circumstances of this case.

10. The court shall, nevertheless, proceed to determine the issues as framed by the Applicant in his originating summons. The court notes that the questions were not elegantly framed to address the particular circumstances of the dispute amongst the parties. For instance, some of the questions framed are so elementary and straightforward that they require just simple answers.

11. The 1<sup>st</sup> question is whether the Applicant successfully appealed against the decree in *Embu CMCC No. 256 of 2010*. There is no doubt from the material on record that the Applicant filed *Embu ELCA No. 13 of 2015* (Formerly *Embu HCCA No. 10 of 2012*). It is also clear from the material on record and in particular the judgement of this court dated 11<sup>th</sup> May 2017 that the appeal partially succeeded to the extent of excluding the suit property from the decree previously issued in favour of the 1<sup>st</sup> Respondent.

12. The 2<sup>nd</sup> question has already been answered in the immediately preceding paragraph. The appellate court held that the Title deed to the suit property could not form the subject of a chattel's mortgage hence the suit property could not be sold pursuant to a chattel's mortgage as known to law. Consequently, the suit property was excluded from the decree in *Embu CMCC No. 256 of 2010* by the appellate court.

13. The 3<sup>rd</sup> question relates to the circumstances under which the caution lodged by the Applicant against the suit property was removed. The Applicant contended and submitted that the suit property was transferred to the 2<sup>nd</sup> Respondent in spite of a caution he had registered against the suit property. The Respondents' contention, on the other hand, was that the caution was lawfully removed by the Registrar before the transfer of the suit property.

14. The issue of the registration and removal of the caution is a matter which would ordinarily be handled by the Land Registrar under **sections 71-74 of the Land Registration Act** (hereinafter *the Act*). Although the Land Registrar was joined as an Interested Party in the originating summons, he did not file any response or submissions in the matter. The court will therefore make do with the scanty material on record on this issue.

15. Under **section 71(1)(a) of the Land Registration Act**, a person who claims to have a right or interest in any land, lease or charge may lodge a caution against the property in issue for the purpose of forbidding registration of dispositions in relation thereto. There is no doubt from the material on record that the Applicant lodged a caution against the suit property claiming a purchaser's interest during the pendency of *Embu ELCA No. 13 of 2015*. The copy of the green card annexed to the Applicant's supporting affidavit indicates that the caution was registered as entry No. 9 on 3<sup>rd</sup> February 2012.

16. So, what is the effect of such caution upon registration? **Section 72(2)** of the Act stipulates as follows in that regard:

**“(2) A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court.”**

17. The Act also provides an elaborate mechanism for the removal of a caution which requires the Land Registrar to give a notice of removal to the cautioner and to hear the concerned parties before removing a caution. The material provisions of **section 73** of the **Act** stipulate as follows:-

**“1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.**

**2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.**

**3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.**

**4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.”**

18. Although the Respondents contended that the caution was lawfully removed by the Land Registrar, there is no material on record to that effect. There is no evidence on record that any notice of removal was given, that the concerned parties were heard and that the caution was ever removed. On the contrary, the copy of the green card on record indicates that the caution (entry No. 9) was still subsisting at the time the suit property was transferred to the 2<sup>nd</sup> Respondent. The transfer to the 2<sup>nd</sup> Respondent is recorded as entry No. 10 dated 30<sup>th</sup> May 2012. It is obvious that there is no entry between entry No. 9 and entry No. 10.

19. The court, therefore, finds that the caution registered as entry No. 9 in the green card was never removed either by the Land Registrar or by court order. The decree in favour of the 1<sup>st</sup> Respondent in *Embu CMCC No. 256 of 2010* did not contain any order for removal of a caution for obvious reasons. The caution registered on 3<sup>rd</sup> February 2012 had not been registered by the time the decree was made on 12<sup>th</sup> January 2012. The said caution was therefore in existence at the time of transfer of the suit property to the 2<sup>nd</sup> Respondent on 30<sup>th</sup> May 2012.

20. The 4<sup>th</sup> question concerns the circumstances under which the 2<sup>nd</sup> Respondent was registered as the proprietor of the suit property. It is obvious from the material on record that the transfer was made on the basis of the decree in favour of the 1<sup>st</sup> Respondent in *Embu CMCC No. 256 of 2010*. However, as indicated earlier, that transfer was undertaken irregularly in the face of a subsisting caution against the suit property.

21. The 5<sup>th</sup> question is whether this court should give effect to the judgement in *Embu ELCA No. 13 of 2015* by ordering cancellation of the 2<sup>nd</sup> Respondent's title to the suit property. This is really the main question for determination in the originating summons. There is no doubt that the Applicant partially succeeded in his appeal. The effect of the partial success was to vary the decree in the 1<sup>st</sup> Respondent's favour in *Embu CMCC No. 256 of 2010* with the consequence that the suit property was **excluded** from the decree.

22. This is not a straightforward issue because of a number of reasons as put forward by the Respondents. First, the 2<sup>nd</sup> Respondent contends that she was not party to either of the two previous suits before the Magistrates court. She was also not party to the appeal. Second, she contended that she was an innocent purchaser for value hence should be protected as such. Third, the Respondents contended that there was no stay of execution at the time the suit property was transferred. Fourth, it was contended that no fraud, illegality or mistake was proved by the Applicant against the current registered owner.

23. Although the court agrees that the 2<sup>nd</sup> Respondent was not party to the previous proceedings before the magistrates court and the appellate court, that by itself cannot give her a blanket shield against cancellation or rectification of title. And although the 2<sup>nd</sup> Respondent was not heard in previous proceedings, she has now been joined in the instant originating summons. She has now been accorded an opportunity of being heard before any adverse action affecting her property rights could be made. There is no way she could have been heard in previous proceedings since she acquired the suit property after conclusion of the two suits in the magistrates court.

24. The court is not satisfied that the 2<sup>nd</sup> Respondent was an innocent purchaser for value without notice of prior claims. The material on record indicates that the green card had an entry which could have alerted the 2<sup>nd</sup> Respondent of a claim by the Applicant. The caution which was registered as entry No. 9 in the green card clearly stated that the Applicant was claiming a purchaser's interest. That caution was subsisting at the time of the transfer and was still subsisting at the time of institution of the instant originating summons.

25. Whereas the court agrees that there was no order for stay of execution of the decree in *Embu CMCC No. 256 of 2010*, such lack of stay did not give the Respondents and the interested party a blank cheque to flout the law by undertaking a transfer in violation of **section 72(2)** of the **Act**. There is no reason why the Respondents did not formally apply to court for removal of the caution or why the Land Registrar did not invoke due process under **section 73** of the **Act** to have the caution removed. It would appear that the Respondents did not want to alert the Applicant of the transfer by invoking due process.

26. The court is aware that the rights of a registered proprietor of land are highly protected under the Act. The court is further aware that one's certificate of title is *prima facie* evidence that the proprietor is the absolute and indefeasible owner and that such title can only be challenged on the limited grounds specified in **section 26** of the **Act**. The grounds of impeachment include fraud, or misrepresentation to which the proprietor was privy, or where the title has been acquired illegally, unprocedurally or through a corrupt scheme. See **Eldoret ELC Case No. 609B of 2012 – Elijah Makeri Nyang'wara Vs Stephen Mungai Njuguna & Another [2013] eKLR**.

27. Although no evidence of misrepresentation is on record, there is evidence on record to demonstrate that the Respondent and the

Interested Party violated the provisions of **section 72** of the **Act** by undertaking a transfer transaction in the face of a subsisting caution. The 2<sup>nd</sup> Respondent, who is the current registered owner, was aware of the encumbrance since it appears on the face of the register as entry No. 9. That is an indication that the transfer of the suit property was not only irregular but also illegal within the meaning of **section 26 (1)(b)** of the **Act**.

28. The court has said enough on the impropriety of the purported transfer of the suit property to the 2<sup>nd</sup> Respondent. The court is satisfied that this is a fit case for cancellation of title and rectification of the register under the Act. The 2<sup>nd</sup> Respondent cannot be said to have no knowledge of the mistake or omission in consequence of which she obtained registration of the suit property within the meaning of **Section 80 of the Act**. The court is consequently inclined to make an order for rectification of the register as sought by the Applicant.

29. The 6<sup>th</sup> issue regards issuance of a new title deed to the Applicant. This cannot really be a stand one issue. It would follow that once the land register is rectified and a new proprietor entered, the new proprietor should be issued with a title document subject to compliance with any applicable statutory requirements.

30. Before concluding this ruling, the Respondents contended that the originating summons should be dismissed because the Applicant had failed to disclose to the appellate court in *Embu ELCA No. 13 of 2015* that the suit property had already been disposed of. The court is of the view that a party is only bound to disclose what he or she may be aware of at any particular time. The material on record indicates that the Respondents and the Interested Party avoided due process under the Act which could have alerted the Applicant of the transfer. Had the Respondents applied for removal of the caution, they would have been obliged to serve the requisite notice. Either way, the Applicant would have been alerted of the desire to have the encumbrance removed and acted accordingly. It is also not clear why the 1<sup>st</sup> Respondent did not inform the appellate court of the transfer.

31. The last question is on costs. Although costs of an action or matter are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the *proviso* to **section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no reason why the successful party should be deprived of costs. The Applicant shall, therefore, be awarded costs of the suit.

There is no good reason why the successful Applicant should not be awarded costs of the originating summons. Accordingly, the Applicant shall be awarded costs of the suit.

32. In a nutshell, all the seven questions framed by the Applicant have been answered as indicated in the preceding paragraphs. The upshot of the foregoing is that the court hereby orders cancellation of the 2<sup>nd</sup> Respondent's registration of the suit property i.e. *Title No. Mbeti/Gachoka/2651* and consequent rectification of the register to have the suit property registered in the name of the Applicant. The Applicant is awarded costs of the suit to be borne by the 1<sup>st</sup> Respondent who facilitated the irregular transfer.

33. Orders accordingly.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 27<sup>TH</sup> day of JUNE 2019.**

In the presence of Ms. Maina holding brief for Ms. Muthoni Ndeke for 1<sup>st</sup> Respondent, Ms. Mbwiria holding brief for Mr. Muriithi for 2<sup>nd</sup> Respondent and in the absence of the Plaintiff and the Interested Party.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**27.06.19**