



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 25 OF 2003

STANSLAUS KHAEMBA (Suing as the Administrator of the Estate of

CLEOPHAS KHAEMBA (Deceased).....**PLAINTIFF/RESPONDENT**

VERSUS

JOSEPH WEKESA & 10 OTHERS.....**DEFENDANTS/APPLICANTS**

RULING

(On removal of a Caution placed by a Land Registrar)

THE APPLICATION

1. The Applicants brought a Notice of Motion dated **18/10/2021**. It was filed on **29/10/2021**. It generally sought removal of a caution placed on the suit land. It was brought under **Sections 1A, 1B, 3, 3A and 63E** of the **Civil Procedure Act**, Chapter 21 of the Laws of Kenya, **Sections 73(1), 78(2)** and **93** of the **Land Registration Act of 2012**, **Article 159** of the Constitution and **Order 51 Rules 1** of the **Civil Procedure Rules 2010**. The Applicant sought for the following specific orders:

1. ...spent

2. That the Land Registrar, Trans Nzoia be ordered to remove the caution lodged against title number Kiminini/Kinyoro Block 3/Matsi/10 by one Cleophas Khaemba on 9/8/1994.

3. Any other orders the Court shall deem fit.

4. Costs be provided for.

2. The Application was supported by the Affidavit of one Joseph Wekesa sworn on **3/11/2021** and five grounds which were given on the face of the Application. The grounds were that the suit herein was compromised by consent after which the Plaintiff failed to remove the caution that had been placed on the suit land; the Land Registrar had declined to remove the Caution unless ordered by the Court; the subdivision of the land had stalled due to the placement of the caution hence the prayers sought.

3. In his Affidavit, Joseph Wekesa deponed that he was the Administrator of the Estate of the late Stephen Wekesa. He annexed to the Affidavit and marked as **JW 1** a copy of the grant issued to him for that purpose by the High Court in Kitale in Succession Cause No. **304 of 2019**. He also annexed as **JW 2** a copy of the consent order given by this Court on **8/10/2019** and issued on **22/10/2019**. By the said consent the suit against the Defendants was compromised on the terms that it be withdrawn and a sum of **Kshs. 100,000/=** be paid as costs to the Defendants within **90** days.

4. The deponent then stated that the father to the Plaintiff had, before his death, placed a caution on the suit land which he did not remove. He annexed a copy of a letter written by the Applicants' Advocates to the Plaintiff requiring removal of the caution. He stated that it was not acted upon. He attached to his Affidavit as **JW 4** a copy of a certificate of official search dated **13/9/2018** showing that as at the date of the search the caution was still in place in the records of the land registry.

5. He swore further that when he followed up the issue with the Land Registrar, he was advised by the said office that only a court order could make the Registrar act on the caution. He then stated that as a result of the caution, he was hindered from subdividing the land and transferring it to purchasers and rightful beneficiaries. His deposition was that he could not carry out the processes on the suit land unless the caution was gotten out of the way. He then deponed that having the caution on the land was injurious to the interests of the beneficiaries of

the suit land.

SUBMISSIONS

6. When the Application came up before me under certificate of urgency on **01/11/2021**, I gave directions for the service of the same and its disposal by way of written submissions. The parties were at liberty to file responses and supplementary affidavits if there was need of the same. It was to be mentioned on **29/11/2021** to confirm compliance. By that date, although the Affidavit of Service filed on **22/11/2021** by counsel for the Applicants showed that service was effected as directed, the Respondent had neither filed any response to the Application nor any submissions thereon. Thus, the Court gave the ruling date for the Application.

7. The Applicants filed written submissions dated **19/11/2021** on **23/11/2021**. In them learned counsel for them reiterated the contents of both the grounds and affidavit in support of the Application. He also submitted that the caution placed against the suit land was still subsisting as **13/09/2018** and that he had made efforts to have it removed by the Registrar but to no avail. He then submitted that the land could not be subdivided and given to the rightful beneficiaries for the reason of the caution. He then reproduced **Sections 73(1)** and **78(1)** of the **Land Registration Act** which is to the effect of removal of a caution placed by a person on any parcel of land either by the Land Registrar of the relevant office or by order of the court.

8. As stated earlier, the Respondent did not oppose the Application. That does not of itself entitle the Applications to automatic grant of the orders sought. The Court has to determine the merits or otherwise of the Application.

DETERMINATION

9. I have carefully considered the Application, the affidavit in support of the Application, the grounds in support thereof too and submissions as well as the law. I found two issues for determination. These were:

a. Whether the Applicants have satisfied the requirements of for the removal of a caution;

b. Who to bear the costs of the instant Application.

10. I begin by analyzing the first issue and the law thereon. **Section 73(1)** of the **Land Registration Act** provides as follows:-

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

11. This means that there are three ways in which a caution placed on a parcel of land may be removed. They are, one, that the person who placed the caution may remove it, two, the court may make an order to that effect, and three, the Registrar. But in terms of subsection two (2), the Registrar proceeds to remove the caution after he has given written notice to the cautioner that he will remove it after the expiry of that notice. Although the Applicant relied on **Section 78(1)** to move the Court, it is this Court's view that the Section is irrelevant. There is a difference between a caution placed on a parcel of land and a restriction. Suffice it to say that a caution is placed on land by an interested party while a restriction is placed on a parcel of land by the Registrar himself. **Section 78 (1)** deals with removal by a Registrar of a restriction placed on a parcel of land. What was in issue here was a caution placed on the land by a person who has since died.

12. From the pleadings herein, the suit which was finally withdrawn was to the effect that the Defendants, now Applicants, had trespassed onto land parcel number **Kiminini/Kinyoro/Block 3/Matisi/9**. The Defendants filed a defence averring that they never trespassed onto the land parcel in question but that they had bought land parcel No. **Kiminini/Kinyoro/Block 3/Matisi/10** which was far situate from the Plaintiff's alleged land. Later, on **14/10/2005**, the Plaintiff averred that the land parcel No. **Kiminini/Kinyoro/Block 3/Matisi/10** was held by the Defendants in trust for him.

13. On **9/05/2019** this Court ordered for a survey to be conducted on the two parcels of land. A report dated **09/07/2019** was filed in Court and it confirmed that the two parcels of land existed and various individuals were settled on the parcels. After the Report, the consent referred to herein was filed and adopted as the judgment of the Court on **8/10/2019**. The land parcel on which the late Cleophas Khaemba placed a caution as shown by **JW 1** is **Kiminini/Kinyoro/Block 3/Matisi/10**.

14. From facts in the Application, the land Registrar has been moved on several occasions to take steps in terms of **Section 73(1)** as read with subsection 2 of the Land Registration Act to remove the caution. There are no reasons that have been advanced by the Respondents why the caution should not be removed. This suit having been withdrawn, and the matters herein settled, and the cautioner against whom the Registrar should have served notice in order to remove the caution at the expiry of the notice having died and the Registrar therefore unable to act, it is in the interest of justice that the caution placed on the parcel of land be removed. In conclusion, the Application dated **18/10/2021** is merited and succeeds. It is hereby ordered and directed that the Land Registrar, Trans-Nzoia County does remove the caution lodged on land parcel No. **Kiminini/Kinyoro/Block 3/Matisi/10** by one Cleophas Khaemba on **09/08/2004**.

15. Although costs follow the event, since the Respondents did not oppose the Application, there shall be no order as to the costs of this Application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 25TH DAY OF JANUARY, 2022

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE