



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.800 OF 2017

JOHN NDUNGU KARIITHI.....PLAINTIFF

VERSUS

KARIUKI KARIITHI.....DEFENDANT

JUDGEMENT

By a *Plaint* dated 17th October 2017, the Plaintiff herein *John Ndungu Kariithi*, filed a claim against the Defendant *Kariuki Kariithi*, who is his biological brother. The Plaintiff has sought for Judgement against the Defendant in the following terms:-

a) *An order compelling the Defendant to unconditionally withdraw the placed restriction against land parcel No.Limuru/Bibirioni/1863 and in default, the Land Registrar Kiambu be directed to execute the same.*

b) *Costs of this suit.*

In his *Plaint*, he alleged that he is the absolute and registered owner of land parcel *No.LR.Limuru/Bibirioni/1863* as is evident from the *Certificate of title* attached to the pleadings. He further alleged that on or about 29th July 2016, the Defendant herein illegally and unlawfully placed a *restriction, inhibition* and/or *caution* against land parcel *No.Limuru/Bibirioni/1863*, on allegations of claiming an unknown interest thereon. Further that the Plaintiff has on numerous occasions tried to have the Defendant withdraw the placed restriction against the

Plaintiff's subject land parcel *No.LR.Limuru/Bibirioni/1863* but the Defendant has with adamance declined to. Therefore the Plaintiff's claim against the Defendant is for orders compelling the Defendant to withdraw the placed restriction against land parcel *No.Limuru/Bibirioni/1863* either by himself or in default the *Land Registrar Kiambu* be directed to execute the removal of the restriction.

Though the Defendant was served with *Summons to Enter Appearance* on 20th November 2017 as per the *Affidavit of Service* of Michael N. Nganga, he failed to enter appearance nor file Defence. Therefore the matter proceeded for formal proof on 26th June 2018 wherein the Plaintiff gave evidence for himself and adopted his witness statement wholly which was filed in court on 17th October 2017. He further testified that he lives in *Limuru/Ngarariga Village* on the suit property whereas the Defendant his brother lives in *Njabibi*. He also testified that he is the registered owner of the suit property *Limuru/Bibirioni/1863* wherein he was registered as such on 10th December 2013 as per the copy of the title deed dated 10th December 2013. It was his testimony that the suit property is a resultant subdivision of *LR.No.Limuru/Bibirioni/705*, which was initially owned by their father. However, the above suit land was subdivided among the *five brothers* and the Defendant was one of them. Further that after the subdivision, the Plaintiff obtained his *title deed* on 10th December 2013 but on 29th July 2016, the Defendant *Kariuki Kariithi* placed a *Caution* on the suit property claiming interest as a beneficiary. The Plaintiff alleged that the said caution is unwarranted as the Defendant only quarreled with the Plaintiff's wife and he had no good reasons to place a caution on the suit property.

Thereafter the Plaintiff filed brief submissions and reiterated the contents of his *Plaint*.

The Court has now carefully considered the available evidence and the annexures thereto. It is not in doubt that the Plaintiff is the registered owner of *Limuru/Bibirioni/1863* wherein he obtained the said registration on 10th December 2013. As provided by *Section 26(1)* of the *Land Registration Act*, the Plaintiff is deemed to be the *absolute* and *indefeasible* owner of such registered property. See *Section 26(1)* of the *Land Registration Act*, which provides:-

“The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

a) *On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

b) *Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

Further as a registered proprietor, the Plaintiff has his rights protected under Section 24(a) and Section 25(1) of the Land Registration Act which provides:-

24(a) Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

25.(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.

However, such proprietorship can be challenged if the said registration was acquired through **fraud, misrepresentation, illegally** or through **corrupt scheme**. See exception **(a) & (b)** of Section 26(1) of the Land Registration Act.

It is not in doubt that the Defendant has placed a Caution on the suit property which he placed on **29th July 2016** as is evident from the **Certificate of official Search**. Though the Defendant alleged to have interest as a beneficiary, he did not appear in court to give evidence and elaborate on such interest.

Section 71(1) of the Land Registration Act grants power to a person who claims right whether contractual or otherwise to obtain interest in any land or lease to lodge a caution forbidding any dealings on such property.

The Defendant herein did lodge such a caution on **29th July**, claiming beneficial interest. However the Plaintiff alleged that his suit property is a resultant subdivision of **LR.No.Limuru/Bibirioni/705** which was owned by his late father and which was subdivided among the five brothers. It was his testimony that the Defendant too has his portion of land.

Section 72(1) mandates the Land Registrar to give **Notice in writing** of the Caution to the proprietor whose land or lease is affected by the said Caution. The Plaintiff alleged that he was never given such Notice.

Further Section 73(1) of the said Act provides that a Caution may be withdrawn by the Cautioner or removed by an order of the Court or by order of the Registrar.

The Defendant herein is the Cautioner but has not applied to remove the caution. The proprietor has applied for such removal of the Caution by the Defendant. The Defendant has not appeared in court to controvert the Plaintiff's evidence. The Court is therefore not certain what interest as a beneficiary the Defendant may be claiming from the Plaintiff. The Plaintiff is a registered proprietor of the suit property and he should be at liberty to use his land as he so wish especially if there is no evidence that his acquisition of the suit property was through fraud or any of the exceptions stated in Section 26(1)(a)&(b) of the Land Registration Act.

The Court therefore finds no reasons to allow the Caution to remain

in place. See the case of **David Macharia Kinyuri...Vs...District Land Registrar, Naivasha & Another (2017) eKLR**, where the Court held that:-

“I have already stated that the Respondents have not appeared before this court to explain why the restriction should continue being in the register. I have not seen any reason why such restriction should remain and I am persuaded that the Application must succeed. I therefore order the Land Registrar to remove the restriction registered on 22nd July 2014....”

Having now carefully considered the available evidence and the exhibits produced in Court, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities.

For the above reasons, the Court allows the Plaintiff's claim entirely in terms of **prayer No.(a)** of the **Plaint** and for avoidance of doubt, the Court enters Judgement in the following terms:-

a) An Order be and is hereby issued compelling the Defendant to unconditionally withdraw the placed restriction and/or caution against land parcel No.Limuru/Bibirioni/1863, and in default, the Land Registrar Kiambu is hereby directed to execute the same.

Further, costs of the suit to be borne by the Defendant herein.

It is so ordered.

Dated, Signed and Delivered at Thika this **2nd day of **November 2018**.**

L. GACHERU

JUDGE

2/11/2018

In the presence of

John Ndungu Kariithi the Plaintiff present in person

No appearance for Defendant

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Judgement read in open court in the presence of the Plaintiff in person and no appearance for the Defendant.

L. GACHERU

JUDGE

2/11/2018