REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 206 OF 2007

ZEDEKIAH NYANDIEKA AGATA……
APPELLANT

-VERSUS-

ELIJAH M. OBARE… ……
RESPONDENT

JUDGEMENT

(Being an appeal from the judgment and decree of Mrs. Wewa, SRM in Kisii C.MCC.no. 240 of 2006 dated 22nd October, 2007)

Zedekiah Nyandieka Agata, *"the appellant"*, sued **Elijah M. Obara, *"the respondent"*** in the Chief Magistrate's Court at Kisii in case number CMCCC. No. 240 of 2006. In the said suit, the appellant prayed for an injunction to restrain the respondent from in any way interfering with land parcel **West Mugirango/Siamani/2111, *"the suit premises",*** until the final determination of the suit. He also asked for costs and interest.

The facts informing the suit were that on or about 14th November, 1995 the appellant bought a portion of the suit premises

measuring 50ft by 100ft or thereabouts from the registered owner of the same, one, **Ocharo Onkangi.** It appears thereafter a dispute arose. In 1998, he filed a suit in the Senior Resident Magistrate's Court at Nyamira being Nyamira SRMCCC. No. 82 of 1998 against the vendor to protect his interest in the said portion of the suit premises and at the same time registered a caution. On or about 23rd march, 2006, the appellant found the respondent fencing the said portion of the suit premises and had assembled building materials as well, hence the suit.

The suit was met with an Amended defence and counter claim by the respondent. By an amended defence dated 8th July, 2006 the respondent denied all the averments of the appellant while conceding the fact that the appellant had entered into a sale agreement with **Ocharo Onkangi.** However the agreement fell through and the appellant successfully sought and obtained a refund of the purchase price vide Nyamira SRMCC No. 82 of 1998 aforesaid. The respondent further averred that the appellant never took possession of the suit premises. He maintained though that he was the rightful owner of the suit premises and fenced it on that basis. It was also his case that the value of the suit premises being Kshs.600,000/= the trial court had no jurisdiction to entertain the suit. Finally he averred that the suit was ambiguous, incompetent and bad in law or otherwise an abuse of the court process and that the appellant was a busy body with no ***locus standi*** to challenge the respondent's ownership of the suit premises. The jurisdiction of the court was denied.

By way of counterclaim, the respondent claimed that by virtue of being the rightful owner of the suit premises, he was entitled to the removal of the caution registered by the appellant on the same. He therefore demanded the removal of the caution by the appellant.

When the suit came up for hearing on 17th April, 2007, the appellant applied to withdraw the main suit. The respondent did not oppose the application. Accordingly, by consent of the parties, the appellant's suit

was marked as withdrawn with costs to the respondent.

The respondent nonetheless chose to pursue his counterclaim. In support of the counterclaim, the respondent testified that on or about 19th September 2003 he bought from one, **Ocharo** the suit premises at a consideration of Kshs. 600,000/= which he duly paid. The agreement was reduced into writing which he tendered in evidence. Before that he had conducted a search and noted that the suit premises were registered in the name of **Paulina Ocharo.** Having cleared the balance of the purchase price, he later found out that there was a caution registered on the suit premises by the appellant. He was aware though that the appellant had initially intended to purchase the suit premises but the deal fell through and he was refunded his money courtesy of Nyamira SRMCCC.No. 82 of 1998 that he filed against the vendor. Despite having received the refund, the appellant had refused to remove the caution despite having been requested to do so by the district Land Registrar, Nyamira vide a letter dated 15th September, 2005. He therefore prayed to court to assist him remove the caution so that he can get the title deed in respect of suit premises.

Cross examined, he conceded that he had not sued the Land Registrar to remove the caution. He maintained that he had bought the suit premises. The search indicated that the suit premises belonged to **Pauline Ocharo** when he entered into the agreement and there was no caution registered thereon then.

The respondent then called the son, brother in-law and nephew of **Pauline Ocharo** as witnesses. They were **Stanlaus Orwabe Ocharo**, **Joseph Nyamasebe** and **Charles Ogega** respectively. They all confirmed that the appellant had initially intended to buy the suit premises. However the deal fell through and he was refunded the purchase price by **Ocharo Onkangi**, the vendor. They also confirmed that the suit premises were later sold to the respondent. They were witnesses to the sale agreement executed between the respondent and

Pauline Ocharo. However the respondent could not get his title deed by virtue of a caution registered by the appellant. He had no right to register the caution though having been refunded the purchase price.

The appellant did not see any need to call any evidence to counter the evidence of the respondent. He therefore closed his case without calling any evidence against the counterclaim.

The learned magistrate having listened to the oral submissions by respective parties, reserved her judgment which she delivered on 22nd October, 2007 and held thus:

"From my consideration (sic) view there is no evidence that the defendant didn't purchase the land. That the owner of the land is the deceased and there are no documents to show who is administering the estate that (sic) how could the caution be placed and by who. (sic) The one who does (sic) so lacked the necessary search (sic). I do find that the defendant has proved his counterclaim on a balance of probabilities. I do enter judgment in his favour and grant the orders sought, costs and interest thereof……."

That judgment and decree elicited this appeal. The judgment and decree was attacked by the appellant on 4 grounds vide a memorandum of appeal dated 7th November, 2007 . These grounds are:-

"1. THAT the learned trial magistrate erred in law and in fact in giving judgment for the counter-claim as prayed when there was no legal basis for doing so.
2. THAT the learned trial magistrate erred in law and in fact in not finding that the Defendant (respondent) had no locus standi to file

the counter-claim.
3. THAT the learned trial magistrate erred in law and in fact in not considering the Defence to the counter-claim as filed which raised serious issues which were not resolved by the Respondents (sic) evidence in support of the counter-claim.

4. THAT the learned trial magistrate decided the counter-claim against the weight of evidence on record……..”

When the appeal came before me on 28th June, 2010 for directions, **Mr. Masese** and **Mr. Minda** both learned counsel agreed amongst other directions to canvass the same by way of written submissions. Subsequently they filed and exchanged written submissions which I have carefully read and considered.

It is common ground that, the appellant initially expressed interest to purchase a portion of the suit premises and did enter into an agreement with the vendor, **Ocharo Onkangi** to that effect. It is also common ground that the said agreement subsequently fell through and the appellant was refunded the amount he had paid in pursuit of the land vide a suit he filed against the vendor in Nyamira SRM’s court. It is also common ground that subsequent thereto the widow, one **Pauline Ocharo** entered into a sale agreement with the respondent over the same parcel of land for which she was paid Kshs. 600,000/=. It is also common ground that the appellant much as he had been refunded the purchase price nonetheless proceeded to register a caution on the suit premises claiming purchaser’s interest. It is also common ground that the respondent has yet to be issued with the title deed in respect of the suit premises as a result of the caution registered by the appellant thereon. Finally it is common ground that the appellant has been requested by both the respondent and the District Land Registrar severally to remove the caution to no avail.

The evidence of the respondent and his witnesses was not challenged at all. Apart from the respondent himself, he also called 3 witnesses in support of his counterclaim. These witnesses were all in unison that

the appellant though had intended to buy the suit premises, the transaction did not work out and he was subsequently refunded the purchase price paid. They also confirmed their presence when **Pauline Ocharo** executed a fresh agreement with the respondent to sell the suit premises. As far as they were concerned, the appellant had no business registering a caution on the suit premises. The appellant's interest in the suit premises whether purchaser's or not ended with the refund of the purchase price he had paid as aforesaid.

As already stated elsewhere in this judgment, when the respondent closed his case, the appellant did not call any evidence to challenge the counterclaim. Thus the appellant did not adduce any evidence to show his alleged interest in the suit premises. Indeed he had none in view of the evidence tendered by the respondent and his witnesses. Apparently having obtained judgment and decree against **Alexander Ocharo Onkangi** in respect of the refund of the purchase price, the appellant executed the same by committing him to civil jail and thereafter admitted having received the decretal sum. That being the case it is highly oppressive and in bad faith for the appellant to continue maintaining a caution on the suit premises on account of purchaser's interest when that interest became extinct on receipt of the refund. I cannot fault therefore the learned magistrate in allowing the counterclaim on that account.

On the question of ***locus standi***, no evidence was called by the appellant in this regard. Indeed it was never canvassed before the trial court. Nor was it captured in the pleadings. It cannot therefore be raised on an appeal and from the bar. Moreover and as correctly submitted by the respondent, the evidence of the respondent together with his witnesses confirmed that the respondent had interest in the suit premises. That alone gave the respondent the necessary ***locus standi*** to seek the removal of the caution. Indeed it defeats logic for the appellant to sue the respondent first and when confronted with a defence and counterclaim turns around to claim that the respondent had no ***locus standi.*** Who dragged the other to court in the first place? What locus standi then did the respondent have in the first place to be sued by the appellant?

Then there is the issue as to whether the vendor, **Pauline Ocharo** had capacity to enter into a sale agreement with the respondent for want of a grant of letters of administration. The appellant did not testify to that effect. It is even possible that the said **Pauline Ocharo,** had such a grant. In any event whether or not **Pauline Ocharo** had a grant, it had nothing to do with the removal of the caution. The appellant registered the caution on account of puchaser's interest and not on account of **Pauline Ocharo** having sold to the suit premises to the respondent without first obtaining the necessary grant of letters of administration intestate. In any event if the respondent chose to have the caution removed by way of counterclaim, it is not open to the appellant to complain.

The suit premises border the houses of the respondent. They are well defined. They are not undefined as claimed by the appellant. In any event, even if they were not defined, then equally the appellant had no basis for the same reason to lodge a caution. Further the appellant is not saying that there are two different suit premises and that the one he cautioned is well defined on the ground as opposed to that being claimed by the respondent.

I think that the appellant is being less than candid when he claims that the Nyamira case has not been finalized. There is no doubt at all that the appellant in that case obtained judgment, extracted a decree and proceeded to execute the same by committing **Ocharo Onkangi** to civil jail. He was later paid the decretal sum whose receipt he acknowledged.

To my mind the filing of the suit against the respondent was in bad faith. If anything it was an abuse of the court process and was clearly aimed at frustrating and vexing the respondent. The learned magistrate saw through the appellant's machinations and allowed the counterclaim and rightly so in my view. There is no merit in this

appeal. Accordingly it is dismissed with costs to the respondent.

Judgment dated, signed and **delivered** at **Kisii** this 16th September, 2010.

ASIKE-MAKHANDIA
JUDGE