



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Miscellaneous Application 57 of 2013**

ABEL WALEKHKWA NAMIANYA .....APPLICANT

VERSUS

IEMMA MACHASIO..... RESPONDENT

**RULING**

The applicant has sought through his notice of motion dated 15<sup>th</sup> February 2013 seeking orders to have the caution lodged on land parcel No. Bokoli/Chwele/982 on 24<sup>th</sup> May 2011 removed.

The motion is supported by grounds on the face of it, inter alia that the applicant being the administrator of the estate of John Namanya Munialo alias Namanya Munialo is unable to proceed with the distribution to the beneficiaries. The applicant also swore an affidavit at paragraph 6 he avers that it is two years from the time of lodging of caution and the respondent has remained quiet to her claim. The respondent on her part filed grounds of opposition through her advocates on record Ms. Nanzushi & co. advocates and it raised 4 issues;

- i). The application is res judicata
- ii). The matter was determined vide Misc. 93/2011
- iii). The court lacks jurisdiction under order 37 rule 8 and section 128 & 133 of cap 300.
- iv). The application is fatally defective.

During oral submissions, the applicant maintained his application is properly before court. Mr. Khakula for the respondent argued that the application is fatally defective for not disclosing the sections of law under which it is brought.

He submitted that removal of a caution cannot be brought by way of

miscellaneous application except through a substantive suit. And that the Land Act gives the land registrar powers to remove caution after summoning both parties. He sought to have the application dismissed with costs.

The respondent has not however disclosed the prejudiced suffered due to the applicant's failure in not disclosing the section of the law under which the application is grounded. I hold that this is an aspect

curable by article 159 of the Constitution. On the aspect of this application being res judicata nothing was shown to this court to support the claim.

Order 37 rule 8 refers to cap 300 which has been repealed. I believe the law will be amended accordingly. Irrespective of the amendment having not been effected, I cannot apply a law that is repealed and replaced with new Land Registration Act. The applicable law – the Land Registration Act section 73 deals with withdrawal and removal of a caution. Section 73 (1) states “***a caution may be withdrawn by the cautioner or removed by order of the court subject to sub section (2), by order***

***of the registrar***”.

The section does not take power of court to give order removing a caution and does not specify mode of suit to be filed in court to obtain the court order. Had the respondent sworn an affidavit to demonstrate her interest in the land perhaps it would have made it easier for this court to consider refusing the granting of the orders sought. She lodged the caution on 24<sup>th</sup> May 2011. She has neither filed a suit against the applicant or his family members to establish her interest in the land nor moved the registrar to summon the applicant for making her claim known. In the absence of such evidence, this court find no reason to have the caution remain lodged on the title. I do therefore allow the application and give an order to have the caution lodged on land title Bokoli/Chwele/982 removed forthwith.

**RULING DATED, SIGNED, DELIVERED AND READ** in open court this 28<sup>th</sup> Day of March 2013.

**A. OMOLLO**

**JUDGE.**