



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC MISC NO. 7 OF 2021

NDULULU KAMAMI.....APPLICANT

VERSUS

KATHAWA KIMEU NDOLO.....1ST RESPONDENT

THE COUNTY LAND REGISTRAR MAKUENI.....2ND RESPONDENT

RULING

1. Before me is a Notice of Motion Application dated 29th of June 2021 brought under Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Section 73 of the Land Registration Act 2012, wherein the Applicant seeks for the following orders: -

1. That this Court be pleased to order the County Land Registrar Makueni do remove the caution registered against land parcel number Kisau/Mukimwani/347.

2. That the costs of the application be in the cause.

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of the Applicant sworn on 20th June 2021.

3. A summary of the grounds and the averments is that the Applicant is the registered owner of land parcel number Kisau/Mukimwani/347. That upon the application by the 1st Respondent, the Makueni County Land Registrar registered a caution against his property on 11th of April 2019. The Applicant averred that despite several demands from his Advocate, the Land Registrar had failed to remove the caution registered on his property. The Applicant further averred that as a result of the existing caution, he was unable to transfer a portion of the land that he had sold to a purchaser. The Applicant argued that the caution registered on his land restricted him from enjoying his rights as the proprietor of his land.

4. The 1st and the 2nd Respondents upon being duly served did not enter appearance or file any response to the application.

5. The application was canvassed by way of written submissions. The Applicant's submissions were filed on the 7th of February 2022 which I have duly considered.

ANALYSIS AND DETERMINATION.

6. Having considered the application and the submissions filed herein, I find that the only issue for determination is whether the caution registered on the Applicant's land can be removed vide a miscellaneous application.

7. The Applicant herein is seeking for an order that the County Land Registrar do remove the caution registered by the 1st Respondent on land Parcel Number Kisau/Mukimwani/347.

8. The parameters on who should register a caution are provided for under Section 71 of the Land Registration Act. Section 71(1) provides as follows: -

A person who-

a. claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act,

b. is entitled to a licence, or

c. has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land, lease or charge.

9. Section 73 of the Land Registration Act makes provisions on the removal of a caution. Section 73(1) stipulates that;

1. A caution may be withdrawn by the cautioner or removed by the order of the court or subject to sub section (2) by order of the registrar.

2. The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

3. If the cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

4. If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing of the objection within the time specified in the notice, and the Registrar shall after giving the parties an opportunity of being heard, make such order as the Registrar considers fit and may in the order provide for the payment of costs.

5. After the expiry of thirty days from the date of the registration of a transfer by a charge in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealings by the charge that was registered after the charge by virtue of which the transfer has been effected.

6. On the withdrawal or removal of a caution, the registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation."

10. Order 3 Rule 1 of the Civil Procedure Rules provides that;

"Every suit shall be instituted by way of a Plaint or in any other manner that may be prescribed."

11. As a general rule, a suit can only be instituted by way of a Plaint, a Petition or an Originating summons. It therefore follows that a Notice of Motion can only be filed within a properly instituted suit.

12. In the case of Joseph Kibowen Chemjor Vs William C Kisera (2013) eKLR the court held that;

"It is therefore my considered view that an action for the removal of a caution needs to be commenced by way of a plaint in which suit the plaintiff needs to prove on a balance of probabilities why the defendant has no right to place the caution on his title and why the caution placed by the defendant needs to be removed."

13. In associating myself with the above decision, I find that the issues relating to the removal of a caution are substantive issues which ought to be canvassed in the main suit where the Applicant will furnish the court with the relevant documents alluded to in his supporting affidavit.

14. In the end, I find that the miscellaneous application before the court is incompetent and I proceed to strike it out. The Applicant is directed to file a substantive suit.

15. Costs will be in the cause.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF APRIL 2022

IN THE PRESENCE OF: -

Court assistant – Mr. Mohammed

Ms. Ong'ong'a for the Applicant

