



REPUBLIC OF KENYA

High Court at Kisii

Miscellaneous Application 32 of 2013

SIMON PETER ONDIEKI.....1<sup>ST</sup> APPLICANT

MARIA KERUBO ONDIEKI.....2<sup>ND</sup> APPLICANT

V

LAZARUS ONGWAE ONDIEKI.....1<sup>ST</sup> RESPONDENT

LEWIS ONDANDE.....2<sup>ND</sup> RESPONDENT

DOUGLAS ONDIEKI..... 3<sup>RD</sup> RESPONDENT

RULING

1. The application before me has been brought by way of Notice of Motion dated 5<sup>th</sup> January, 2013. The same is supported by the Affidavit of the Applicants sworn on the same date. The application is seeking an order that the caution lodged on the title of parcel of land known as **C/ K/ Mwamosiama/3018** (hereinafter referred to as “**the suit property**”) by the respondents be removed. In their affidavit is support of the

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application, the applicants have deposed that the respondents have lodged a caution against the title of the suit property claiming that they are the grandsons of the Applicants and as such have an interest in the property. The applicants have stated further that the respondents have no valid interest on the suit

property. The applicants claim that the said caution has prevented them from dealing with the suit property and that the same serves no useful purpose. They have prayed that the same be removed so that they may be free to deal with the suit property.

2. When the application came up for hearing on 16<sup>th</sup> May, 2013, only the Applicants appeared. The respondents had been served with the application but neither responded to the same nor appeared for the hearing. The Applicants relied entirely on their affidavit in support of the application and urged the court to grant the orders sought. I have considered the application and the affidavit sworn

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in support thereof. The Applicants are the registered proprietors of the suit property. They have annexed to the affidavit in support of the application a copy of an official search dated 23<sup>rd</sup> January, 2013 which shows that the suit property is registered in their names. The search shows that the Applicants were registered as the proprietors of the suit property on 3<sup>rd</sup> August, 2011. The said certificate of official search shows further that on 19<sup>th</sup> July, 2012, a caution was registered against the title of the suit property in favour of the 1<sup>st</sup> respondent, **LAZARUS ONGWAE ONDIEKI**. I have not had sight of a copy of the said caution but from the search aforesaid, it is indicated that the 1<sup>st</sup> respondent lodged the said caution to protect what is referred to as “**beneficiary’s interest**”. The caution was registered under the provisions of **Section 71** of the **Land Registration Act, No.3 of 2012 (“the Act”)**. That section has provided for persons who can lodge a caution. A caution can only be lodged by a person; who claims a right to obtain an

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interest in land, lease or charge which is capable of creation by an instrument registrable under the said Act or who is entitled to a license over the land or who has presented a bankruptcy petition against a proprietor of the land, lease or charge. For the 1<sup>st</sup> respondent to be able to maintain the present caution against the title of the suit property, 1<sup>st</sup> the respondent has to show that he has an interest in the nature set out above.

3. As I have stated above, the 1<sup>st</sup> respondent is claiming “**beneficiary interest**”. In the absence of a replying affidavit, I am unable to appreciate what beneficial interest the respondent has on the applicant’s property. I am also unable to determine whether such interest is capable of being created by an instrument registrable under the Act. The Applicants have demonstrated that they are the registered proprietors of the suit property and that the 1<sup>st</sup> respondent has no right to lodge a caution against their title. In the absence

of any reasonable or

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lawful cause put forward by the 1<sup>st</sup> respondent as to why the caution should not be removed, the Applicants' application must succeed. I therefore allow the applicant's application dated 5<sup>th</sup> January, 2013 and direct the District land Registrar Kisii Central District to remove forthwith the caution that was registered against land parcel number **C/ K/ Mwamosiama/ 3018** on 19<sup>th</sup> July, 2012. Since the application was not opposed, each party will bear its own costs.

**Dated, signed and delivered on 24<sup>th</sup> day of May, 2013.**

**S. OKONG'O,**

**JUDGE**

**In the presence of:-**

.....for the Applicants

.....for the Respondents

..... Court Clerk.

**S. OKONG'O,**

**JUDGE.**

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