



**Chebon v Land Registrar & another (Environment & Land Case
003 of 2023) [2023] KEELC 22223 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 003 OF 2023
LA OMOLLO, J
DECEMBER 14, 2023**

BETWEEN

SILAS KIPTIS CHEBON PLAINTIFF

AND

THE LAND REGISTRAR 1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 2ND DEFENDANT

RULING

Introduction.

1. This ruling is in respect to the Applicant's Notice of Motion application dated July 7, 2023.
2. The applicant seeks the following orders:
 - i. Spent.
 - ii. That this honourable court be pleased to issue an order directing the land registrar, Nakuru to remove the caution placed on land parcel no. Nakuru Municipality Block 23/239 forthwith.
 - iii. That costs of this application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on July 5, 2023 by one Silas Kiptis Chebon.

Factual Background.

4. The plaintiff commenced this suit *vide* a plaint dated July 7, 2023 which was filed on July 19, 2023. The plaintiff prays for the following orders



- a. Pending the hearing of this suit, this honourable court be pleased to issue that the Land Registrar Nakuru do implement forthwith the orders of the Land Registrar Nakuru dated December 19, 2012 and signed on the March 21, 2013. (Sic)
 - b. That the caution plaves pn Nakuru Municipality Block 23/239 be removed forthwith as the same is without good reason, excuse or justification
 - c. Costs be provided for.
 - d. Any other relief that this Honourable Court may deem fit to grant.
5. The defendants were served and a memorandum of appearance filed on August 28, 2023. They subsequently filed a written statement of defence on August 29, 2023.
 6. Although the application was served on the respondents as set out in the affidavit of service sworn by Nicholas Kiamba on August 3, 2023, there is no response from them.
 7. On October 9, 2023 the court gave directions that the application would be heard by way of written submissions. On October 18, 2023, the applicant confirmed having filed his submissions and the and the application reserved for ruling.
 8. I have confirmed that the applicant’s submissions were served upon the respondents on October 17, 2023 as set out in the affidavit of service sworn by Nicholas Kiamba on October 17, 2023 .

Plaintiff’s Contention.

9. The plaintiff contends that he is the registered owner of Nakuru/Municipality Block 23/239.
10. It is the Plaintiff’s contention that he conducted a search on March 1, 2023 which revealed that a caution was registered in favour of John Wagacha Thuo and that the said John Wagacha Thuo is claiming beneficial interest in the suit property.
11. The Plaintiff further contends that he had earlier lodged a complaint on the subsistence of the caution and a hearing was conducted under section 73(2) of the *Land Registration Act*.
12. He contends that a ruling was delivered on December 19, 2012 by the District Land Registrar to wit, “the caution to be removed 30 days, right of appeal apply”.
13. The Plaintiff contends that no appeal was preferred against the said ruling and adds that despite him visiting the Registrar’s office several times, the order removing the said caution is yet to be implemented.
14. He ends his deposition by stating that he has joined the 2nd defendant to the suit so as to advise the land registrar to remove the caution.

Issues for Determination.

15. The plaintiff filed his submissions on October 16, 2023. In his submissions, he gives a background of the case and reiterates the contents of his supporting affidavit.
16. He submits that this court has the power to order removal of the caution under section 73(1) of the *Land Registration Act*. He further submits that both respondents’ had been served with the application but they never responded to it.
17. The Plaintiff relies on the judicial decisions of *Wambua Kingoo v Musyimi & 2 others; Registrar of Lands Makeni Registry* [2020] eKLR and *Peter Kabubo Muchai v Francis Muchai Kabubo* [2018] eKLR.



18. In conclusion, he urges the court to order removal of the caution in line with section 73(1) of the [Land Registration Act](#), 2012.

Analysis and Determination.

19. Upon perusal of the Application, Supporting Affidavit, Replying Affidavit, Annexures and the Applicant's submissions, it is my considered view that the single issue for determination is:

Whether an order should issue directing that the caution registered on the Plaintiff's land be removed.

20. The applicant's contention is that a caution was registered by one John Wagacha Thuo on land parcel No. Nakuru/Municipality Block 23/239. He does not give the date on which this caution was registered.

21. The Applicant goes on to depose that he conducted a search vide an application dated March 1, 2023 and that the search result was released *vide* a certificate of official search dated March 8, 2023. Neither the application nor search certificate is annexed to the supporting affidavit.

22. Section 73 of the [Land Registration Act](#) makes provisions on the removal of a caution. It provides as follows:

- “ 1. A caution may be withdrawn by the cautioner or removed by the order of the court or subject to sub section (2) by order of the registrar.
2. The registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
3. If the cautioner has not raised any objection at the expiry of the time stated, the registrar may remove the caution.
4. If the cautioner objects to the removal of the caution, the cautioner shall notify the registrar, in writing of the objection within the time specified in the notice, and the registrar shall after giving the parties an opportunity of being heard, make such order as the registrar considers fit and may in the order provide for the payment of costs.
5. After the expiry of thirty days from the date of the registration of a transfer by a charge in exercise of the chargee's power of sale under the law relating to land, the registrar shall remove any caution that purports to prohibit any dealings by the charge that was registered after the charge by virtue of which the transfer has been effected.
6. On the withdrawal or removal of a caution, the registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.”

23. In the case of [Joseph Kibowen Chemjor v William C Kisera](#) (2013) eKLR the court held as follows;

“It is therefore my considered view that an action for the removal of a caution needs to be commenced by way of a plaint in which suit the plaintiff needs to prove on a balance of



probabilities why the defendant has no right to place the caution on his title and why the caution placed by the defendant needs to be removed.”

24. As a general rule, a suit can only be instituted by way of a plaint, a petition or an originating summons. It therefore follows that a notice of motion can only be filed within a properly instituted suit.
25. The orders sought in the plaint are similar to those sought in the instant application. The suit has not been heard. Determining this application is akin to making final orders at an interlocutory stage.
26. I am of the view that the suit ought to be determined on merit and as held in the decision of [Joseph Kibowen Chemjor](#) (supra) issues pertaining to the removal of a caution are substantive issues that ought to be canvassed at the hearing of a suit. It is then that the applicant will have opportunity to furnish the court with the documents alluded to in his supporting affidavit which he failed to annex.

Disposition.

27. The upshot of the foregoing is that the notice of motion application dated July 7, 2023 is incompetent. Consequently, it is dismissed with no order as to costs.
28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF DECEMBER, 2023.

L. A. OMOLLO

JUDGE

In the presence of:

Mr. Muthanwa for the Plaintiff/Applicant.

Miss Adomeyon holding brief for Miss Nyambura for the Defendants/Respondents.

Ms Monica Wanjohi: Court Assistant

