



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ELC MISCELLENOUS CASE 8 OF 2021

(FORMERLY ELDORET ELC MISCELLENOUS. NO. E031 OF 2021)

ANNA CHESAINA KENDUIYWA.....APPLICANT

-VERSUS-

THE NANDI COUNTY LAND REGISTRAR.....RESPONDENT

RULING

1.The Applicant has moved this court primarily under section 78(2) of the Land Registration Act, seeking orders that:

1. the Court be pleased to order the removal of the restrictions entered in the register of the parcels of land known as NANDI/KAMAIYWO 288 as entries numbers 5 and 6 in the Green card

2. The Application is grounded on grounds interalia that-

- i) the Applicant is the registered proprietor of the suit property and that she is elderly and intends to subdivide the aforesaid parcel
- ii) the Applicant instructed her advocates to carry out a search for purposes of the application for consent and found that they were restrictions had been placed by the Land Registrar as entries number 5 and 6
- iii) the entries in the restrictions are worded as follows;

“Entry no. 5 dated 14.4.2001 Restriction, No dealings without the consent of the Land Registrar (Dickson Dulo) see Chiefs letter dated 14.8.2000 and advocates letter see Kapsabet SPMCC no. 7/1982 and the ruling of the case that Monica Chemtai is entitled to equal share of this land.

Entry no.6 dated 21.2.06 Decree by the Principal Magistrate Kapsabet Civil Suit no.7 of 1982 that the Defendant and her children are entitled to an equal share from the parcel since they are legally the wife and children of the Plaintiff.”

3. The Application is further supported by the Supporting affidavit of the Applicant who reiterates the grounds thereof but has annexed the search certificate showing the said entries 5 and 6 as aforementioned, a copy of the green card is equally annexed, a letter from the Advocates dated 20.5.2021 and a letter to Kapsabet Law Courts with regard to Kapsabet RMCC NO 7 OF 1982 and a response thereof indicating the parties to Kapsabet SPMCC NO.7 of 1982 were **JOHN CHEREKA VS MRS VERONICA W/O FRANCIS** and copies of the pleadings of that case are all equally annexed.

4. A Replying Affidavit by the Respondent and deponed by Judith Cherutich the office holder was filed. It is her response that whereas the parties herein were not party to the Kapsabet RMCC NO7 OF 1982 that the Applicant ought to have enjoined Monica Chemtai who filed the restrictions so as to hear her side of the story. The Respondent equally responds that the Applicant side stepped the provisions of section 78 of the Land Registration Act and that this Honourable court is not the right forum to adjudicate the dispute and for this she prays that the application ought to be dismissed.

5. Both parties filed their submissions and now this Ruling;

APPLICANTS SUBMISSIONS

6. It is the Applicant's submission that the court has the jurisdiction to hear this matter and that section 78(2) refers to an application made to the court which court ought to be the ELC court. The court therefore has jurisdiction to hear the application and the orders sought and allowed the same.

7. The Applicant further submits that there was no valid court order to give rise to the restriction as the pleadings annexed in relation to Kapsabet 7 of 1982 relate to a monetary claim and not the suit property, that the **entries 5 and 6** were initially made on the strength of the letter from the chief and a decree which letter and decree are no longer available, consequently the Applicant argues that there was no justification for the restriction to be registered in the first place. The Applicant relies in the case of **DAVID MACHARIA KINYURU VS DISTRICT LAND REGISTRAR NAIVASHA AND ANOTHER (2017)** eKLR and therefore prays that the application be allowed.

RESPONDENT'S SUBMISSIONS

8. The Respondents submit that the Applicant never applied to the Land Registrar to remove the restriction as that would have been the first port of call. In support of this position the Respondent has cited section 73 (1) and (2) of the Land registration Act, which provide for the removal of the Restriction by the cautioner themselves, the Land Registrar or the Court.

9. The Respondent submits that a reading of section 73(1) and (2) together with section 78 gives the impression that that a Land Registrar ought to be moved first to remove the caution/restriction before moving to the Court. It is the Respondents submission that Section 78(1) therefore gives first priority to the Land Registrar to remove the Restriction before invoking 78(2) where the court may then be moved; in this regard the Respondent has relied on the case of **Mwangi Rukwaro And Another Vs Land Registrar Nyeri 2019 Eklr.**

10. The Respondent submits that the procedure of seeking the orders for removal of the restriction ought to be by way of a Complaint not through Originating Summons and certainly not through a Miscellaneous Application like the present application, and in this regard the Respondent has cited the decision in **Joseph Kibowen Chemior vs William C. Kiseru 2013 eKLR** as well as the decision in **Rajab Kosgei Magut vs Nuru Jepleting Choge 2020 eKLR**.

ANALYSIS AND DETERMINATION

11. The court has considered the rival submissions of the parties herein. The Applicant has exhibited before court the letter dated 20.05.2021 through her advocates to the Land Registrar seeking details in support of the entries 5 and 6. The respondents in her Replying Affidavit confirm this vide paragraph 11 of the said affidavit.

12. The applicant has however not invoked the procedure at section 73 and 78(1) which requires that an application for removal of caution / restriction be made to the Land Registrar. Section 73(1) provides:

“A Caution may be withdrawn by the cautioner or removed by the order of the court or subject to subsection 2 by the order of the Registrar.

13. (2) ***the Registrar on the application of any person interested, may serve notice to the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.”***

14. In the case of **Mwangi Rukwaro and another vs Land Registrar Nandi (2019) eKLR** the court expressed itself as follows

“There is no evidence that the Applicant made the applications contemplated in section 73 and 78 of the Land Registration Act cited above.

19. Whilst this Court has power to order removal of the caution/restrictions herein it cannot do that through a process where the cautioner or his legal representative has not been given an opportunity to participate. In the special circumstances of this case, I am of the considered view that the Applicants should invoke the process in section 73(3)(4) of the Land Registration Act. As it is the only through that process that it may be determined that there is no person with an interest in maintenance of the caution.’

15. The court in the **Mwangi Rukwaro case** further observed in relation to the impact of giving the cautioner notice that:

16. “A determination as to whether or not any person stands to suffer any prejudice if the caution filed against the title held by the Applicants can only be made if the process of removing a caution as contemplated in law is followed. That is to say there is need for the Applicant to apply to the Registrar for removal of the caution. The Registrar would then write to the cautioner to show cause why the caution should not be removed.....”

17. Having left out MONICA CHEMTAI and/or her legal representative, the court is not able thus to hear them on this application for removal moreover given that the documents leading to the registration of the restriction have not been availed before court.

18. The general trend taken by the courts in such applications, especially where the cautioner has not been joined in the proceedings, is to disallow the application so as not to condemn the cautioner unheard as was held in the case of **John Kamau Kinyanjui v Thika District Land Registrar [2017] eKLR** where the Honourable Judge declined to remove restriction for the reason that no green card had been attached to the application to clearly show who lodged the restriction and further that the person who lodged the restriction had not been served. The Court noted that allowing such an application would condemn them unheard.

19. Similarly in Nyaga Nderi v James Nyaga Kinyua [2021] eKLR the Court held that;

“But there is still another aspect that the applicant seems to overlook. The restriction is not solely about the Respondent. It is also about five (5) others who are not part of the appeal and were not also part of the lower court case. I don’t know who the five (5) others are but I know that the removal of the restriction in the manner proposed by the Applicant would amount to condemning them unheard”

20. On that score of non joinder of the cautioner the court disallows the application.

21. The Respondent has submitted extensively on the fact the Applicant has used a wrong procedure to approach the court and the court is therefore inclined to make a finding as to whether by filing a Miscellaneous application instead of a Plaint did the applicant invoke the right procedure. The Respondent has cited the case of Joseph Kibowen Chemior where the court in reference to the procedure for removal of a caveat / restriction observed as follows:

21. If it is apparent that the right to register a caution was exercisable before the commencement of the Land Registration Act (L.R.A). Such right unless the contrary is specifically provided continues to be exercisable and governed by the law that was applicable to it immediately prior to the commencement of the L.R.A since the L.R.A does not provide for a procedure that in the Civil Procedure Act As contrary to the procedure under the RLA regime, the same procedure for the removal of cautions prevailing in the RLA regime is the same procedure that will apply under the current law. The prior procedure did not provide for cautions to be removed by miscellaneous Applications or Originating Summons as we have seen above. In such case the fallback is to commence suit by way of Plaint as noted in the Civil Procedure Act. It is therefore my considered view that an action for the removal of a caution needs to be commenced by way of 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.’

22. Having observed and made a finding that the procedure under section 73 and 78(1) of the L.R.A were not exhausted and further that the proper way to have approached the court was through a Plaint and not through the Miscellaneous Application as was done in this matter, the inevitable conclusion is that the Application dated 12.08.2021 is hereby disallowed.

23. The Applicant should exhaust the mechanism for a removal of a caution and or restriction as provided for under sections 73 and 78(1) by making the necessary application before the Land Registrar. Costs awarded to the Respondent.

DATED AT KAPSABET THIS 19TH DAY OF JANUARY, 2022.

M. N. MWANYALE

JUDGE

Ruling delivered in the presence of: -

Mr. Sambu for the Petitioner

Mr. Kuria for the Respondent