



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 127 OF 2015**

**NYAGA NJAI .....PLAINTIFF/APPLICANT**

**VERSUS**

**ANTHONY MUNENE NYAGA .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**AMOS KINYUA NYAGA .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ALBERT NJAI NYAGA ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**MARY NJERI NYAGA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**LUCY MURINGI NYAGA ..... 5<sup>TH</sup> DEFENDANT/RESPONDENT**

**WINNIE WANJIRA NYAGA .....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**ANN ROSE WAKUTHII NYAGA .....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application before me is the Notice of Motion dated 11/03/ 2021 and filed on 17<sup>th</sup> June, 2021 whereby the Applicant is seeking the following orders: -

- a. **That an order do issue for removal of the restrictions/cautions on L.R. Nos. Mwea/Tebere/B/346, 347, 348 and 1186.**
- b. **That the costs of the application be provided for by the Respondents.**

2. On 7<sup>th</sup> October, 2021, the parties herein through their advocates on record agreed that the application be canvassed by way of written submissions.

3. The Applicant filed his on 5<sup>th</sup> November, 2021 whereas the respondents did not file any.

**APPLICANT'S CASE AND SUBMISSIONS**

4. The application is premised on the grounds set out on the face thereof, supported by an Affidavit of the Applicant sworn on 29<sup>th</sup> March, 2021.

5. The Applicant's case is that this Honourable Court vide a judgment delivered on 2<sup>nd</sup> October, 2020 granted an order of permanent injunction against the Respondents.

6. He stated that upon conducting an official search, he discovered that there are restrictions placed by the Respondents against his parcels of land L.R. Nos. Mwea/Tebere/B/346, 347, 348 and 1186.

7. He further stated that despite several demands, the Respondents had refused, neglected and or ignored his request to remove the restrictions placed against their said parcels of land and that unless the said restrictions/cautions are removed, he stands to suffer irreparably.

8. The Applicants submitted that the removal of the cautions is not a new claim and that restriction was placed by the respondents through

the Deputy County Commissioner Mwea hence the ground that the same were placed by a person who is not a party in this case was misplaced.

9. He relied on the case of *Jane Wanjiku Mwangi & Catherine Nyambura Mwangi Vs Nathan Ndegwa Njeru ELC 363 OF 2017* where he submitted that **Justice Kemei** held that the Environment and land Court can invoke original jurisdiction when dealing with an application to remove cautions especially where judgment favours the applicant and there is no pending appeal or orders setting aside the judgment of the court.

10. He prayed that the application be allowed.

#### **RESPONDENTS' CASE**

11. The Respondents opposed the application by filing grounds of opposition dated 25<sup>th</sup> June, 2021 setting out the following grounds;-

- a. That the matter is finalized, judgment entered against the defendants hence the Court is functus official.
- b. The applicant's prayers, in the plaint had not claimed removal of restrictions on L.R. Nos. Mwea/Tebere/B/346, 347, 348 and 1186.
- c. That the restriction was placed by a party who is not a party in this case.

#### **ANALYSIS**

12. I have considered the Notice of Motion, grounds in support thereof, supporting Affidavit, annexures thereto applicant's submissions and grounds of opposition.

13. The applicant has brought the application under **Section 38 of the Civil Procedure Act** which provides that: -

*"Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree — (a) by delivery of any property specifically decreed; (b) by attachment and sale, or by sale without attachment, of any property; (c) by attachment of debts; (d) by arrest and detention in prison of any person; (e) by appointing a receiver; or (f) in such other manner as the nature of the relief granted may require: ..."*

14. He also relied on **Sections 73 (1) and 78 of the Land Registration Act, 2012** which provide as follows: -

*"73 (1) 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."*

*"78. (1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.*

*(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the Court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs."*

15. I have perused annexure **NN1** in the Applicant's supporting affidavit as well as the records of this Honourable Court and confirm that indeed judgment was entered in favour of the applicant herein on 02/10/2020.

16. The Respondents have opposed the application on ground that this Honourable Court is functus officio and the application amounts to introducing a new claim after judgment.

17. The main issue in contention in this application is whether the caution placed on the suit land on 17/07/2014 prior to instituting this suit is tantamount to introducing a new cause of action after judgment has been entered and the court is therefore functus officio?

18. First, it is important to understand the power of this Honourable Court to remove a caution. **Section 73(1) of the land Registration Act, No. 3 of 2012** states 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"*.

19. From the provisions of the law, it is clear that a caution may be removed either by the cautioner, the Registrar or by the Court. The argument by the Respondent that this Honourable Court is functus officio is untenable to the extent that the issue was not a cause of action in the plaint or the defence. It is not also an issue that can fall as a cause of action within the meaning of **Section 7 of the Civil Procedure Act, Cap 21**. It is a form of restriction registered by a person who has an interest on a parcel of land. Ordinarily; person who wishes to place a caution on a parcel of land applies through the office of the Land Registrar concerned or the Court who usually gives notice to the registered owner of such intention. In most cases, parties apply for the registration of cautions through the Deputy County Commissioners and the County Administrators themselves or other law enforcement and administration officers without giving notice to the registered proprietor of

the land to either accept or oppose such restriction. Where such a scenario happens, a caution can be placed on land without the knowledge of the registered proprietor.

20. That in my view could have happened in this case which explains why the Applicant was not aware that a caution had been placed on his land without his knowledge.

21. The Respondents cannot be opposing the removal of the caution if the Applicant was aware of the existence of the same. If indeed the Respondents placed the caution without notifying the Applicant, they cannot be allowed to benefit from their mistakes

22. Justice **J.G.KEMEI** was faced with a similar dispute in the case of *Jane Wanjiku & Anor Vs Nathan Ndegwa Njeru (2020) e KLR* where she observed as follows:-

*“The Court has considered and re-evaluated the entire material on record and the reasons tendered by the trial court in its ruling dated 14<sup>th</sup> July, 2016. The court has also considered the circumstances of the case and the nature of the application before the trial court. The court finds no error of law on the part of the trial Court. The reasons given for allowing the application for removal of a caution were perfectly plausible. The Respondent had succeeded in the suit. He had a decree in his favour against the Appellant. There was no pending application for setting aside the Judgment. There was no order for stay pending Appeal in force at the time. There was surely no plausible reason why the application could not be allowed.”*

23. The facts of this case are at all fours with those in the cited case. I agree with the reasoning by the learned Judge.

24. The upshot of my findings are that the Applicants Notice of Motion dated 11/03/2021 is merited and the same is hereby allowed as follows:-

**a. Restrictions/Cautions placed on L.R. No. MWERUA/TEBERE//B/346, 347, 348 and 1186 be and are hereby removed.**

**b. Costs of the application be borne by the Respondent.**

**RULING READ, DELIVERED AND SIGNED THE OPEN COURT AT KERUGOYA THIS 18TH DAY OF FEBRUARY, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**IN THE PRESENCE OF:-**

**1. MS MUTURI HOLDING BRIEF FOR MR. OMBACHI FOR PLAINTIFF/APPLICANT**

**2. RESPONDENT/ADVOCATE – ABSENT**

**3. KABUTA – COURT CLERK.**