



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 944 OF 2017

(FORMERLY NAIROBI ELC NO. 1281 OF 2013)

MARY WARIARA MBORO.....PLAINTIFF

VERSUS

TITUS TOKION.....1ST DEFENDANT

GEORGE MBUGUA.....2ND DEFENDANT

THE KAJIADO LAND REGISTRAR.....3RD DEFENDANT

MENETO SIMINKOR OLENGURO.....4TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion dated the 20th June, 2017 brought pursuant to Order 8(3), Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act. The applicant seeks leave to amend the Plaintiff and for removal of the caution which was registered against land parcel number KAJIADO/ KISAJU/ 2055 and KAJIADO/ KISAJU/ 2056.

The application is premised on the ground that the Nairobi ELC No. 619 of 2015 being the subject matter of the caution was withdrawn by consent. The 3rd Defendant has registered the caution reference CID/ SEC/ 4/ 4/ VOL. IX/ 134 but has declined to withdraw it. The Plaintiff learnt of the subsisting caution when she undertook a search over the suit lands. The Plaintiff intends to amend the Plaintiff to include a prayer for mandatory injunction.

The application is supported by the affidavit of the Plaintiff MARY WARIARA MBORO where she reiterates her claim and deposes that the Defendants will suffer no prejudice if the proposed amendment to the Plaintiff is allowed.

The application is opposed by the 4th Defendant MENETI SIMINKOR OLOGURRO who filed a replying affidavit where he deposed that the Plaintiff's mother ANNAH WANJIRU BORO, entered into an agreement for the sale of the suit properties but the said Sale did not materialize due to non payment of purchase price. He claims the Plaintiff fraudulently got registered as the proprietor of the suit lands and his mother instituted proceedings at the Land Disputes Tribunal Kajiado North. He contends that judgement was entered in his favour vide the Land Disputes Tribunal in TC/ 331/ 08/ 010 which was adopted in Court and the District Land Registrar was directed to revoke the titles. Pursuant to the Court Order, he was registered as the proprietor of the suit lands. He explains that on 5th July, 2015 vide this instant suit, the Plaintiff sought injunctive orders against him but the matter did not proceed, however on 7th December, 2015, he was called to the local Chief's office and given documents indicating that the Plaintiff is now the proprietor of the suit lands. He lodged a complaint at the CID's offices who advised the Land Registrar to register a caution over the suit lands. He reiterates that the Plaintiff acquired her titles illegally and irregularly by lying to the Land Registrar that her Land Registers were missing and a process of reconstruction of the said Registers was undertaken, yet they knew he had been registered as the owner of the suit lands in February, 2014. He insists the application for removal of the caution has no basis and is only meant to delay the speedy conclusion of the suit herein.

The 1st, 2nd and 3rd Defendants did not file any response to oppose the application.

Both the Plaintiff and the 4th Defendant filed their submissions that I have considered.

Analysis and determination

Upon perusal of the instant application including the supporting and replying affidavits as well as submissions from the Plaintiff and 1st Defendant, the following are the issues for determination:

- Whether the Plaintiff should be granted leave to amend the Plaintiff.
- Whether the caution registered over land parcels numbers KAJIADO/ KISAJU/ 2055 and 2056 should be lifted.

As to whether the Plaintiff should be amended to include the prayer for mandatory injunction.

Order 8 Rule 5 of the Civil Procedure Rules provides as follows: **'(1) For purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.'**

I note the Plaintiff is simply seeking leave to amend the Plaintiff herein. The Defendants' have not filed any response to oppose the amendment sought. Further, the Defendants have not demonstrated what prejudice they will suffer if the Plaintiff was amended. It is my considered view that the amendment sought would be pertinent to enable the court determine the real question in controversy. It is against the foregoing that I will grant the Plaintiff leave to amend the Plaintiff. The Defendant will also have corresponding leave to file an amended Defence if need be.

As to whether the caution should be lifted. Both the Plaintiff and 4th Defendant claim ownership of the suit lands and each has a title to them. Although it would be good to find out how the Plaintiff and the 4th Defendant both came to have titles to the suit lands. The Plaintiff avers that the suit lands are hers while the 4th Defendant claims that the Plaintiff got fraudulently registered as its proprietor after he had a title by virtue of a Court order issued in 2014. There are also allegations of fraud by both parties and the 4th Defendant avers that the issue of the two titles was reported to the CID. I opine that where there are allegations of fraud, the same cannot be wished away, especially in circumstances where two parties are holding titles to the same parcel of land.

Section 71 of the Land Registration Act provides that **'(1) 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) is entitled to a licence; or (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, 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. (2) A caution may either— (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.'**

Further section 76 (1) of the Land Registration Act provides that: **'(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.**

(2) A restriction may be expressed to endure— (a) for a particular period; (b) until the occurrence of a particular event; or (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.'

In the instant case, looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the 4th Defendant to retain the caution is not baseless. I find that it would be pertinent if both the Plaintiff and the 4th Defendant are granted an opportunity to be heard to enable the court make a determination on the ownership of the suit lands. Insofar as I appreciate the authorities cited by the Plaintiff seeking for the removal of the caution, it is my view that it would be proper if the substratum of the suit is preserved pending the court making a determination on the same.

Since both the Plaintiff and the 4th Defendant are staking claim over the suit lands, with the sanctity of the titles being in dispute, I will hesitate to make an order for the removal of the caution and make a finding that these are issues best determined at a full trial, I will hence decline to grant the said orders as sought but will proceed to make the following order:

'An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO/ KISAJU/ 2055 and KAJIADO/ KISAJU/ 2056. of any dealings, lease or charge pending the hearing and determination of the suit.'

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 25th day of October, 2018

CHRISTINE OCHIENG

JUDGE