



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. E022 OF 2021 (OS)

SECTION 73(1) OF

IN THE MATTER OF THE LAND REGISTRATION ACT (ACT NO. 3 OF

2012)

IN THE MATTER OF SECTION 57(5) AND 64 OF THE REGISTRATION OF TITLES ACT (CAP 281 LAWS OF KENYA NOW REPEALED)

AND

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ORDER 37 RULE 5 OF THE CIVIL PROCEDURE

RULES 2010 (CAP 21 LAWS OF KENYA)

AND

IN THE MATTER OF REMOVAL OF CAVEAT/CAUTION LODGED AS ENTRY NUMBER 3 IN THE INHIBITION SECTION OF LR NO. 209/5096

BETWEEN

JOMBA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

ADAN MOHAMED ADAN.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

(Under Order 37, rules 1, 3 and 14, of the Civil Procedure Rules 2010, Sections 1A and 3A of the Civil Procedure Act, and all other enabling provisions of the law.)

JUDGEMENT

Background

1. The Plaintiff moved the Court by way of an Originating Summons dated 11th May 2021. The Plaintiff being the registered proprietor of a leasehold interest known as parcel number 209/5096 sought the determination of 3 questions, namely;

a) Whether the caveat /caution lodged on the parcel of land number 209/5096 (hereinafter referred to as the suit land) should be

removed.

b) Whether the 2nd Defendant, the Chief Land Registrar, should withdraw and deregister the caveat /caution registered as entry number 3 in the inhibition section of title to the suitland.

c) Whether the 1st defendant should bear the costs of the originating summons.

2. The Plaintiff's Originating Summons is supported by the affidavit of James Mbatia Njoroge, a director of the Plaintiff Company. He deposes that sometimes in the year 2020, he was informed that there was an attempt by some unknown person to defraud the Plaintiff of the title to the Suitland. That prompted him to commence investigations at the Nairobi Lands office where he obtained a copy of a search of the title. That was when he noticed that a caveat/caution had purportedly been registered on the title on 26/2/2009, by the 1st Defendant. On 2/4/2009, the same 1st Defendant applied to withdraw caveat/caution. However, a recent search (marked as document 6) indicates that the title is still cautioned. The caveat that is registered was supposedly registered on 1/1/1970 as per the search.

3. The Plaintiff intends to develop the Suitland through financing by a Commercial Bank but the caveat/caution is inhibiting registration of any transactions frustrating its progress. That is what prompted the plaintiff to commence the proceedings in this Court.

Court's Directions.

4. The Court, having been satisfied that the defendant had been properly served but failed to enter appearance and or file a response proceeded to give directions in terms of the provisions of Order 37 of the Civil Procedure Rules, 2010. The Court's directions were that the Originating Summons be heard by way of affidavit evidence. Consequently, the Plaintiff was directed to file written submissions within 14 days.

The Plaintiff's Submissions.

5. The Plaintiff filed submissions as directed by the Court. The Plaintiff submitted that since the caveat/caution the subject matter of this suit was registered prior to the repeal of the Registration of Titles Act (RTA), the Court ought to be guided by the provisions of part XI of the Repealed RTA, Cap 281 laws of Kenya in its determination of this suit. Under section 37, of the Repealed Act, the proprietor of land may by summons, call upon the caveator to attend before Court and show cause why the caveat should not be withdrawn. The Court has the discretion to make such order in the matter as it deems fit even ex-parte.

6. The Plaintiff urges the Court to exercise the discretion in its favour since the 1st Defendant has not shown any cause why the caveat/caution lodged on the title to the Suitland should not be removed, and or withdrawn.

Issues for determination.

7. The court is of the view that there are only two issues for determination in this case namely; -

a) Whether the caveat/caution lodged on the suit land by the 1st Defendant should be removed.

b) Whether the 1st Defendant should bear the costs of the Originating Summons.

Analysis and Determination

A. Whether the caveat/caution lodged on the suit land by the 1st Defendant should be removed.

8. From the documents exhibited by the Plaintiff, it is clear that the title to the Suitland is a leasehold for 99 years from 1st July 1992. The suit land was transferred to the Plaintiff, Jomba Investments Ltd on 24th September 2003. The caveat/caution by the 1st Defendant, Adan Mohamed Adan was registered on the title on 26/2/2009. The caveator was claiming a purchaser's interest pursuant to a sale agreement dated 23rd December 2008. The caveat/caution forbade any dealings with the land absolutely.

9. The latest search conducted by the Plaintiff marked as document number 6 confirms the details. On the inhibition section however, the entry number 3 is a caveat/caution by Adan Mohamed Adan claiming a purchaser's interest, supposedly registered on 1st January 1970. I say supposedly, because the leasehold interest itself as stated above is a 99 years lease from 1st July 1992. It was not in existence in 1970.

10. The Plaintiff seeks the removal of the caveat/caution. The entry on the title indicates that the caveat/caution was registered on 26/2/2009. The entry in the search then can only be termed as erroneous. In 1970, the title to the suit land was non-existent.

11. Be that as it may, the caveat/caution was registered before the enactment of the Land Registration Act of 2012. It was registered under the repealed Registration of Titles Act (RTA). The Court agrees with the submissions of the Plaintiff's Advocates that the applicable law in this case then is the repealed Registration of titles Act (RTA).

12. The Interpretation and General Provisions Act, Cap 2 Laws of Kenya at Section 23 (3)(b) provides that, "**where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not –**

(b) “.....affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed.”

13. The import is that though the Registration of Titles Act was repealed wholly by the Land Registration Act, 2012, it will apply in this case since the caveat/caution was registered before the repeal.

14. In determining the issue whether the caveat/caution should be removed, I will have to make reference to the relevant provisions of the repealed RTA. The relevant provisions on the lodging, removal and or withdrawal of caveats was section 57 thereof.

15. Section 57(5) empowered the Court either ex-parte or otherwise to make such an order as it deemed fit against a caveator once it was satisfied that the caveator had been duly served with a summon to show cause why the caveat should not be withdrawn.

16. In this case, the Court already confirmed that the 1st Defendant, who is the caveator was duly served with the Originating Summons as evidenced by the affidavits of service on record.

17. The Court is further convinced from the evidence adduced that the Plaintiff is indeed the registered proprietor of the land. The caveat lodged against the title to the land prohibits all dealings in the land absolutely. The Plaintiff's case that it has been prejudiced and inconvenienced by the unreasonable maintenance of the caveat on its title to the Suitland is therefore valid.

18. Accordingly, the court's finding is that the caveat/caution lodged as entry number 3 on the title to suit land should be removed.

B. Whether the 1st Defendant should bear the costs of the Originating Summons.

19. Having found in favour of the Plaintiff, the Court has not reason to depart from the norm that costs follow the cause. Accordingly, the Court's finding in respect of the 2nd issue is that indeed the 1st Defendant should bear the costs of the Originating Summons.

Conclusion.

20. In conclusion the Court makes the following orders:-

a) That the caveat/caution lodged on the parcel of land number 209/5096 as entry number 3 be removed forthwith.

b) That the 2nd Defendant should deregister the caveat/caution registered as entry number 3 on the inhibition section of title known as L.R no. 209/5096.

c) That the 1st Defendant shall bear the costs of the Originating Summons.

It is ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2022.

M.D. MWANGI

JUDGE

IN THE VIRTUAL PRESENCE OF:-

MR MALANGA FOR THE PLAINTIFF

NONE APPEARANCE FOR THE RESPONDENT

COURT ASSISTANT: HILDA

M.D. MWANGI

JUDGE