



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. APPLICATION NO. 47 OF 2007**

FREDRICK NJUGUNA NJAGI.....APPLICANT/ DEFENDANT

VERSUS

MBEERE COUNTY COUNCIL..... RESPONDENT/PLAINTIFF

**RULING**

This is an application dated 17/4/2015 seeking for orders that;

1. *The honourable court grants an order that the caution lodged by the plaintiff/respondent's agent against land no Evurore/Evurore/1067 be lifted.*
2. *The Land Registrar Mbeere be ordered to delete from the register the name of Embu County Council as the owners of land parcel number Evurore/Evurore/1067 and register Fredrick Njuguna Njagi as the registered owner thereof. The Land Registrar Mbeere do dispense with the attendance of the Embu County Council during the land control board meeting.*
3. *The cost of the application be provided for.*

The application is supported by the affidavit of Fredrick Njuguna Njagi. In the affidavit the applicant states that parcel no Evurore/Evurore/1067 originally belonged to him after he was given the same by his father who is the 1st defendant. During demarcation the said parcel was fraudulently registered under Embu County Council. The applicant sued the Council claiming the said land and the council agreed to settle the matter out of court by filing a consent dated 30/4/2004 in court. The Council had resolved to withdraw the case vide minutes for the meeting held on 9/3/2004.

The Clerk to the respondent had registered a caution against the title of the land though they had no proprietary interest in the same. The Council had even executed transfer of land documents and the consent of the Land Control Board given in the applicants favour before the respondents filed the case. This court dismissed the respondent's case against the applicant on 13/10/2014 for want of prosecution. The respondent did not appeal against the ruling. The applicant states that there is nothing left to prevent the land from being registered in his name as the registered owner had even executed transfer in favour of the applicant and the caution should therefore also be lifted.

The respondent did not file a replying affidavit after being served with this application.

The counsel for the applicant Ms. Muthoni submitted that the land in question was erroneously registered in the name of Embu County Council as shown in the green card. A case filed by Mbeere County Council PMCC No. 38 of 2005 in Siakago Court was dismissed for want of prosecution. The counsel argued that Mbeere County Council has no proprietary interest in this case. The Council had however registered a caution against the title of the said land. The applicant seeks for removal of the said caution and cancellation of title and issue a new title in the name of the applicant. The Land Registrar requires a court

order to implement the consent orders between the parties.

The grounds upon which a court can lift a caution were discussed in the case of **MARIA NGANGI GWAKO VS CHARLES MWEZI NGANGI [2014] eKLR**. The applicant sought an order for the removal of caution lodged by the respondent on parcel of land known as LR .No Wanjare/Bokeire/1467. The court held that when a caution is objected to by a proprietor of land, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place.

In the case of **JACOB MWANTO WANGORA V GEDION M. WANGORA & 3 OTHERS [2013] eKLR** the applicant sought that a restriction be removed. The court held that the applicant needed to prove that the restriction on LR No. Ngong/Ngong/2141 was illegal and not justifiable.

In the instant case, the respondent was served with the present application but did not file a replying affidavit. The court on 27/9/2015 held that it was satisfied that service of the said application on the respondent was proper. In the absence of a replying affidavit justifying why the caution should remain in place, the court should lift the said caution.

In pursuance to a consent dated 26/7/2004 and adopted as a court order, the suit between the applicant and Embu County Council was marked as settled.

In another suit PMCC NO 38 OF 2005, Mbeere County Council sued the applicant and another seeking for an injunction to restrain them from interfering, trespassing or alienating Evurore/Evurore/1067.

In a consent dated 5/6/2007 and filed in court on 6/6/2007, the parties agreed to have the suit transferred to the High Court Embu. In an application dated 13/5/14, the applicant sought that the suit be dismissed for want of prosecution. On 13/10/2014, the suit was dismissed by this court for want of prosecution. The order for dismissal has not been reviewed or appealed against.

The applicant has established that there is no pending suit against him by either Embu County Council or Mbeere County Council. In absence of any suit and any justification as to why the caution should not be lifted, the prayers in the application should be allowed.

In regard to dispensing with the presence of Mbeere County Council in the Land Board, the court will look at the relevant provisions of the law. Section 17 of the Land Control Act provides that;

*(1) Where an application for consent or an appeal is before a board, the board may—*

- a. require the applicant or appellant or any person interested in or affected by the application to attend before it;*
- b. require the applicant or appellant to adduce evidence to its satisfaction as to the applicant's identity and as to the ownership of the land to which the application relates;*
- c. require any person to produce any document or other evidence relating to the land, and shall allow such reasonable time as it may think fit for a person to appear before it or produce a document or other evidence.*

In view of the above provision, it is not mandatory that all the parties to a transaction physically attend the Land Control Board meetings. The Board has powers to summon the parties to attend the session before consent can be granted if need be. The respondent herein has no proprietary interest in the land.

It is my considered opinion that the applicant has satisfied this court that the presence of the respondent is not necessary before the Land Control Board. Prayer 3 should therefore be allowed.

I find the application merited and allow the same with no order as to costs.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 22ND DAY OF OCTOBER, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Muthoni for the Applicant**