



REPUBLIC OF KENYA

High Court of Kisii

Civil Miscellaneous Application 302 of 2012

ZAKARIA NYAMWEYA NYAMWEGA.....APPLICANT

VERSUS

SOPHIA BONARERI GESICHO.....RESPONDENT

RULING

1. The application before me has been brought by way of Notice of Motion dated 5<sup>th</sup> December, 2012. The same is supported by the Affidavit of the Applicant sworn on the same date. The application is not opposed. The applicant who filed the application in person has filed in court an affidavit of service of the hearing notice upon the respondent sworn by a court process server by the name **Justus Orondo**. I am satisfied that the respondent was served with the application herein and a hearing notice to the effect that the same was coming up for hearing on 20<sup>th</sup> February, 2013. The respondent having chosen not to appear in court, I heard the applicant in her absence.

2. In his address to the court, the applicant asked the court to remove the caution that was lodged by the respondent against the title of the property known as **Wanjare Bogiakumu/4606** (hereinafter referred to only as “**the suit property**”) on 21<sup>st</sup> March, 2012. The applicant relied entirely on his affidavit in support of the application and prayed for the application to be allowed. I have considered the application and the affidavit sworn on 5<sup>th</sup> December, 2012 in support of thereof. I am satisfied that the applicant is the registered proprietor of the suit property.

3. The applicant has annexed to the affidavit in support of the application a copy of official search dated 22<sup>nd</sup> November, 2012 which shows that he is the proprietor of the suit property. The search shows that the applicant was registered as the proprietor of the suit property on 15<sup>th</sup> August, 2011. The said certificate of search shows further that on 21<sup>st</sup> March, 2012, a caution was registered against the title of the suit property in favour of the respondent. A copy of the said caution was not produced in court but from the search aforesaid, it is indicated that the respondent lodged the caution to protect what is referred to as “**beneficiary’s interest**”. This caution was registered under **Section 131** of the **Registered land Act Cap. 300 Laws of Kenya** (now repealed). That section is very clear as to who can register a caution against title to land. A caution can only be lodged by a person, who claims a right to obtain an interest in land, lease or charge which is capable of creation by an instrument registrable under the said repealed Act or a person who is entitled to a license over the land or a person who has presented a bankruptcy petition against a proprietor of land, lease or charge. For the respondent to be able to maintain the caution registered against the title of the suit property, the respondent has to show that she has an interest in the nature set out above.

4. As I have already stated above, the respondent is claiming “**beneficiary interest**”. In the absence of a replying affidavit, I am unable to understand what beneficial interest the respondent has on the applicant’s property. I am also unable to determine whether such interest was capable of being created by an instrument registrable under the Registered land Act, Cap. 300 Laws of Kenya (**now repealed**). The applicant has demonstrated that he is the registered proprietor of the suit property and that, the respondent has no right to lodge a caution against her title. In the absence of any justification from the respondent as to why the caution should not be removed, the applicant’s application must succeed. I therefore allow the application dated 5<sup>th</sup> December, 2012 and direct the District land Registrar Kisii/Gucha District to

**HC.MISC.APPL.NO.302 OF 2012**

**NO.37**

remove forthwith the caution that was registered against land parcel number **Wanjare Bogiakumu/4606** on 21<sup>st</sup> March, 2012. The applicant shall have the costs of the application.

**Dated, signed and delivered at Kisii this 8<sup>th</sup> day of March, 2013.**

**S. OKONG’O,  
JUDGE**

**In the presence of:-**

No appearance Applicant.  
No appearance Respondent.  
Mobisa Court Clerk.

**S. OKONG’O,  
JUDGE.**

**HC.MISC.APPL.NO.302 OF 2012**