



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

MISCELLANEOUS APPLICATION NO. EO21 OF 2021

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

IN THE MATTER OF THE LAND REGISTRATION NO. 3 OF 2012 SECTIONS 73(1), (2), (3), (4) AND (5),

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT NO. 9 OF 2011 SECTIONS 13

AND

IN THE MATTER OF FAIR ADMINISTRATION ACT SECTIONS 3, 4, 7, 8, 10 AND 11

AND

IN THE MATTER OF TITLE NUMBER KAJIADO/DALALEKUTUK/6557

AND

IN THE MATTER OF ILLEGAL, WRONGFUL PLACING OF CAUTION AGAINST ALL THAT PARCEL OF LAND KNOWN AS LAND REFERENCE NUMBERS KAJIADO/DALALEKUTUK/6557

BETWEEN

DANIEL SUPEYO NKAL.....APPLICANT

AND

SIMON NTASIKOI NOONKANAS.....1ST RESPONDENT

LAND REGISTRAR, KAJIADO.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. This ruling is on the Preliminary Objection dated 7th June, 2021 filed by the first Respondent's Counsel. It states as follows;

2. (a. That the Applicant's application is fatally and incurably defective in that no Judicial Review Order can be issued or granted against a private individual, particularly the 1st Respondent.

(b. That the Honourable Court lacks jurisdiction to issue Judicial Review Orders and or stay a decision by a private individual, particularly the 1st Respondent herein.

(c. That the Applicant has not exhausted the internal remedies available under the **Land Registration Act** as provided under **Section 73**.

3. The application which is the subject of the Preliminary Objection is the Chambers Summons dated 10th May, 2021. It seeks two main prayers namely;

a. An order of Mandamus compelling the Land Registrar Kajiado the second Respondent to remove the registered caution against all that parcel of land known as KAJIADO/DALALEKUTUK/6557.

b. An order of Prohibition to issue against the first Respondent forbidding him or anybody claiming through him from placing any caution whatsoever against the suit land without informing the Applicant.

c. That the leave so granted to operate as a stay of the decision of the first Respondent.

4. In addition to the Preliminary Objection by the first Respondent, the Honourable the Attorney General has filed three grounds of opposition to the summons dated 10/5/2021.

They are as follows;

1. That the registration of the caution was done within the second Respondent's statutory mandate as provided by **Section 71 of the Land registration Act (Act No. 3 of 2012)**.

2. That there is a contractual dispute between the Applicant and the first Respondent which ought to be determined.

3. That the Application is misconceived, mischievous and an abuse of the Court process.

5. In support of the Preliminary Objection, the first Respondent's Counsel filed written submissions dated 24/1/2022 in which he urged that under **Section 71** of the **Land Registration Act**, the first Respondent is entitled to caution the suit land.

Secondly, counsel said that **Section 73** of the **same act** provides for the removal of a caution and that the Applicant has not complied with this procedure.

Counsel cited the authority of **Mwangi Rukwaro –vs- Land Registrar, Nyeri (2019) eKLR** whose ratio decidendi is that before filing a suit in Court, one should exhaust the procedure in **Sections 71** and **73** of the **Land Registration Act** regarding cautions.

Thirdly, Counsel said that the proper course open to the Applicant is to file a plaint so that the Respondents may counterclaim for the part paid purchase price.

Finally counsel concluded by saying that the suit does not meet the threshold necessary for the grant of prerogative orders as per the case of **The Republic –vs- District Land Registrar Kiambu and another ex parte: Muguga Pyrethrum Growers Cooperative Society LTD and another (2014) eKLR**.

6. On the other hand, the Applicant's Counsel filed written submissions on 28/1/2022 in which he urged that the law relating to Judicial Review has radically changed from the common law position to the current hard look doctrine dictated by **Articles 23(3)(f) and 47 (1) of the Constitution as well as by Section 7(2) of the Fair Administrative Act**

In support of the above proposition, Counsel relied on several authorities the most notable being **Judicial Service Commission and another –versus - Lucy Muthoni Njora (2021) eKLR and Felix Kiprono Mategei–vs- Attorney General; LSK (Amicus Curiae) 2021 eKLR where the new hard look doctrine was applied**.

7. I have carefully considered the preliminary objection in its entirety including the Applicants pleadings which contain the facts of the case, the grounds of opposition by the Honourable the Attorney General and the submissions by the Applicant and the first Respondent.

8. I find that there is only one issue to be decided, namely, does this suit meet the threshold of Judicial Review considering that one of the reliefs sought, namely, prohibition, is against a private person and not against the Government or a Government body?

9. I find that the suit does not meet the above test because even though Judicial Review has radically changed from the common law position to the current hard look doctrine, it has not evolved to a level where the prerogative writs can issue against a private person.

10. I have perused the two authorities of **Njora and Matagei (Supra)** and I have not seen anything that extends the writs to private persons.

Secondly, I am persuaded by the argument put forth by the Honourable the Attorney General and also by the first Respondent's Counsel that there exists a procedure for removal of a caution in the Land Registration Act which should be exhausted first before coming to this Court.

11. Finally, the first Respondent cannot be prohibited from cautioning the suit land so long as he has a genuine grievance against the Applicant which remains unresolved.

12. For the above stated reasons, I uphold the Preliminary Objection dated 7th June, 2021 and dismiss the suit.

13. Regarding, costs, I order that each party bears its own because the dispute between the parties may still be filed in another form at a different forum.

Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 23RD DAY OF MARCH, 2022

M.N. GICHERU

JUDGE