



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC NO. 13 OF 2017

(formerly NAIROBI HCCC -ELC Div No. 1909 of 2000)

KURANI ENE MUIKAIPLAINITFF

VERSUS

MULINGE KILUNGU & 19 OTHERSDEFENDANTS

RULING

The application before this court is a notice of motion dated the 6th February, 2017 brought pursuant to section, 3& 3A and 63 of the Civil Procedure Act and Order 17 of the Civil Procedure Rules.

The Plaintiff is seeking for the following prayers:

1. Spent
2. The Notice of Motion dated 7th October, 2014 be dismissed for want of prosecution.
3. All prohibitions/inhibitions/restrictions/cautions placed on land parcel Nos. Kajiado/Kaputiei - Central/4056,4057,4058, 4059, 4060, 4061, 4062, 4063,4064, 4065 and 4066 be vacated, varied, discharged or set aside immediately.
4. All the cautions and restrictions registered on land parcel Nos. Kajiado/Kaputiei - Central/4056,4057,4058, 4059, 4060, 4061, 4062, 4063,4064, 4065 and 4066 thereon by the Land Registrar Kajiado on 13th October, 2014 be immediately removed.
5. The Respondents to bear the costs of this application.

The application is premised on the following grounds:

1. No action has been taken by the Applicants thereon of the application of 7th October, 2014 since 22nd October, 2014 and the same has not been set down for hearing.
2. The Respondents used the ex parte order obtained on 9th October, 2014 to register cautions on land parcels Nos. Kajiado/ Kaputiei - Central/4056,4057,4058, 4059, 4060, 4061, 4062, 4063,4064, 4065 and 4066
3. The orders obtained on the 9th October, 2014 were never extended.
4. The said title numbers Kajiado/Kaputiei - Central/4056,4057,4058, 4059, 4060, 4061, 4062,

4063,4064, 4065 and 4066 still remain encumbered by the said cautions to the prejudice of the various title owners and the said cautions should be removed immediately

The application is supported by the affidavit sworn by ELVIS MOGOA who is the Plaintiff's advocate.

She avers that the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, 12th, 16th, 17th and 19th Defendants' filed a notice of motion application dated 7th October 2014 and obtained ex parte orders for 14 days on the 9th October, 2014; and the said orders were never extended on 22nd October, 2014 when the application came up for hearing. She states that the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, 12th, 16th, 17th and 19th Defendants have failed to set down their Notice of Motion dated 7th October, 2014 for hearing. Further that the said Defendants' used the ex parte order obtained on 9th October, 2014 to register cautions on land parcels numbers Kajiado/Kaputiei - Central/4056, 4057, 4058, 4059, 4060, 4061, 4062, 4063, 4064, 4065 and 4066. She states that this land belongs to other owners while the Plaintiff/applicant is the beneficial owner of land parcel Kajiado/Kaputiei/4061. She prays that the prohibitions/inhibitions/restrictions/cautions placed on the said parcels of land be vacated, discharged. or set aside.

The 1st, 2nd, 5th, 7th, 8th, 9th, and 19th Defendants opposed the application and granted authority to JOHN MUTUA MUTISYA to swear an affidavit on their behalf. He averred that there was an application pending in court that was seeking to substitute 3rd, 6th, 12th and 16th Defendants who are deceased. He states that the Notice of Motion dated 7th October, 2014 was settled when the parties agreed that status quo to be maintained pending the hearing of this suit. He avers that this current application is a replica of a notice of motion dated 4th March, 2015 that had been heard and determined. He further states that the Plaintiff filed the current suit with no intention of prosecuting it but rather have the Court file inundated with numerous applications seeking to condemn the Defendants' without giving them an opportunity to be heard. Further that the Plaintiff in a bid to circumvent this suit subdivided original title known as Kajiado/Kaputiei Central/466 and obtained title numbers Kajiado/Kaputiei Central/4056 -4066 and has transferred part thereof to a third party. He states that there is a pending suit instituted by way of Originating Summons Machakos ELC Misc. Civil Application No. 87 of 2015 that has since been transferred to the Kajiado ELC for hearing and final determination; where the Defendants are seeking alternative claim to ownership by adverse possession. He says due to the numerous cases filed at the ELC Court in Nairobi and no availability of dates at the said court registry, it was not possible for the application dated 6th May, 2016 to be fixed for hearing. He states that the Plaintiff's claim for trespass has no merit and the said Plaintiff is now seeking to use interlocutory applications to deny the Defendants' their right to property known as Kajiado/Kaputiei Central/ 466 which has since been subdivided into titles known as Kajiado/Kaputiei Central/ 4056 - 4066. That the removal of the cautions is detrimental to the Defendants' as the Plaintiff does not respect the doctrine of *lis pendens* and is in contempt of court when she proceeded to subdivide Kajiado/Kaputiei Central/466 into Kajiado/Kaputiei Central/4056 - 4066. He avers that Defendants' have lived on Kajiado/Kaputiei Central/466 and developed homes thereon and that they will be at risk of being displaced if the Plaintiff is granted a free hand to deal with the subdivisions of Kajiado/Kaputiei Central/466 as she pleases. Further that the substantive rights to parties to the property known as Kajiado/Kaputiei Central/466 is yet to be determined and run the risk of being infringed. He reiterates that the Plaintiff has not taken reasonable steps to set the suit down for hearing.

The Plaintiff was represented by Ms. Mogoia while the Defendants' were represented by Mr. Olonde. Both parties filed their written submissions in respect to the application. Ms Mogoia argued that the orders of interim injunction were detrimental to the Plaintiff as she is unable to enjoy her rights of use over the suit property. Further that the Notice of Motion dated 7th October, 2014 has never been set down for hearing and is seeking the same to be dismissed for want of prosecution so that the main suit can be set down for hearing. She averred that in the Notice of Motion application dated 4th March, 2015 the Plaintiff was seeking to set aside orders dated 9th October, 2014 but in the current application the Plaintiff seeks to dismiss the Notice of Motion dated 7th October, 2014 for want of prosecution.

Mr. Olonde opposed the application and stated that the Court had already made an order dismissing the application dated 4th March, 2015 and the Plaintiff never appealed nor sought for review of the said order. The order was granted by Justice Gacheru on 4th March, 2016. He argued that the current

application is res judicata. Further, that the Plaintiff by her conduct has demonstrated that she will go to whatever length to have the substance of the matter defeated. The Plaintiff has not denied subdivision or transfer of land. They have come to court seeking removal of caution to enable Plaintiff proceed with interfering with the land. It is important for the suit parcel to be preserved pending the hearing of the suit. The Defendants have waited for 17 years and it is not in the interest of justice that they should be kept in anxiety over the matter. He said he relied on his written submissions and that the time limits ought to be set when the matter should be heard and the cautions should remain in place.

Ms Mogoia reiterated that the Plaintiff is willing to prosecute the matter and was not aware of the subdivision and transfer of land.

On 15th February, 2017 the Court directed the parties to file their written submissions. Having carefully considered the written submissions filed herein, the instant Notice of Motion, the ruling of the Justice L. Gacheru dated 4th March, 2016 and the relevant laws, the Court makes the following findings:

The issues analyzed by Justice Gacheru are the same issues raised in the instant Notice of Motion. In the motion dated 4th March, 2015 that was dismissed by Justice Gacheru, it is noted the Plaintiff also sought for the removal, variation, vacation and or discharge of cautions and restrictions registered by the Land Registrar Kajiado on 13th October, 2014 on land parcels numbers Kajiado/Kaputiei Central/ 4056 - 4066. The Plaintiff is seeking to have the Notice of Motion dated 4th March, 2015 dismissed for want of prosecution and further that all prohibitions/inhibitions/restrictions/cautions placed on land parcel Nos. Kajiado/Kaputiei - Central/4056,4057,4058, 4059, 4060, 4061, 4062, 4063,4064, 4065 and 4066 be vacated, varied, discharged or set aside immediately. Some of the prayers in the instant application is a replica of the notice of motion dated 4th March, 2015. Once the order was granted by Justice Gacheru, instead of waiting for another one year to file such an application, the Plaintiff ought to have set the suit down for hearing to enable the issues within this suit to be determined once and for all. Further, the Court notes that the Order of Status Quo was agreed upon by consent. It is also important that the suit land be preserved pending the outcome of the suit. From the proceedings in the court file and the instant application, there is no demonstration by the Plaintiff of her intent to prosecute her case, it seems her only contention is to have the cautions removed. The Court further finds that instead of the Plaintiff filing many applications, she should proceed to set down the suit for hearing to enable the court make a final determination of the matter.

Having carefully considered the instant Notice of Motion, the court finds it is not merited and dismisses it with costs. The Court makes an Order of Status Quo to be maintained pending the hearing and final determination of this suit.

It is so ordered.

Dated, signed and delivered at Kajiado this 9th May, 2017

CHRISTINE OCHIENG

JUDGE

REPRESENTATION:

Court Clerk Mpoeye

Morara holding brief for Ocharo for plaintiff/applicant

Muak holding brief for Odero-Olonde for 1st – 9th, 12th, 16th, 17th and 19th defendants.