



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 134 OF 2018

RAPHA HOSPITAL & CLINIC

ELDORET COMPANY.....PLAINTIFF/RESPONDENT

VERSUS

ABDUL AZIZ KANA.....1ST DEFENDANT/APPLICANT

WAHEDHA JAFERRALI KANA.....2ND DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application dated 16th May 2019 by way of Notice of Motion the defendant/applicants seeking for the following orders:

- a) Spent.
- b) That this honourable court grants an order compelling the plaintiff to continue remitting the monthly rent to the defendant on or before the 5th day of every month pending the hearing and determination of this application.
- c) That this court grants an order compelling plaintiff to continue remitting the monthly rent to the defendant on or before the 5th day of every month pending the hearing and determination of this suit.
- d) That the caution placed, registered against and or on the title ELDORET MUNICIPALITY BLOCK 13/255 by the plaintiff herein on 7th June 2018 be and is hereby removed and set aside.
- e) That the stay of the proceedings of Nairobi Business Premises Tribunal No. 19 of 2018 between Abdul Aziz Kana and Rapha Hospital & Clinic Eldoret Ltd be and is hereby reviewed, revised, vacated, removed and or set aside.
- f) That the orders obtained by the Respondent herein consequent to their application dated 17th December 2018 and which orders were issued by the court on 17th December 2018 granting temporary injunction against the defendants from interfering with the suit property ELDORET MUNICIPALITY BLOCK 13/255 pending the hearing of this application inter partes and are hereby reviewed, revised and set aside.

On 22nd May 2019 both Counsel for the plaintiff and the defendant recorded a consent to the effect that the plaintiff respondent do pay the monthly rent on or before 7th of every month and when the matter came up for mention Counsel for the defendant confirmed that the plaintiff is in compliance of the said consent order.

Counsel for the defendant/respondent submitted on the need for the removal of the caution lodged on the suit land by the plaintiff on 7th June 2018 on the ground that it was contrary to section 25, 26 and 71 of the Land Registration Act. Counsel submitted that the Chief Land Registrar had un-procedurally caused to be registered a caution on grounds of purported existence of a registered lease despite being the bearer of the title file/folder and being aware that there is no lease registered against the title.

It was Counsel's submission that the sale agreement dated 17th May 2017, lapsed on the 16th August 2017, as was agreed by the parties under clause 2 and therefore there was no privity of contract. Counsel gave an elaborate chronology of the transaction between the parties and stated that the defendant had filed a suit on 29th October 2018 which has now been overtaken by events with the filing of this suit.

Mr. Ochieng submitted that the sale agreement between the plaintiff and the defendant lapsed hence they do not have any proprietary interest

in the land as envisaged by section 71 of the Land Registration Act

Counsel further submitted on whether the Land Registrar was not right in registering of the caution on the suit property without proof on a proprietary interest the defendant having lodged a protest. Counsel further submitted that the plaintiff is not entitled to the injunction orders as it has not met the threshold for grant of such equitable orders. Counsel therefore urged the court to dismiss the plaintiff's application for injunction and grant the orders for removal of the caution as prayed.

Plaintiff's Submission

Counsel submitted that the court has jurisdiction to hear and determine the application before the court. On removal of caution Counsel cited Section 73 (1) of the Land Registration Act No.3 of 2012 states:-

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.

On discharge, variance and setting aside of injunction orders under Order

40 Rule 7 of the Civil Procedure Rules 2010

Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.

Counsel submitted that it is admitted by the Plaintiff that it lodged a caution against the suit property known as *ELDORET MUNICIPALITY BLOCK 13/255* and the same was registered on 7th June 2018 claiming a purchaser's interest. Section 71 of the Land Registration Act No. 3 of 2012 states that a person who =

a. *claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;*

b.....

c.....

May lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land, lease or charge

Counsel submitted that it is the Plaintiff's contention based on the agreement of sale entered with the Defendants herein that it had a right over the suit property which right gave it capacity to lodge the caution and that the defendant wrote a letter dated 28th May 2018 threatening to sell the property to third parties without its consent and detriment.

Counsel cited the provisions of section 71 (2) of the Land Registration Act No. 3 of 2012 highlights the purpose of the caution to include:-

a. *forbid the registration of dispositions and the making of entries;*

or

b. *forbid the registration of dispositions and the making of entries to the extent expressed in the caution*

Section 73 of the Land Registration Act envisions removal of cautions in three ways:-

a. *By withdrawal by the cautioner;*

b. *By removal by order of the Court; or*

c. *By removal by order of the Registrar*

Counsel cited the ways in which suits are supposed to be instituted and relied on Order 7 Rule 3 of the Civil Procedure Rules 2010 which prescribes the way in which a claim may be instituted by the Defendant.

"A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the Plaintiff, any right or claim whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof."

Miss Chesio submitted that the issue of whether or not the caution should be lifted is a contentious issue fit to be determined during the

substantive hearing of the main suit where parties call evidence and the Defendants prove their case on a balance of probabilities as was held by Justice **Munyao in Joseph Kibowen Chemjor v William C Kisera [20131 eKLR** where although the ruling was on a preliminary objection the Court rendered itself on pleadings for lifting a caution as follows:-

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. A matter touching on whether or not a caution needs to be removed is in my view a civil action which then must be commenced in the manner prescribed by the Rules. The issue whether the caution should be removed or should remain is at that moment a contentious issue that must be tried on merits.

Counsel further submitted that in asking the Court to lift the caution, the Defendants are seeking that the Court determines the rights of the parties before which is tantamount to determining the substantive issue and issue mandatory orders at a substantive stage. Counsel therefore submitted that the right to be heard and adduce evidence on an application to lift caution that the Uasin Gishu Land Registrar had issued a hearing notice herein for the parties to appear and make a representation which is still pending before the Land Registrar for hearing as at now.

Counsel further relied on the principle of Audi Alteram partem which is enshrined in **Article 50 (1) of the Constitution, Article 7 of the African Charter on Human and People's Rights and Article 14 (1) of the International Covenant on Civil and Political Rights**. That at its core the right to fair trial demands that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. That the right to fair trial is not subject to any kind of limitation. The Human Rights Committee in its General Comment 13 on fair trial declared that certain aspects of the right to a fair trial under Article 14 of the International Covenant on Civil and Political Rights could not be the subject of derogation even under emergencies. Although Article 24 of the Constitution 2010 provides for the limitations of fundamental rights and freedoms, the right to fair trial cannot be limited as expounded under Article 25 of the Constitution. Under the said Article, the right is listed as one of the non-derogable rights.

Counsel therefore submitted that the Defendants are not entitled to the order of lifting caution order at this stage and they have recourse of filing a counterclaim and seek as is provided under Section 75 of the Land Registration Act for compensation should the Court make a finding that the caution was wrongfully and without reasonable cause lodged against the title. Counsel cited the case of **Kiptuya Ngerech Too v Peris Wangui macharia & another [20181 eKLR and Meshack Okumu Otiende & 3 others v Charles Odongo Ngani [20151 Eklr**

On the of discharge, variance and or setting aside the orders issued on 17th December 2018 counsel submitted that the Defendants/Applicants were under a duty to establish that:

- a) There exists material non-disclosure made by the Plaintiff occasioning abuse of the Court process at the ex-parte proceedings;
- b) There was blatant misrepresentation and suppression of material facts by the Plaintiff of utmost importance in relation to the issues under consideration to warrant discharge of the orders herein;
- c) The Plaintiff has been deceitful to the Court and the other parties to the litigation;
- d) Without prejudice to the above, the Plaintiff is undeserving of locus poenitentiae (opportunity to withdraw from a contract or obligation before it is completed)

Counsel submitted that the Plaintiff is in possession of the suit property, it has exhibited a high quality and degree of sincerity and honesty and has kept nothing that touches on the matter away from the Court. It has acted in utmost good faith. That the defendant had issues threats to sell the property vide a letter to the plaintiff and that the only thing standing between the defendant and actualization of the threats is the order of injunction issued by the court on 1st December 2018.

Miss Chesio also submitted that the plaintiff has demonstrated good faith by the continuance of payment of rent while the suit is pending. Counsel therefore urged the court to dismiss the application for lifting of caution and confirm the injunction orders earlier granted by the court.

Analysis and Determination

The court gave directions that the two applications for review or setting aside of the ex parte orders granted by the court on 17th December 2018, lifting of the caution lodged on the suit land, payment of monthly rent by the plaintiff pending the hearing and determination of the suit and finally confirmation of the injunction until this suit is heard and determined be heard together.

It should be noted that Counsel recorded a consent order on 22nd May 2019 allowing the defendant's plea for payment of rent on or before 7th day of every month of which Counsel for the defendant confirmed that the plaintiff had complied with. The issues that remain unresolved are as to whether the caution lodged on the suit land should be lifted at this interlocutory stage or wait for the full hearing. The other issue is whether the plaintiff has established a prima facie case with a probability of success.

It is not in dispute that the plaintiff and the defendants entered into a transaction with an intention of selling the suit property. The issues that will be handled at the hearing are as to whether the agreement is still in force or it lapsed. Determining that issue at this stage will be tantamount to handling the substantive case on an interlocutory application without hearing evidence from both parties. This could only happen if the parties entered into a consent compromising the matter.

The issue as to whether the caution can be lifted at an interlocutory stage, there are three options provided for removal of caution under Section 73 of the Land Registration Act which are either by the cautioner, by a court order or by the Registrar upon notifying the cautioner.

In this particular case the only option that is applicable is removal by court as the cautioner does not intend to remove it as there is a dispute pending before the court and requires the preservation of the substratum of the case. Further a summons was issued to the parties by the Land Registrar for a hearing which is still pending before the Registrar.

When there is a contentious issue to be determined then the best way forward is to hear the parties to give their side of the story why the caution should remain in force or why it should be removed. If the court finds that the cautioner placed the caution without a good cause then if the party asks for damages then the court would be at liberty to award the same. It would not be in the interest of justice to remove the caution at this stage when the dispute is still pending before the court.

The court finds that removal of the caution might interfere with the substratum of the case but the court orders that the plaintiff continues paying rent as agreed until this case is heard and determined. The court further orders that the plaintiff does not engage in any further development of the property including construction failure of which the injunction shall lapse. Parties to comply with order 11 within 30 days and fast-track the matter for hearing.

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF OCTOBER, 2019.

M.A. ODENY

JUDGE

RULING READ in open court in the presence of Mr.Ochieng for Defendant and in the absence of Miss.Cheso for the Plaintiff.

MR. Mwelem – Court Assistant