



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 76 OF 2017**

**TOLELINYANG LOMONGONI.....PLAINTIFF**

**VERSUS**

**CHEMORU TOLELINYANG.....DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced these proceedings by way of a plaint dated 21/4/2017 filed on the same day.
2. The defendant filed a defence dated 26/5/2017 on 2<sup>nd</sup> June, 2017.
3. Hearing of this suit took place on 13/12/2017 and 27/2/2018. Parties filed their written submissions. The plaintiff filed his on 13/4/2018 and the defendant on 11/4/2018.

**The Plaintiff's Case**

4. The plaintiff's case is that the defendant has unlawfully registered a caution over **LR No. West Pokot/Siyoi"B"/8** of which the plaintiff is the absolute registered proprietor. The plaintiff avers that he has no intention of disposing of the land without knowledge of his family members and has applied to the Kapenguria Land Control Board for Consent to subdivide the land parcel into three portions which consent was granted on 11/4/2016. He has written to the Registrar on numerous occasions seeking that the caution be removed but the Registrar has adamantly refused to do so. This, he says, frustrates his intention to subdivide his land among his family members. He therefore prays for the following orders:-

- (a) **The defendant be compelled to remove the caution on LR. No. West Pokot/Siyoi"B"/8.**
- (b) **An order to issue to the Land Registrar Kapenguria County to remove the lodged caution.**
- (c) **Costs of the suit.**

**The Defendant's Defence**

5. The defendant's response to the claim is that the caution was lodged in good faith to protect her beneficial interest in the land parcel. She states that the suit land was subdivided when her co-wife came into the family setup and each wife has been peacefully occupying her respective portion since then. She avers that the plaintiff has already disposed of a portion of the land to some two people and the subdivision is only intended to formalize her dispossession thereof. She avers that since the initial submission in the year 2003, her sons have occupied the portions that were allocated to them by the plaintiff and extensively developed them. She pleads that no *prima facie* case has been made out against her and seeks that the suit be struck out preliminarily.

**Evidence of the Parties**

6. The plaintiff produced the original title to the land in evidence of his ownership thereof. He admitted he has two wives who include the defendant. The first wife has 5 boys and 3 girls. He acquired the land before marrying any of the two wives. He wanted to subdivide the land among his two wives and retain a 10 acre portion for himself. He wanted both houses to have equal portions and to this end he procured the Kapenguria Land Control Board's Consent. His testimony is that he never showed any of the wives any boundary, but only told them to build at specific places. The plaintiff therefore denies subdividing the land. He avers that he went to the Board with the defendant's first son but the defendant refused to attend the Board meeting. The issue has also been discussed before the Chief and the Land Registrar, both officials who recommended that the matter be resolved at home.

**The Defendant's Evidence**

7. The defendant testified that when she got married to the plaintiff she started living on the suit land. The plaintiff now wants the land divided so that the second wife can have a share. The second wife at first settled at Chemusuk but later came to the suit land and found the defendant living thereon. The farm was subdivided and posts were fixed into the ground to mark their respective portions common boundary. Each wife was therefore given the portion they are currently living on.

8. The plaintiff later on subdivided the defendant's portion among her five sons, who fenced off those portions and planted trees along their boundaries. She avers that her husband's portion was lumped together with the second wife's and she only registered a caution over the suit land to prevent the plaintiff from taking over her portion by force. One of the alleged buyers already lives on the farm the other buyer does not. She did not know when her husband sold the land to these buyers and she was not involved in the subdivision that led to the creation of the bought portions. According to her, the caution she has lodged over the land should remain in place till the plaintiff agrees to share the proceeds of the sale with her. She admits that her portion is larger than the 2<sup>nd</sup> wife's and attributes this to her seniority.

9. **DW1 Nguriakor Limareng** stated that he witnessed the division of the suit land into two portions. He testified that he fixed posts along the agreed boundaries on the lower side of the land, there was a river that formed a boundary between the two portions. Also sisal plants were also planted along the boundary. All this was done in the presence of the plaintiff. The land was therefore subdivided among the plaintiff's wives without any portion being retained by the plaintiff.

10. **DW3, Seromet Shonget**, testified that he knew of the subdivision of the land among the plaintiff's wives. He testified that there is a portion that was left on the upper side of the road and the plaintiff said that that was his portion. According to DW3, the portions belonging to the two wives are clearly marked on the ground. His evidence corroborated the defendant's claim that her sons live on their clearly demarcated portions just as the plaintiff settled them.

### **The Plaintiff's Submission**

11. The plaintiff submitted that being 80 years old he is eager to subdivide his land as he does not want his families to fight over the land parcel upon his demise. The plaintiff also drew the attention of the court to the content of the defendant's testimony to the effect that she wanted money from the plaintiff in order to withdraw the caution she had lodged over the suit land.

12. It is the submission of the plaintiff that the defendant, being a recognized spouse, is entitled to spousal rights which are an overriding interests "in the matrimonial property" hence her interests are secure without having them noted in the register. It has been submitted that the subdivision does not disentitle the defendant to her share of the property.

### **The Defendant's Submission**

13. The defendant's submission is that the plaintiff sold land to one Yarangiro without the defendant's knowledge. She also submitted that when her land was affected by a water way leave, the plaintiff never paid her adequately after receiving the compensation arising therefrom. She states that though the plaintiff confirms that he intends to subdivide the property, the land had been surveyed before and parties should agree before the caution is removed.

### **Determination**

14. I find that the dispute herein revolves mainly on whether the new subdivision should affect the size of the land now occupied by the defendant and her sons. The defendant is apprehensive that her land may be reduced in size. The plaintiff on the other hand has made it clear in these proceedings that he intends to make the parcels occupied by his two wives equal in size. The question that this court should answer is whether it should order the caution to be removed.

15. **Section 71** of the **Land Registration Act** provides for the lodging of a caution by a person who 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 the Act, or who is entitled to a licence or who has presented a bankruptcy petition against the proprietor of any registered land, lease or charge.

16. In the instant case the defendant lodged the caution against the suit land as a licensee for she is a wife to the plaintiff who, being the registered owner, allowed her to occupy the land in such capacity.

17. A licensee cannot bar the registered proprietor from enjoying the full rights he is otherwise entitled to under title that he holds. However where the licensee is a spouse to the land owner, other additional statutory rights do exist under the Constitution and the law. **Article 68 (c) (vi)** of the Constitution of Kenya 2010 provides that Parliament shall enact legislation to protect the dependants of deceased persons holding interests in any land including the interests of spouses in actual occupation of land. **Article 45** of the Constitution of Kenya 2010 recognizes the family as the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the State. This court must have the provisions of the latter clause in mind when dealing with the question of whether lodging of a caution by the spouse is proper and if that caution should be removed.

18. Before reaching that point however there are statutory mechanisms in the Land Registration Act for the removal of a caution and this court must question whether those mechanisms have been exhausted by the plaintiff prior to coming to court. **Section 73** of the **Land Registration Act No. 3 of 2012** provides for removal of a caution. Of course the caution may be removed by the cautioner if she wishes and in this case she does not wish that it be removed as she states that it protects her rights.

19. Secondly the Registrar at the instant of the plaintiff can remove the caution under **Section 73 (2) - (6)**. Regarding this mechanism the plaintiff avers that he has tried to get the Land Registrar to remove the caution but in vain. A letter from Philip Magal & Co. Advocates to the Registrar is exhibited among the plaintiff's documents and it shows that it was received at the West Pokot Land Registry on 26/4/2016. It has been alleged by the plaintiff that the Land Registrar failed to remove the caution when he raised an objection. This court notes that

removal of a caution is not necessarily the automatic outcome of an objection such as the plaintiffs. However, it has been held before that the three methods of removal of caution are independent of one another such that a person does not have to demonstrate that he has attempted to have the caution removed by the Registrar before moving the court for an order of removal of the caution. It is also noted however that the matter of removal of caution should be brought to court only as a last recourse. See case of **Joseph Kibowen Chemjor -vs- William C. Kiseru Eldoret Misc. Case No. 2 of 2013 [2013] eKLR**.

20. In **Ngari Nthumbi -vs- Faithi Kathoni M’Kanga [2015] eKLR** the court ordered the caution removed for the reason that the plaintiffs were not holding the land as trustees and the defendant had not demonstrated any recognizable interest such as that shown by the defendant herein. However even in this case the court is mindful of the fact that the plaintiff is registered as the proprietor of the suit land and is therefore entitled to all rights and privileges that are protected by **Sections 24 and 25** of the Land Registration act.

21. In the case of **Simon Kimemia Muthondu -vs- Moses Mugo Maringa [2017] eKLR** the court stated as follows:-

***“In considering an application for the removal of a caution placed on land which is the subject of a dispute the court will no doubt take into account the circumstances and justification for which the caution was lodged; what interests the person lodging the caution has on the land and what prejudice will be caused to the other party if the caution is removed”.***

22. Would it then not be possible where a cautioner has lodged a caution to have the caution maintained for an unnecessarily prolonged period if the court finds that there are good grounds for lodging it even when the cautioner is only interested in part of the land?

23. I think that to avoid that scenario, this court should balance the rights of both the parties, but also with its sight on claims made by the defendant that there are other persons settled on the land by the plaintiff who are likely to be affected adversely by the orders of removal of the caution. It was the plaintiff’s duty to lay his case out very clearly in order for this court see that no such interested parties will be adversely affected. He has not done so. The evidence presented by the plaintiff is quite scanty in nature and only relates to removal of the caution and his attempts towards that end. No maps, or documents have been produced to show that those persons will not be affected. I also take stock of the fact that the plaintiff is said to have some land reserved for him “on the upper side to the road”, whatever that may mean, yet he is said to be putting into place a subdivision that will reduce the acreage of the defendant and which may dispossess of some of the very sons he had earlier on given land.

24. This court cannot fathom to what extent these parties will be affected by the remove of the caution, if it were ordered so in these proceedings, and this is solely due to the silence of the plaintiff over the issue. I am inclined to believe that such information would have enabled this court to issue a final decision on the removal of the caution but as things stand now, this court cannot do so. For the reason of the dearth of information provided by the plaintiff I therefore find that this claim is unmerited and it should be hereby struck out.

25. I therefore strike out the suit but with no orders as to costs.

**Dated, signed and delivered at Kitale on this 30<sup>th</sup> day of May, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**30/5/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the parties

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**30/5/2018**