



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC. APPLICATION NO. 188 OF 2017

PAUL WAINANA WAWERU.....APPLICANT

VERSUS

WAINAINA KAMANU.....1ST RESPONDENT

KEZIAH NJERI GACHANJA

(Being sued as the legal representative

of the estate of CLEMENT GACHANJA).....2ND RESPONDENT

RULING

In a judgment delivered by this court on 4th November, 2016 in favour of the applicant herein in ELC Appeal No. 33 of 2015 which concerned a dispute between the parties herein over the ownership of L.R No. Dagoretti/Uthiru/T.785 (“the suit property”) the court stated as follows in part:

“The material that has been placed before me overwhelmingly points to the possibility of the Appellant having been involved in fraud in relation to his dealings with the suit property. I am in agreement with the Respondents that this court cannot close its eyes to the evidence of fraud placed before it. As much as I am in agreement with the Respondents that the parties should be given an opportunity to have their respective claims over the suit property determined on merit in a court of competent jurisdiction, I am of the view that these proceedings would not be the best forum to determine the said claims. I cannot convert the proceedings of the tribunal which I have held to be a nullity into a suit before this court for the purposes of determining the dispute between the parties over the suit property.

I am of the view that all is not lost for the Respondents. I have noted that the Appellant is not in possession of the suit property or any portion thereof. The Appellant cannot forcefully take possession of the portion of the suit property in respect of which he has raised a claim. He will have to file a suit for the recovery thereof. I think that that would be the best forum for determining on merit the validity of the Appellant’s claim over the portion of the suit property, namely, LR. No. Dagoretti/Uthiru/T.785 which was the subject of the tribunal proceedings.”

Prior to the proceedings giving rise to that judgment, the respondents herein had caused to be registered against the title of the suit property a restriction and cautions to protect their interests in the property. Following the said judgment, the applicant herein who was the appellant in the said appeal has now moved the court in these proceedings by way of Notice of Motion dated 6th October, 2017 seeking the removal of the said restriction and cautions which were registered against the title of the suit property by the respondents. The application has been brought on the grounds that the dispute over the ownership of the suit property was conclusively determined in ELC Appeal No. 33 of 2015 aforesaid through a judgment delivered by the court on 4th November, 2016 in which the applicant was found to be the owner of the suit property. The applicant has contended that following that judgment, the respondents have not taken any step to establish the interests which they claim to have in the suit property. The applicant has contended that the respondents have no valid interest in the suit property to justify the restriction and cautions which they have lodged on the title of the suit property.

The application was served upon all the respondents but was opposed only by the 1st respondent. The 1st respondent opposed the application through notice of preliminary objection dated 15th November, 2018 and replying affidavit sworn on 17th December, 2018. In the preliminary objection, the 1st respondent has contended that the applicant should have made an application before the Land Registrar Kiambu in the first instance for the removal of the said restriction and cautions before coming to this court. In his affidavit, the 1st respondent has averred that the applicant acquired the suit property illegally through collusion, fraud and misrepresentation with a view to depriving the 1st respondent of

the property which lawfully belongs to him and which he has occupied since 1965. The 1st respondent has averred that the applicant has no interest in the suit property and has never been in possession thereof. The 1st respondent has averred that the restriction and cautions on the title of the suit property have protected him and his family from losing the property. The 1st respondent has urged the court to retain the same so as to prevent a disaster that would befall him if the property is disposed of by the applicant. The 1st respondent has averred that he has filed a suit against the applicant at the Principal Magistrate Court at Kikuyu namely, Kikuyu PMCC ELC No. 83 of 2018 over the suit property. The 1st respondent has urged the court to retain the said restriction and cautions in place to preserve the suit property pending the determination of the said suit pending at Kikuyu. The 1st respondent has contended that since the applicant is now faced with a suit, he is likely to sell the suit property to third parties so as to defeat any decree that may be passed against him.

The application was heard on 6th February, 2019. I have considered the application together with the affidavit filed in support thereof. I have also considered the 1st respondent's notice of preliminary objection and replying affidavit filed in opposition to the application. Finally, I have considered the submissions by the applicant in person and the response thereto by the advocate for the 1st respondent. The following is my view on the matter. I find no merit in 1st respondent's preliminary objection to the application before the court. Under sections 73(1) and 78(2) of the Land Registration Act, 2012 both the Land Registrar and the court have power to remove cautions and restrictions registered against title to land. I am in agreement with the 1st respondent that it is necessary for applications for removal of cautions and restrictions to be made to the Land Registrar in the first instance. That is not to say however that an application filed in court for that purpose before exhausting that alternative remedy would be incompetent. Each case has to be considered on its own facts. In view of the history of the dispute between the parties and litigation in which they have been involved which culminated in the judgment of this court made on 4th November, 2016 in ELC Appeal No. 33 of 2015, I am of the view that this is the ideal forum for determining the application for removal of the restriction and cautions registered by the respondents against the titles of the suit property.

On the merit of the application, it is not disputed that the applicant is the registered proprietor of the suit property. It is also not disputed that the respondents have registered a restriction and two cautions against the title of the suit property. The restriction was registered on 10th August, 2000 pending the resolution of a dispute over the ownership of the suit property between the applicant and the 1st respondent. The first caution was registered on 14th August, 2000 by the 2nd respondent claiming joint ownership interest in the suit property. The second caution was also registered on 14th August, 2000 by the 1st respondent claiming joint ownership interest in the property. The said restriction and cautions have been in place now for the last 8 years. In the judgment delivered on 4th November, 2016 in ELC Appeal No. 33 of 2015 this court stated that the decision in that appeal left the issue of the ownership of the suit property pending. The parties were to consider filing other proceedings for the determination of the issue. As at 11th October, 2017, when the applicant filed the present application, the respondents had not taken any action to establish their claims over the suit property. It was not until 14th December, 2018, two years after this court's judgment in the appeal aforesaid and while this application was pending that the 1st respondent filed a suit at Kikuyu Law Court against the applicant, the 2nd respondent and one, Charles Ngamini for the determination of the dispute over the ownership of the suit property.

I am of the view that it is unjust to keep a restriction or caution on the title of a property against the wishes of the registered proprietor for an indefinite length of time like in this particular case. Now that the 1st respondent has filed a suit against the applicant and the 2nd respondent for the determination of the dispute over the ownership of the property, the court which is seized of the matter should be in a position to consider whether it would be appropriate to stop or prevent the applicant from dealing with the suit property. I have noted from the plaint filed in the new case at Kikuyu Law Court that the 1st respondent has sought an order of injunction against the applicant among others from interfering with the suit property. I am of the view that that is the appropriate forum for the 1st respondent to seek conservatory orders in respect of the suit property pending the determination of the dispute. I am of the view that the continued existence of the restriction and cautions complained of are unjustified in the circumstances. They are in my view giving the respondents undue advantage over the applicant.

Due to the foregoing, I find merit in the applicant's application dated 6th October, 2017. The application is allowed in terms of prayers 1, 2 and 3 thereof but the execution of the order is stayed for a period of six (6) months from the date hereof within which the respondents if so advised should move the court at Kikuyu for an injunction if they have not done so to preserve the suit property which application shall be considered by that court on its own merits. Each party shall bear its own costs.

Delivered and Dated at Nairobi this 18th day of July 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

The Applicant present in person

Mr. Njogu for the 1st Respondent

Mr. Njogu h/b for Mr. Gachanja for the 2nd Respondent

C. Nyokabi-Court Assistant