

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISCELLANEOUS CIVIL APPL. NO. 15 OF 2014

PRYSON MAKOKHA TABATA.....APPLICANT

VERSUS

CHARLES WEKESA WANYAMA..... RESPONDENT

RULING

1. The applicant has moved the court by way of miscellaneous civil application seeking for the removal of caution lodged on land parcel no. N. Wanga/Khalaba/371 by the Respondent. The reason given for seeking orders sought is to enable the applicant to confirm the grant in HC succession cause no. 77 of 2013.
2. The motion is opposed and the Respondent filed a replying affidavit. In the affidavit, the respondent deposes his father purchased a part of L.R N. Wanga/Khalaba/371 and they have been living on that portion for over 20 years. He also deposed that he filed citation proceedings to prompt the applicant to take out letters of grant of his father on receipt of which pleadings the applicant commenced the subsisting succession cause. He deposed further that the applicant has not demonstrated that he has included the respondent as a beneficiary in that cause. He concluded that there is no requirement to remove a caution before a grant can be confirmed.
3. I have considered the matters in issue raised by both parties. It is clear from the replying affidavit that the respondent has a claim to a portion of the land in question. Under Order 3 (1) of the Civil Procedure Rules provides that every suit shall be instituted by presenting a plaint or in such other manner provided. In a claim for land, such other manner provided is under Order 37 where a claim is presented by way of originating summons. There is no way the lodging of a caution by itself will bestow the respondent any portion of this land. He is aware of the options open to him/them to establish their claim and sustaining a caution on the title is not one of options. It is also within the provisions of the Succession Act that a grant cannot be confirmed in respect of an asset which has an encumbrance. In my view, it was upon the respondent to demonstrate to this court that his/their interests are not taken care of in the succession cause and not depose that it was the duty of the applicant to do so.
4. Consequently, I find the notice of motion has merit and allow it. The caution lodged on title no. N.Wanga/Khalaba/371 by the respondent be removed forthwith. Each party shall bear their costs of this application.

Dated, Signed and Delivered in Bungoma this 30th day of JUNE 2014.

A. OMOLLO

JUDGE