



**REPUBLIC OF KENYA**

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

**MISC APPL NO. 3 OF 2020**

**FREDRICK DAVID MUEMA.....APPLICANT**

**-VERSUS-**

**LAND REGISTRAR MAKUENI.....1<sup>ST</sup> RESPONDENT**

**FRANCIS MUISYO MAITHA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before this court for ruling is the Notice of Motion application dated 7<sup>th</sup> July, 2020 and filed in court on 9<sup>th</sup> July, 2020 by the counsel for the applicant under certificate of urgency.

2. The application is expressed to be brought **under Section 26 (1), 73(1) and 75** of the Land Registration Act, No. 3 of 2012, Laws of Kenya **Order 51 Rule 1** of the **Civil Procedure Rules, 2010 Section 14 and 3A** of the **Civil Procedure Act** and all enabling provisions of the law and the following orders are sought:-

**1. Spent**

**2. That this Honourable court do make a finding that the registered caution registered on 19<sup>th</sup> June, 2020 by the 2<sup>nd</sup> respondent is wrongful and make a provision for damages consequently pursuant to Section 75 of The Land Registration Act, 2021, Laws of Kenya.**

**3. That this Honourable court do compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to remove the caution lodged on land parcel No. Makueni/Unoa/2291 by the 2<sup>nd</sup> respondent on 19<sup>th</sup> June, 2020.**

**4. Cost of the application be provided.**

3. The application is predicated on the grounds on its face and is further supported by the affidavit of Fredrick David Mwema, the applicant herein, the same having been sworn at Machakos on 7<sup>th</sup> July, 2020.

4. The second respondent filed a notice of appointment of advocate on 28<sup>th</sup> September, 2020 the same being dated 24<sup>th</sup> September, 2020. He did not file any response to the application.

5. The 1<sup>st</sup> respondent though served did not enter appearance nor file any response.

6. On the 10<sup>th</sup> May, 2021 the applicant filed the affidavit of service sworn at Machakos on 7<sup>th</sup> May, 2021 by Benedict Muthama Mutua, a process server.

7. The application was canvassed by way of written submissions.

Before I evaluate the submissions filed by the applicant on 29<sup>th</sup> September, 2020 I wish to point out one or two issues about the first respondent who is a Government Officer. Service of this application ought to have been effected upon the Attorney General as is provided for under **Section 13 of the Government Proceedings Act (Rev 2021) Cap 40** of the Laws of Kenya. I say so because the aforementioned affidavit of service indicates that it is the Land Registrar, Makueni who was served. For ease of reference **Section 13** of the Government Proceedings Act provides as follows:-

**“All documents required to be served on the Government for purposes of or in connection with any civil proceedings by or against the Government in accordance with the provisions of this Act shall be served on the Attorney General.”**

8. I now turn to the application. The applicant has deposed *inter alia* that he is the registered owner of the parcel of land known as Makueni/Unoa/2291, that the second respondent has wrongfully registered a caution on the entire suit property and unsuccessfully instituted a suit against the applicant being Makueni ELC 287 of 2019, formerly Machakos ELC No. 217 of 2016 over the same suit land. That on 26<sup>th</sup> July, 2017 this court did impose a fine of kshs. 150,000/- upon the 2<sup>nd</sup> respondent for contempt of court orders of injunction against him, that thereafter the 2<sup>nd</sup> respondent attempted to reinstate the suit vide an application dated 10<sup>th</sup> September, 2019 but the same was dismissed with costs, that the respondents have been issued with letters directing them to remove the caution registered on the suit property but they have ignored and/or neglected to comply with the same, that on 22<sup>nd</sup> June, 2020 he applied for search on his parcel of land and it was confirmed that there is a registered caution by the 2<sup>nd</sup> respondent alleging that he has ownership interest on the same parcel of land, that the caution has made it impossible for the applicant to secure loans for developing the parcel of land and it is in the best interest of justice that the same is removed.

9. Having read the application together with the submissions filed by the applicant’s counsel and which submissions reiterate the averments by the applicant, I do note that there is no doubt that land parcel number Makueni/Unoa/2291 is registered in the name of Fredrick David Muema who is the applicant herein. There is no pending case involving the suit property after Makueni Elc 287 of 2017 was dismissed on 13<sup>th</sup> May, 2019 for want of prosecution. Attempt to reinstate the suit vide the Notice of Motion application dated 1<sup>st</sup> October, 2019 filed by the 2<sup>nd</sup> respondent herein was dismissed on 29<sup>th</sup> April, 2020. That being the case, I see no reason why the caution that was lodged in respect of land parcel number Makueni/Unoa/2291 should not be removed. Both the respondents were served with this application and they chose not to respond to it. As it were the application remains unopposed and same is allows as follows:-

**2. This Honourable court has made a finding that the registered caution registered on 19th June, 2020 by the 2nd respondent is wrongful.**

**3. That this Honourable court hereby compels the 1st and 2nd respondents to remove the caution lodged on land parcel No. Makueni/Unoa/2291 by the 2nd respondent on 19th June, 2020.**

**4. Cost of the application be provided.**

**DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 22<sup>ND</sup> MARCH, 2022.**

**Mbogo C.G**

**Judge**

**22/3/2022**

In the presence of: -

CA: T.Chuma