



NO.82

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE MISC. CIVIL APP. NO. 108 OF 2013

ANDREA GISORE ONDITI.....APPLICANT

VERSUS

ANDREW MOGUSU KEREU.....1ST RESPONDENT

JOHN NYAKINA MOTUGUTWA.....2ND RESPONDENT

ZAKARIA MOTUGUTWA NYAKINA.....3RD RESPONDENT

RULING

1. The application before me has been brought by way of Notice of Motion dated 2nd May, 2013. The same is supported by the Affidavit of the Applicant sworn on the same date. The application seeks an order for the removal of a caution and two (2) restrictions that were registered against the title of the applicant's parcel of land known as LR No. Wanjare/ Bomorenda/ 2219 (hereinafter referred to as "**the suit property**") by the respondents on 8th November, 1996 for the caution and on 20th August, 1999 and 8th September, 1999 for the restrictions. The applicant has deposed in his affidavit in support of the application that he is the registered proprietor of the suit property and that the respondents without any lawful cause have registered a caution and restrictions aforesaid against the title of the suit property. The applicant has annexed to his affidavit in support of the application a certificate of official search dated 15th April, 2013 issued by the land registrar, Kisii with respect to the suit property which contains the particulars of the caution and restrictions complained of by the applicant. The applicant has deposed further that there is no suit pending between the applicant and the respondents with respect to the suit property and as such the respondents have no reasonable or lawful excuse for lodging the said caution and restrictions against the title of the suit property. The applicant has annexed to his affidavit in support of the application copies of court orders dated 17th June, 2004 and 18th March, 2009 as evidence of the fact that the suits that had been filed against the applicant by the respondents were dismissed by the court for want of prosecution. The applicant has deposed further that the respondents have no known interest in the suit property that can form a basis for the caution and restrictions that they have lodged against the title of the suit property. The application is not opposed. When the application came up for hearing on 11th June, 2013 the respondents did not appear in court. After satisfying myself that the respondents were duly served with the application, I allowed the hearing of the application to proceed in their absence.
2. Mr. Ondari who appeared for the applicant clarified that the application was brought under

sections 73 and 78 of the Land Registration Act, 2012 and not sections 131, 132 and 133 of the Registered Land Act, Cap. 300 Laws of Kenya (now repealed) as cited in the heading of the application. Counsel relied entirely on the applicant's affidavit and urged the court to grant the order sought as the application was not opposed by the respondents. I have considered the applicant's application together with the affidavit sworn on 2nd May, 2013 in support of thereof. I am satisfied that the applicant is the registered proprietor of the suit property. The applicant has annexed to the affidavit in support of the application a copy of a certificate of official search dated 15th April, 2013 which shows that he was registered as the proprietor of the suit property on 23rd August, 1996. The said certificate of official search confirms further that on 8th November, 1996, a caution was registered against the title of the suit property in favour of the 1st respondent herein. A copy of the said caution was not exhibited by the applicant but from the certificate of official search aforesaid, it is indicated that the 1st respondent lodged the said caution to protect a "purchaser's interest". The said certificate of official search shows further that, on 20th August, 1999, the land registrar, Kisii, put a restriction against the title of the suit property which was to endure until a dispute that existed between the applicant herein and the 2nd and 3rd respondents was resolved. The said search certificate shows also that on 8th September, 1999, the land registrar, Kisii once again put another restriction against the title of the suit property which was to last until Kisii High Court, Civil Suit No. 178 of 1999 between the applicant and the 1st respondent was determined. It is the said caution and restrictions that the present application seeks to remove.

3. It is the applicant's contention that there is no basis upon which the said encumbrances against the applicant's title to the suit property can be sustained. The caution in favour of the 1st respondent was lodged under **Section 131 of the Registered Land Act Cap. 300 Laws of Kenya** (now repealed). That section has been reproduced in section 71 of the Land Registration Act, 2012. Section 131 aforesaid, provided for persons who can lodge a caution. A caution could 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 was entitled to a license over the land or a person who had presented a bankruptcy petition against a proprietor of land, lease or charge. For the 1st respondent to have been able to lodge and maintain a caution against the title to the suit property, the 1st respondent had to show that he had an interest in the nature set out above.
4. As I have already stated above, the 1st respondent lodged the said caution to protect a "purchaser's interest" that he claimed over the suit property. Under the provisions of section 131 of the Registered Land Act aforesaid, a purchaser's interest is protectable by a caution. When a caution is objected to by the proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place. In this case, the caution complained of was lodged by the 1st respondent on 8th November, 1996, more than 16 years ago. I have noted that after the registration of the said caution, the 1st respondent proceeded to file a suit against the applicant pursuant to which a restriction was placed by the land registrar against the title to the suit property on 8th September, 1999. The applicant now has a caution and a restriction registered against the title to the suit property both in his favour. From the material placed before court by the applicant, the suit that was filed by the 1st respondent against the applicant over the suit property which was the justification for both the caution and the restriction aforesaid was dismissed by the court for want of prosecution on 17th June, 2004. In the circumstances, the 1st respondent is under a duty to justify the continuation of the said caution against the title of the suit property. In the absence of a response to the application by the 1st respondent, I am unable to appreciate what further interest the 1st respondent has on the suit property which can justify the continuation of the said caution. The applicant has demonstrated that he is the registered proprietor of the suit property and that the 1st respondent has no basis for continuing to have a caution lodged against the title to the suit property. In the absence of any reasonable cause shown by the 1st respondent as to why the said caution should not be removed, the application for the removal of

the same must succeed.

5. That leaves the applicant's prayer for the removal of the two restrictions for consideration. A restriction is an order normally issued by a land registrar prohibiting or restricting dealings with land, lease or charge for the purposes of preventing fraud, improper dealing with land or for any other sufficient cause(See section 76 of the Land Registration Act, 2012). Section 78 of the Land Registration Act, 2012, provides that a restriction may be removed by an order of the land registrar on notice to all the parties affected or by the court upon notice to the land registrar. The land registrar was not made a party to these proceedings and was not served with the present application. This court is therefore unable to consider the applicant's application for the removal of the restrictions that were registered against the title to the suit by the land registrar on 20th August, 1999 and 8th September, 1999. I have noted however that one of the restrictions seems to have been registered pursuant to an order of the court and may not be removed in any event save by an order from the same court.

6. In conclusion, I allow the application dated 2nd May, 2013 but limited only to the prayer for the removal of the caution. I order that, the caution registered on 8th November, 1996 against the title to **LR No. Wanjare/Bomerenda/2219** shall be removed forthwith. On the issue of costs, I am not inclined to award costs of this application to the applicant. I am of the view that the applicant should have made the application herein before the land registrar in the first instance and should have come to this court only as a last resort. Each party will bear its own costs.

Dated, signed and delivered at Kisii this 21st day of June, 2013.

S. OKONG'O,

JUDGE

In the presence of:-

Mr. Ondari for the Applicant.

No appearance for the Respondents.

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.