



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1080 OF 1977**

**JOSEPH KIHUGU MWENJA (Suing as personal**

**representative of WAWERU KIHUGU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOSEPH MWANGI (Acting as personal**

**representative of ESTON MBOGO).....1<sup>ST</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**AND**

**FREDRICK KAMAU SIMON.....INTERESTED PARTY/APPLICANT**

**RULING**

What I have before me is the Interested Party's application brought by way of Notice of Motion dated 24<sup>th</sup> March, 2014 in which the Interested Party has sought an order lifting and cancelling an inhibition that was registered against the title of Land Reference No. Loc. 2/Mairi/2 (hereinafter referred to as the "the suit property") on 21<sup>st</sup> August, 2000 inhibiting the registration of any dealings with the suit property until further orders by the court. The said inhibition was registered against the title of the suit property pursuant to an order that was made by Amin J. on 8<sup>th</sup> August, 2000 following an application dated 1<sup>st</sup> August, 2000 by the Plaintiff.

The Interested Party's application was supported by an affidavit sworn by the Interested Party on 24<sup>th</sup> March, 2014. The application was opposed by the Plaintiff/Respondent through a replying affidavit sworn on 20<sup>th</sup> November, 2014.

**Interested Party/ Applicant's case:**

The Interested Party/Applicant stated that he was the registered owner of the suit property. He stated that in 1977 the plaintiff's father one, Waweru Kihugu (deceased) instituted this suit against the 1<sup>st</sup> Defendant's father, Eston Mbogo (also deceased) seeking an order that he (Waweru Kihugu) had acquired the suit property by adverse possession. He stated that in 1997, he charged the suit property in favour of Kenya Commercial Bank to secure a loan that was advanced to him by the said bank. The Interested Party stated on 21<sup>st</sup> August, 2000 an order of inhibition was registered against the title of the suit property inhibiting any dealings with suit property pending further orders by the court. He stated that on 18<sup>th</sup> July, 2005 he was added to this suit as an interested party. The Interested Party contended that since his joinder to the suit, the Plaintiff/Respondent has neglected to prosecute the matter. He contended that the existence of the said inhibition has prevented him from utilising the suit property and that there was no justifiable cause for the continued existence of the same on the register of the suit property more than 13 years since it was placed. He urged court to vacate the inhibition.

**The Plaintiff/Respondent's Case:**

The Plaintiff stated that sometime in 1964, his father Waweru Kihugu (deceased) purchased the suit property from the 1<sup>st</sup> Defendant's father, Eston Mbogo (also deceased) who neglected to transfer the suit property to him. He stated that in 1977 his late father instituted this suit claiming the property by adverse possession. He stated that by a judgment that was delivered Platt on 12<sup>th</sup> August, 1980, the court held that the 1<sup>st</sup> Defendant's father was holding the suit property in trust for his (the Plaintiff's) father and 1<sup>st</sup> Defendant's father was ordered to transfer the suit property to his (the Plaintiff's) father. The Plaintiff stated that the 1<sup>st</sup> Defendant's father died after the said judgment and

while his father was in the process of having the said judgment executed, the 1<sup>st</sup> Defendant obtained grant of letters of administration in respect of the estate of his father and fraudulently transferred the suit property to himself and thereafter to the Interested Party.

The Plaintiff stated that on 29<sup>th</sup> November, 1982, the court permitted the Deputy Registrar to execute the necessary documents to facilitate the transfer of the suit property to his father pursuant to which order, the Deputy Registrar executed an instrument of transfer of land on 11<sup>th</sup> January, 1983 transferring the suit property to his father. The Plaintiff stated that following the discovery of the fraudulent transfer of the suit property to the Interested Party, the court made an order on 6<sup>th</sup> April, 1984 for the rectification of the register of the suit property by the cancellation of the name of the Interested Party and replacement thereof with the name of his father. The Plaintiff stated that upon service of this order upon the 2<sup>nd</sup> Defendant, he discovered that the Interested Party had charged the suit property to Kenya Commercial Bank to secure a loan. The Plaintiff stated that on 30<sup>th</sup> October, 1984, the court ordered on his application that the Charge that had been executed by the Interested Party in favour of Kenya Commercial Bank was fraudulent and that the 2<sup>nd</sup> Defendant was to proceed with the rectification of the register for the suit property as had been ordered by the court on 5<sup>th</sup> April, 1984. The Plaintiff stated that following this order, the suit property was purportedly registered in the name of his father and his father who was old and illiterate was issued with a purported Land Certificate dated 14<sup>th</sup> February, 1985. The Plaintiff stated that the Land Certificate that was issued to his father was fake and invalid as it was not signed by the 2<sup>nd</sup> Defendant. The Plaintiff stated that it was after the death of his father that he discovered that the land certificate that was issued to him had no signature of the 2<sup>nd</sup> Defendant.

The Plaintiff stated further that in June 1988, he saw an advertisement by Samburu auctioneers of the intended sale of the suit property with the Interested Party as the owner thereof and judgment debtor in Nakuru HCC No 145 of 1993. He stated that he raised an objection to the attachment of the suit property and the same was lifted on 17<sup>th</sup> November, 1988 after establishing his interest in the suit property. The Plaintiff stated that the 2<sup>nd</sup> Defendant had not complied with the orders that had been made by the court for the registration of the suit property in the name of his father. He stated that the suit herein is finalised and that the problem with the execution of the court decree had arisen as a result of the loss of the register for the suit property at the 2<sup>nd</sup> Defendant's office and the disappearance of the many court orders that had been made in the matter from the file kept by the 2<sup>nd</sup> Defendant. The Plaintiff stated that the Interested Party wanted the inhibition on the title of the suit property lifted so that he could sell the property.

#### Analysis and determination of the issues arising:

I have considered the Interested Party's application together with the supporting affidavit. I have also considered the affidavit filed by the Plaintiff/Respondent in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties and the authorities that were cited in support thereof. This is my view on the matter. It is not in dispute that the court entered judgment herein on 12<sup>th</sup> August, 1980 in favour of the Plaintiff's deceased father against the 1<sup>st</sup> Defendant who had by then come on record in the suit as the legal representative of his father who died on 5<sup>th</sup> February, 1979 during the pendency of the suit. It is also not in dispute that in that judgment, the court made a finding that the 1<sup>st</sup> Defendant's deceased father held the suit property in trust for the Plaintiff's deceased father and ordered the 1<sup>st</sup> Defendant who had become registered as the owner of the suit property on 24<sup>th</sup> September, 1979 to transfer the property to the Plaintiff's father. It is not in dispute that the Judgment that was entered in favour of the Plaintiff's father on 12<sup>th</sup> August, 1980 was neither set aside nor varied. With the full knowledge of that judgment, the 1<sup>st</sup> Defendant purported to sell and transfer the suit property to the Interested Party on 15<sup>th</sup> March, 1982 who proceeded to charge the same to Kenya Commercial Finance on 25<sup>th</sup> August, 1982. It is not disputed that that following the said Judgment in favour of the Plaintiff's father, the Deputy Registrar executed an instrument of transfer of land on 11<sup>th</sup> January, 1983 in favour of the Plaintiff's father in respect of the suit property and that on 6<sup>th</sup> April, 1984 and 30<sup>th</sup> October, 1984, the court ordered that the register of the suit property be rectified by the cancellation of the name of the Interested Party and the registration of the suit property in the name of the Plaintiff's father as the owner thereof. The court also declared the purported charge of the suit property to Kenya Commercial Finance as fraudulent. It is not disputed that the orders that were made by the court on 6<sup>th</sup> April, 1984 and 30<sup>th</sup> April, 1984 have not been set aside or vacated and that the suit property has not been registered in the name of the Plaintiff's father despite the said orders. It is also not in dispute that on 9<sup>th</sup> September, 1986, the suit property was attached and advertised for sale in Nakuru HCCC No. 145 of 1983 in which the Interested Party was a judgment debtor and that the said attachment was lifted on 17<sup>th</sup> November, 1989 following an objection by the Plaintiff. The lifting of the said attachment was registered against the title of the suit property on 6<sup>th</sup> December, 1989. With the full knowledge of the Plaintiff's interest in the suit property, the Interested Party purported to charge the suit property to Kenya Commercial Bank on 30<sup>th</sup> May, 1997 to secure further advances that were made to him.

On 7<sup>th</sup> August, 2000, the Plaintiff out of apprehension that the suit property could be sold by the Interested Party, filed an application dated 1<sup>st</sup> August, 2000 seeking an order of inhibition inhibiting any dealing with the suit property until further orders by the court and an order compelling the 2<sup>nd</sup> Defendant to register the suit property in the name of his father. The Plaintiff's application was heard ex parte by Amin J. on 8<sup>th</sup> August, 2000 who granted the order of inhibition pending the hearing of the application inter partes. This is the order that was registered against the title of the suit property on 21<sup>st</sup> August, 2000. When the application came up for inter partes hearing on 5<sup>th</sup> September, 2000, Rawal J. granted an order compelling the 2<sup>nd</sup> Defendant to register the Plaintiff's father as the owner of the suit property. The court did not deal with the issue of inhibition because it was spent. The order made by Rawal J. on 5<sup>th</sup> September, 2000 has not been varied or set aside.

The Plaintiff's father has to date not been registered as the owner of the suit property despite the various orders that I have referred to above. There is an application pending by the Plaintiff seeking the committal of the 2<sup>nd</sup> Defendant to civil jail for disobedience of the orders of this court that directed him to register the Plaintiff's father as the owner of the suit property. In view of the foregoing, I find no merit whatsoever in the Interested Party's application before me. There is an existing court order cancelling the Interested Party's title over the suit property. The interested party has no basis for seeking the lifting of an order of inhibition that was made by the court to protect the interest of the Plaintiff on the suit property that was confirmed by the court in a judgment made on 12<sup>th</sup> August, 1980. I am in agreement with the Plaintiff that this suit has been prosecuted to conclusion and that what is pending is the execution of the decree of the court which the 2<sup>nd</sup> Defendant has failed to carry out for reasons which are unknown. The Plaintiff cannot be blamed for the 2<sup>nd</sup> Defendant's failure to comply with the

court orders.

The upshot of the foregoing is that Interested Party's Notice of Motion dated 24<sup>th</sup> March, 2014 has no merit. The same is dismissed with costs to the Plaintiff.

**Delivered and Dated at Nairobi this 20<sup>th</sup> day of September, 2018.**

**S. OKONG'O**

**JUDGE.**

**Ruling read in open court in the presence of:**

Mr. Kahuthu for the Plaintiff

N/A for 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

Mr. Wambua h/b for Mr. Wamae for the Interested Party

Catherine Court Assistant