



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELCNO. 271 OF 2017 (O.S)

MULUKA MUTUNGU KITHUKU.....PLAINTIFF/APPLICANT

VERSUS

DORCAS MUTEMI ZAKAYO.....1ST DEFENDANT /RESPONDENT

MAKUENI COUNTY

LAND REGISTRAR.....2NDDEFENDANT/RESPONDENT

JUDGEMENT

1. MULUKA MUTUNGU KITHUKU (*hereinafter referred to as the Applicant*) commenced this suit against DorcasMutemiZakayo and Makueni County Land Registrar(*hereinafter referred to as the first and the second Respondents respectively*) by way of originating summons for orders:-

1) That an order do issue directing the 2ndRespondent to remove the caution registered against Title number Kathonzweni/Kitise/1631 by the 1stRespondent on 23rd December, 2013.

2) That the 1st Respondent be condemned to pay costs of the application.

2. The application is supported by the affidavit of the Applicant sworn at Nairobi on the 31st December, 2015.

3. The first Respondent opposed the application vide her replying affidavit sworn at Nairobi on the 13th October, 2017 and filed in court on the 16th October, 2017.

4. The second Respondent though served on the 31st August, 2016 did not enter appearance nor did he/she file his response.

5. On the 20th December, 2017 the court directed that the originating summons be disposed off by way of viva voce evidence. This direction was amended and/or vacated on the 5th February, 2018 whenboth parties consented to disposing off the application by way of written submissions.

6. In his submissions, the Applicant's counsel framed the following issues for determination:-

a) Whether the 1st Respondent has beneficial interest in the suit property.

b) Whether the 2nd Respondent should beordered to remove a caution placed against the suit property by the 1st Respondent.

c) Who should bear the costs of the application.

7. The second Respondent adopted the three issues raised by the Applicant.

Whether the 1st Respondent has a beneficial interest in the suit property.

The Applicant's counsel submitted that during the proceedings that were conducted by the 2ndRespondent on 9th September, 2014, the 1st

Respondent did not identify herself by her Kenyan identity card to prove that she was related to the Applicant. The counsel went on to submit that the 1st Respondent has not produced any identification documents in these proceedings such as her national identity card and birth certificate. The counsel was of the view that the 1st Respondent is a stranger who is not related in any way to the Applicant and thus has no beneficial interest in the suit property.

8. Regarding the customary trust pursuant to the Kamba Customary Law, the counsel submitted that the 1st Respondent has merely alleged its existence without providing any evidence.

9. The counsel concluded by submitting that the 1st Respondent has not established any trust in the suit property and that she is in no way related to the Applicant.

10. On the other hand, the counsel for the 1st Respondent submitted that the 1st Respondent has shown that she is the child of the Applicant by virtue of the marriage between her mother and that of the Applicant's wife. The counsel pointed out that such marriages are recognized under Kamba customary marriage rites. The counsel went on to submit that the 1st Respondent has tendered evidence to prove that the Applicant's wife by the name of Susan Muluka did indeed purchase the suit property. The counsel added that the 1st Respondent has tendered more evidence to prove that during the proceedings before the Land Registrar, the Applicant acknowledged the fact that he had two wives who include the 1st Respondent's mother. The counsel added that the Applicant did not appeal against the decision of the Land Registrar and termed the suit before this court as pre-mature since the Applicant was yet to exhaust all the legal avenues available to him.

11. Whether the 2nd Respondent should be ordered to remove caution.

The counsel for the Applicant submitted that since the 1st Respondent has not proved any beneficial interest or trust in the suit property, the 2nd Respondent should be compelled to remove the caution placed by the 1st Respondent.

12. The counsel for the 1st Respondent submitted that the law to do with cautions is encapsulated under section 71(1) of the Land Registration Act; 2012 which states as follows:-

“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 the 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 disposition of the land, lease or charge concerned and the making of entries affecting the land or charge”

13. The counsel submitted that the 1st Respondent having established that she has beneficial interest to the suit property, the 2nd Respondent should not be ordered to remove the caution placed on the property.

14. Who should bear the costs of the application?

The Applicant's counsel submitted that the Applicant should be awarded costs since the caution was placed against the suit property illegally by the 1st Respondent and, therefore, she should be made to bear the cost of these proceedings.

15. The counsel for the 1st Respondent submitted that this is a court of equity and as such, it will not assist a wrongdoer to achieve his illegal outcomes.

16. I have read the originating summons as well as the grounds it is predicated on together with the supporting affidavit by the Applicant. I have also read the replying affidavit by the 1st Respondent. I have also considered the submissions that were filed and my finding is as follows:-

17. Regarding the first issue, the Applicant has deposed in paragraphs 4, 5, and 6 that during the proceedings conducted by the Land Registrar Makueni on 9th September, 2014 the Applicant did not identify herself by producing her national identity card in order to prove the nexus between him and her. The Applicant also deposes that the 1st Respondent did not produce a birth certificate to prove that she was his daughter.

18. The 1st Respondent has annexed the proceedings that were conducted by the Land Registrar Makueni on 16th September, 2014 in paragraph 3 of her replying affidavit as DM2 -1. In the said proceedings, the 2nd Respondent held that the 1st Respondent had beneficial interest in land parcel Kathonzweni/Kitise/1631. The 2nd Respondent therefore declined to remove the caution lodged by the 1st Respondent.

19. I do agree with the 1st Respondent counsel that the Applicant chose not to appeal against the decision of the Land Registrar to the Chief Land Registrar but instead came to this court without exhausting all the legal avenues available to him. Suffice it to say, the doctrine of exhaustion appears to have caught up with him. I note that the Applicant has not controverted the averments in paragraph 7 & 8 of the

replying affidavit by the 1st Respondent that her mother was the wife of the Applicant's first wife under Kamba Customary Law and as such, I am satisfied that the 1st Respondent has beneficial interest in the suit property.

20. As for issue number two, having found that the 1st Respondent has beneficial interest in the suit property, it would be unfair to order the 2nd Respondent to remove the caution lodged against Kathonzweni/Kitise/1631.

The end result of my finding in issue number 1 and 2 is that the Applicant having failed to prove issue number 1 and 2, costs must follow the event. As such, I hold that the Applicant himself is the one who should bear the costs.

21. For the foregoing reasons, my finding is that the originating summons must fail and I therefore proceed to dismiss it with costs to the 1st Respondent.

22. It is so ordered.

Signed, Dated and Delivered in Makueni this 17th day of October, 2018

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

No appearance for the Plaintiff

No appearance for the Defendant

Mr. Kwemboi – Court Assistant

MBOGO C. G.

JUDGE