



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL APPEAL 50 OF 2002

J M N.....PLAINTIFF

VERSUS

J M A.....DEFENDANT

RULING

1. The Motion dated 22nd February 2011 seeks several orders among them being – enlargement of time to settle the decretal amount by a further 120 days, waiver of interest, removal of a caution and costs.
2. The applicant’s principal, complaint is that the respondent had been ordered on 9th December 2010 to remove a caution on *[particulars withheld]* within 14 days to enable the applicant obtain a loan so as to pay the outstanding decretal amount to the respondent. The caution was not removed within 14 days and a consequence the applicant has not been able to obtain the envisaged and subsequently to clear the outstanding decretal amount. The orders in the application dated 22nd February 2011 are sought against that background.
3. The respondent by her affidavit sworn on 18th May 2011 states that she complained with the court order by applying for the lifting of the caution. Her case is that if the caution was not lifted after that then she is not to be blame.
4. The order in question was made by Kimaru J on 25th November 2010, and formally extracted on 10th December 2010. The extracted order was in the following terms:-

“1. That the respondent do remove the caution placed by her on land reference number Ngong/Ngong/5211 within 14 days from today.

2. That the defendant (the applicant herein) to pay the enter decretal sum to the plaintiff (the respondent herein) within 45 days from today’s date.

3. That the defendant’s advocates do give a preliminary undertaking to the court prior to the removal of the caution money secured as a loan from the bank shall be solely applied to settle the decretal sum.

4. ...”

5. It would appear from the order that the removal of the caution was conditional on a professional undertaking being given by the advocate for the applicant herein to the effect that the money loan money raised against *[particulars withheld]* was to be applied solely to settle the decretal sum.

6. The said professional undertaking was given by the advocates for the applicant herein through their letter dated 15th December 2010 which was lodged in court on 16th December 2010. The said letter is adduced to the Deputy Registrar and is in the following terms:

“PROFESSIONAL UNDERTAKING

Pursuant to the Courts Order dated 25/11/2001 (sic), we hereby give our undertaking to pay as money received from the defendant to the plaintiff's advocates towards payment of the decretal amount.”

7. To my mind the condition imposed in the court order of 25th November 2010 for the removal of the caution has been satisfied. It was incumbent on the respondent to remove the caution so as to facilitate the obtaining of a loan by the applicant to settle the decretal amount within 45 days as ordered by the court.

8. Has the respondent taken any steps to remove the caution? She in her affidavit of 18th May 2011 that she paid Kshs.500.00 for the removal of the caution. She has exhibited copy of a receipt purported by issued by the Lands Department to that effect. However, it would appear to date that the caution has not been removed. I note, the respondent's double speaking in her submissions dated 23rd February 2012. She says she paid for the removal of the caution in her affidavit, yet in her submissions she says that the condition for the removal of the caution had not been fulfilled. So has she paid for the removal of the caution, or is she saying that the caution cannot be removed before the condition is met?

9. My understanding of the facts is that the applicant has fulfilled the conditions imposed by the court in order of 25th November 2010. On her part the respondent has not reciprocated by removing of the caution as ordered by the court. Consequently, I find merit in the application dated 22nd February 2011.

10. I hereby allow the said application in its entirety. The respondent has 28 days to cause removal of the caution she lodged on 24th June 1982 against the title Ngong/Ngong/5211. The matter shall be mentioned after 30 days for compliance.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE

W. M. MUSYOKA

JUDGE