



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION
ELC NO. 126 OF 2016

PETER RAMOYA PLAINTIFF

VERSUS

EUSEDUS BARAZA DEFENDANT

R U L I N G

1. The application before me is a Notice of Motion dated 1/3/2017 filed on the same date. The application has four (4) prayers on the face of it but at this stage, only two – prayers 3 and 4 – are for consideration, the others having been granted or considered at an earlier stage. The prayers for consideration are as follows:

Prayer 3: That the caution/restriction registered on L.R. No. BUKHAYO/BUGENGI/6496 be and is hereby removed forthwith.

Prayer 4: That costs of this application be provided for.

2. According to the Applicant – **PETER RAMOYA** – the Respondent – **EUSEDUS BARAZA** – has interfered with his land Parcel No. L.R. **BUKHAYO/BUGENGI/6496** (hereafter “disputed land”) by placing a restriction without any colour of right. The Applicant averred that his plea to the land registrar to remove the restriction has fallen on deaf ears. The Applicant further said that he is in dire need of funds for medical treatment and he wants to raise money by using the disputed land as security. The Respondent is said to have no rights in the disputed land.

3. The supporting affidavit to the application states, *inter alia*, that the Applicant, aged 81, is the Respondent’s father. The Respondent has been violent to him, he deponed, and has made him a vagabond by throwing him out of his home on land parcel No. BUKHAYO/BUGENGI/7316. He wants to raise money for his treatment and in that regard, the disputed land is intended to be used as security.

4. The Respondent opposed the application vide a replying affidavit filed on 9/11/2017. He admitted that he has placed a restriction on the disputed land claiming beneficiary interest. According to him, the restriction cannot be removed as it was not prayed for in the suit filed herein on 15/11/2016. And even if the plaint were to be amended – and it was – to include the prayer for removal of the restriction, there still cannot be removal at the interlocutory stage as the suit would need to be fully heard and determined.

5. The Respondent also deposed that the restriction was placed by the County Land Registrar, not the Respondent, and in absence of joining the Land Registrar as party, the restriction cannot be removed.

6. The application was canvassed by way of written submissions. The Applicant reiterated that the Respondent has been cruel and/or violent to him, with some of the reported violence forming the basis of some pending criminal cases against the Respondent. The Applicant further submitted that the alleged beneficiary interest claimed by the Respondent does not exist in law.

7. According to the Applicant, the Respondent is an ungrateful son who desires to see him dead so that he can inherit his properties. He reiterated that the Respondent has no proprietary rights in the suit property and reinforced his argument by availing the decided case of **GITHUNGU KIHITO KIMANI vs ANTONY KIIHIKO NAKURU HCC NO. 338 of 2004**.

8. The Respondent's submissions were filed on 24/11/2017. According to the Respondent, we are dealing with a restriction placed on the title by Land Registrar, and not a caution, which is in law placed on a title by a party. It was pointed out that the law applicable – cited as Sections 76 and 78 of Land Registration Act – requires that a Notice be given to the Registrar before the court removes a restriction. The Applicant herein was faulted for not giving notice to the Registrar.

9. The Respondent also submitted that the prayer for removal of restriction is included in the amended plaint that was filed later. He reiterated that it would be improper to deal with it in the interlocutory stage.

10. I have considered the application, the response made, rival submissions, and the suit as generally filed and defended. The law is as stated by the Respondent. The Applicant seems to confuse a restriction and caution. That is why in various instances in the application, he talks of “caution/restriction” as if the two are synonymous. They are not but they are generally confused. There is also another legal device generally confused with these two; the inhibition.

11. The differences between the three legal devices lies in where they originate. In other words, where do they come from? A caution finds its way to the land register from a party interested in the land. A restriction on the other hand finds its way to the same register from the Land Registrar himself while an inhibition originates from the courts. In terms of operations however or their intended purpose, the three devices generally serve similar purposes. The applicable law itself – Land Registration Act, 2012 – does not treat the three as the same. Inhibitions, for instance, are provided for in Sections 68, 69 and 70 while cautions find their place and space in Sections 71, 72, 73, 74 and 75 of the same Statute. Restrictions are to be found in Sections 76, 77 and 78. Quite clearly, the three devices would not have their separate provisions if they were the same.

12. In this particular matter, we are dealing with a restriction. As correctly pointed out by the Respondent, it is the Land Registrar who places it on the land register and the law enjoins that the Land Registrar be notified before it is removed. If the Applicant had served the Land Registrar with the Notice of Motion herein, there would be no need of a notice because the Notice of Motion is itself a Notice. And to serve the Land Registrar with a Notice, one would expect that the land Registrar would be enjoined as a party. All this was not done.

13. As things stand, the Applicant wants the restriction removed without notifying or involving the Land Registrar. That would be in violation of the law.

14. The Respondent also pointed out that there is a prayer for removal of caution in the amended plaint filed later. Well, it's true that there is such a prayer. And when such a situation obtains, one would expect that full trial is required before removal. The prayer then to remove the restriction on the basis of an interlocutory application seems to me misplaced as it is seeking to deal with a final order before a full trial. In other words, it is a premature prayer at this stage. One only need to ask oneself which prayer would be granted after full trial if the same prayer is granted at this stage.

15. I need to point out that the court is not being heartless. The concerns raised by the Applicant concerning this health are appreciated. But it also needs to be stressed that the law has to be complied with at all times. It is from following the law that justice is done. It is not good to bend the law to

accommodate a situation. As the saying goes: *FIAT JUSTITIA RUAT CAELUM* (Let justice be done though heavens fall). I think we should focus on expediting the hearing of the case.

16. It is in the light of the foregoing that I find the application herein unmeritorious and dismiss the same with costs.

Dated, signed and delivered at Busia this 28th day of February, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: