

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 523 OF 2014

NGOME NATALA ::::::::::: PLAINTIFF/RESPONDENT

VERSUS

GEOFFREY L. LUSENEKA :::::::::::DEFENDANT/APPLICANT

RULING

This application is dated 11th May 2017 seeking the following orders;

a. The caution placed on land parcel No. N. KABRAS/MALAVA/4088 by the respondent be removed.

b. Costs be provided for.

The applicant submitted that, he is the registered owner of the suit land N/KABRAS/MALAVA/4088. That prior to this suit the respondent placed a caution on the land and he went to the Land Registrar seeking its removal and the Land Registrar gave notice and attached is a copy of the Notice marked Annex "A". Attached also is a copy of the caution marked Annex "B". That the respondent objected to the removal of caution pending the determination of this case attached is a copy of the respondent objection marked Annex "C". That as the suit has been determined the applicant now wants to sell some of the land to settle the decretal sum and he cannot do that unless the caution is removed.

The respondent submitted that he bought 2 $\frac{3}{4}$ acres comprised in land parcel NO. KAKAMEGA/MALAVA/1094 from the defendant at an agreed consideration of 675,000/=. That upon sub-division of land parcel NO. KAKAMEGA/MALAVA/1097 the defendant was to transfer land parcel NO. KAKAMEGA/MALAVA/4088, which was a creation from the former title, to him, but he has failed to do so to date. That after the defendant/applicant failed to transfer title to the said parcel of land to him, he filed this suit claiming the transfer of title to land parcel NO. KAKAMEGA/MALAVA/4088, to him and lodged a caution against the said title. That the suit was determined and a decree extracted in which this honourable court ordered the defendant to pay him the consideration of Ksh. 675,000/= with interest and he has applied for execution of the decree by way of notice to show cause why the suit land shall not be attached and sold in satisfaction of the decree. (Attached are copies of the decree and application for execution marked "NN1" and "NN2".) That he has been advised by Mr. Akwala advocate, that since he has filed an application for execution of decree, the caution placed against land parcel NO. KAKAMEGA/MALAVA/4088 should be maintained to preserve the title pending determination of execution proceedings. That he urges this honourable court to dismiss the defendant's application with costs and further do order the preservation of caution placed on land parcel NO. KAKAMEGA/MALAVA/4088.

This court has carefully considered both the applicant's and the respondent's submissions. The applicant submitted that the suit has been decided and the respondent has no justification for retaining the caution. The applicant wishes to sell the said land to settle the decretal sum. Under section 133(1) of the Registration of Land Act it is provided that;

“ a caution maybe withdrawn by the cautioner or removed by the order of the court, or subject to subsection (2), by order of the Registrar”.

It is not in dispute that the defendant is the registered owner of land parcel NO. KAKAMEGA/MALAVA/1094. The respondent submitted that he bought 2 $\frac{3}{4}$ acres comprised in land parcel NO. KAKAMEGA/MALAVA/1094 from the defendant at an agreed consideration of 675,000/=. That upon sub-division of land parcel NO. KAKAMEGA/MALAVA/1097 the defendant was to transfer land parcel NO. KAKAMEGA/MALAVA/4088, which was a creation from the former title, to him, but he has failed to do so to date. That after the defendant/applicant failed to transfer title to the said parcel of land to him, he filed this suit claiming the transfer of title to land parcel NO. KAKAMEGA/MALAVA/4088, to him and lodged a caution against the said title. It is not disputed that the suit was determined and a decree extracted in which this court ordered the defendant/applicant to pay him the consideration of Ksh. 675,000/= with interest. As the award is for the refund of and not specific performance I see no reason why the caution should not be lifted. In the case of **Moses Kariuki Wachira Vs Joseph Muriithi Kanyita & 3 Others (2010) eKLR**, Justice Koome in lifting a caution held that;

“The 1st defendant has established that he is the registered proprietor of the premises and has as an absolute owner; he is entitled to deal with the premises. In this regard, nothing stops him from transferring and charging the property as he deems fit”.

I find the application has merit and I grant the same as prayed with costs to the applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21ST DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE