



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Suit 19 of 2012

IN THE MATTER OF THE REGISTRATION OF TITLES ACT, CAP 281 OF THE LAWS OF KENYA

IN THE MATTER OF SECTION 69 AND 69A OF THE TRANSFER OF PROPERTY ACT 1882 INDIA AS AMENDED BY THE INDIAN TRANSFER OF PROPERTY (AMENDMENT) ACT 1959

IN THE MATTER OF ARTICLES 47 AND 50 OF THE CONSTITUTION OF KENYA

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

THE REGISTRAR OF TITLES.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

THE COMMISSIONER OF CO-OPERATIVE DEVELOPMENT3RD DEFENDANT

J U D G M E N T

1. Before me is an Originating Summons dated 16th January, 2012 and filed on 18th January, 2012. The same is brought pursuant to the provisions of Section 57 of the Registration of Titles Act, Cap 281 of the Laws of Kenya (“the RTA”), Sections 69 and 69A of the Transfer of Property Act, 1882 of India (“the ITPA”), both now repealed and Articles 47 and 50 of the Constitution of Kenya. The Plaintiff relied on the grounds on the originating summons and the Supporting and Further Affidavit of Peter John Oringo, the Plaintiff’s Relationship Manager, sworn on 17th January, 2012 and 20th July, 2012, respectively.

2. The Plaintiff seeks a declarations that caveat number I.R 33813/32 (hereinafter “the Caveat”), registered over the property known as L.R. No. 209/8658 (hereinafter “the Suit Property”) be declared null and void. The Plaintiff has also sought a mandatory injunction to compel the 1st Defendant to remove the caveat. The Plaintiff contends that there was no basis for the registration of the Caveat registered at the behest of the Commissioner for Co-operative Development (hereinafter referred to as “the Commissioner”) as evidenced by a letter dated 29th March 2010 from the said Commissioner to the 1st Defendant. It is further contended that the Commissioner has failed to show or demonstrate any interest in the property to warrant the registration of the caveat. That the registration of the caveat on the basis of interest of the farmers in the said property was not registrable under Section 57 of the Registration of Titles Act Cap 281. Moreover, it is the contention of the Plaintiff that the registration of the said Caveat was aimed at circumventing the proper procedure of challenging the Plaintiff’s statutory

power of sale. That the registration of the caveat was arbitrary and an abuse of power on the part of the 1st Defendant, that the the 1st Defendant had failed to respond to the Plaintiff's request for the withdrawal of the caveat, that it is on this basis that the Plaintiff decided to come to court.

3. Ms. Odari learned counsel for the Plaintiff submitted that Section 3 of Co-operative Societies Act Cap 490 Laws of Kenya, does not give the Commissioner powers to interfere with matters concerning co-operative societies but only sets out responsibilities as concerns registration, operation and dissolution of co-operative societies, that the Charges in its favour were indeed registered by the Registrar of Co-operatives as evidenced in the Certificates of Registration dated 12th November, 1992 and 27th February, 1998, respectively. That the contention by the 3rd Defendant of the non-registration of the Charges was therefore without basis. Ms. Odari further submitted that the 1st Defendant did not notify the Plaintiff of his intention to register the caveat contrary to Section 57(3) of RTA. Counsel therefore urged that the orders sought be granted in the interest of justice.

4. In opposition to the application, the 1st Defendant through the 2nd Defendant filed a Replying Affidavit sworn on 20th April, 2012 by Charles Kipkirui Ng'etich, a Land registrar. The 1st and 2nd Defendant contend that the Government of Kenya placed a caveat on LR. No. 209/8658 (IR 33813) pursuant to the instructions from the Commissioner vide a letter dated 29th March, 2010. That the said caveat was lodged by the Commissioner on the grounds of public interest to avert the imminent danger of the property being sold thereby permanently affecting the rights of coffee farmers. That it is on this basis that the caveat was registered on 1st May, 2010.

5. On 21st May, 2012, this Court gave directions that the 3rd Defendant be enjoined in the suit and to subsequently file a Replying Affidavit within fourteen days. On being joined, the 3rd Defendant opposed the Originating Summons vide a Replying Affidavit by Fredrick F. Odhiambo, the Commissioner for Co-operatives Development, sworn on 11th July, 2012. In that Affidavit, the 3rd Defendant contended that the Kenya Planters Co-operative Union (KPCU), the proprietor of the suit property otherwise known as "Wakulima House" is a registered entity under both the Companies Act Cap 486 Laws of Kenya and the Co-operative Societies Act, Cap 490 Laws of Kenya. Therefore, given this dual registration, the 3rd Defendant contends that he has been seized with the regulation and supervision of KPCU as a Co-operative Society. He further contended that two thirds of the shareholding in KPCU was composed of co-operative societies, that because of the stake held by these co-operative societies in KPCU, there was need to safeguard as well as take care of the interest of the farmers. He further contended that he has power by virtue of Section 3 of the Co-operative Societies Act Cap 490, to intervene in matters affecting the interests of co-operative societies, including those of KPCU as a Co-operative union.

6. The 3rd Defendant further contended that under Section 65 (f) of the Registration of Titles Act, Cap 281 (now repealed), the Registrar of Titles has the power to enter a caveat on behalf of the Government where it appears that an error has been made on the instrument of Charge. That there is an error on the instrument of Charge created in favour of the Plaintiff as the same was not registered with nor endorsed by the Commissioner of Co-operative Societies as is mandated by section 51 of the Co-operative Societies Act, Cap 490 Laws of Kenya. That the said Charges were not noted in the register of charges. That given this state of affairs, the 3rd Defendant was not aware of the existence of the said Charge(s) and owing to the eminent danger of the property being sold in exercise of the Plaintiff's statutory power of sale, it was vital to address the issue by writing a letter dated 29/03/2010 to the Chief Land Registrar urging him to register a caveat and afford the 3rd Defendant an opportunity to verify the authenticity of the Plaintiff's statutory power of sale. It is further contended that the Plaintiff failed in its duty to observe the statutory requirements with regard to Charges created over the suit property.

7. I have carefully considered the Summons, the Affidavits on record and the written submissions by counsel to the Plaintiff. I note that none of the Defendants filed any submissions as directed nor appeared before me to make any representations. The issue for determination is whether the registration of the caveat on L.R. No. 209/8658 was regular and whether in the circumstances it should be lifted? I note that the RTA was repealed in May this year by virtue of Section 109 of the Land Registration Act 2012.

However, there is a saving and transition provision in the Land Registration Act which provide that legal proceedings instituted before the coming into force of the Land Registration Act shall not be affected by the change of law. The starting point is to look at the law regarding caveats in the RTA. This is to be found in Part IX under Section 57 of the RTA which provides that:-

“Any person claiming the right, whether contractual or otherwise, to obtain some defined interest in any land capable of creation by an instrument registrable under this Act, and any person in whose favour a debenture has been executed by a company within the meaning of the Companies Act or by a company to which Part X of that Act applies creating a floating charge over land (hereinafter called the caveator), may lodge a caveat with the registrar of the registration district within which the land is situated forbidding the registration of any dealing with that land either absolutely or unless the dealing is expressed to be subject to the claim of the caveator as may be required in the caveat, or to any conditions conformable to law expressed therein”. (Emphasis added)

It is clear, from the reading of this Section that in order for one to lodge a caveat, one must show that he or she has a right or a registrable interest in that particular piece of land. The question therefore that arises is whether the 3rd Defendant has demonstrated whether he has sufficient interest in the suit property to be entitled to the continued existence of the caveat registered thereon. In the case of **MUCHANGA INVESTMENTS LTD –VS-SAFARIS UNLIMITED (AFRICA) LTD & 2 OTHERS CIVIL APPEAL NO.25 OF 2002** Bosire J (as he then was) held that:-

“On the basis of the provisions of section 57 of the Registered Titles Act, it is clear that a caveat may be registered only pursuant to a contractual relationship or otherwise. However, it is expressly provided that the interest being claimed must be such as is registrable under the Act.”

8. I note that the 3rd Defendant herein does not purport to have an interest in the terms inferred by Section 57 of the RTA, but in essence alludes to the fact that the Government, through the Ministry of Co-operative Development and Marketing has an interest in the suit property since as the same touches on a Co-operative Society that is within its purview. It was the 3rd Defendant’s contention that Kenya Planters Co-operative Union serves a large number of both large scale and small scale farmers in the country and therefore holds strategic importance to the said farmers. Should the eminent sale of the suit property proceed, this would not only cause harm to the farmers but to the public at large. That it was on this basis that, the 1st Defendant registered a Government Caveat on.

9. Government Caveats or Registrar Caveats in the RTA are governed by Section 65 (1)f which reads in part;

“A registrar may exercise the following powers in addition

to other powers conferred under this Act-

(a).....

(b).....

(f) he may enter a caveat on behalf of the Government to prohibit the transfer or dealing with any land belonging to or supposed to belong to the Government and also to prohibit the dealing with any land in any case in which it appears to him that an error has been made by misdescription of the land, or otherwise in any certificate of title or other instrument, or for the prevention of any fraud or improper dealing or for any other sufficient cause.....”

From this provision, it is clear that the 1st Defendant may register a “Registrar’s Caveat” but only on the following specified grounds:-

i) to prevent the transfer or dealing with any land “belonging to or supposed to belong to the government”;

- ii) ***to prohibit the dealing with any land in a case in which it appears to the Registrar that an error has been made by misdescription of land or otherwise in any certificate of title or other instrument;***
- iii) ***to prevent fraud or improper dealing;***
- iv) ***for any other sufficient cause.***

10. Did the reason forwarded by the 3rd Defendant meet the threshold set by the Act in terms of the powers given to the Registrar of Titles in registering a Government Caveat? It is not in dispute the Kenya Planters Co-operative Union (KPCU) is the registered proprietor of the suit property and that it is indeed a Co-operative Society that is duly registered under Co-operative Societies Act Cap 489 Laws of Kenya. It is also not in dispute that KPCU is a private entity and the government holds no shares therein. It follows therefore that the suit property cannot be termed as government land. However, the registrar is given the power to register the government caveat for the prevention of any fraud, improper dealing or for any other ***sufficient cause*** in any land. In the Case of ***BOYES v GATHURE (1969) EA 385*** the Court of Appeal held that:-

“a caveat is intended to serve a twofold purpose: on the one hand, it is intended to give the caveator temporary protection, and on the other, it is intended to give notice of the nature of the claim to the person whose estate in the land is affected and to the world at large.”

11. Given the above, was public interest, that is, the interest of the coffee farmers, ***sufficient cause*** to lodge the government caveat? The checkered past of KPCU has been in the public gallery for a while now. I am well aware that the said entity is under receivership and I can envisage that this may have put considerable strain on the coffee farmers of this country whose interest is the 3rd Defendant’s concern. Section 3 (3) of the Co-operative Societies Act cap 489 Laws of Kenya, states that:-

“The Commissioner shall be responsible for the growth and development of co-operative societies for their organization, registration, operation, advancement and, dissolution and for administration of the provisions of this Act.”

12. It is with this responsibility in mind that the same Act provide in section 51 that:-

“It shall be the duty of every co-operative society to register with the Commissioner, every charge created by it and the particulars thereof.....”

Section 52 provides that:-

“(1) The Commissioner shall, with respect to each co-operative society, register in such form as may be prescribed by or under this Act, all charges requiring registration and shall enter in the register, with respect to every charge, the following particulars:

- a) ***if the charge is a charge created by the society, the date of its creation, and if the charge was a charge existing on property-acquired by the society, the date of the acquisition of the property;***
- b) ***the amount secured by the charge;***
- c) ***short particulars of the property charged; and***
- d) ***the persons entitled to the charge.***

(2) The Commissioner shall issue a certificate under his hand of the registration of any charge registered under this Act stating the amount secured and the certificate shall be conclusive evidence that the requirements of this Act as to registration of charges have been complied with.

(3)

(4) *The Commissioner shall keep a chronological index in the prescribed form and containing the prescribed particulars, of the charges entered in the register.*”

13. The 3rd Defendant contended that the Plaintiff had failed to comply with the above provisions of the Co-operatives Societies Act and there was therefore an error apparent on the instrument of the charge since the particulars of the various charges held by the Plaintiff over the suit property do not appear in the Ministry’s schedule of charges. The Plaintiff responded that the alleged Charge documents were registered with the Ministry of Co-operative Development and Marketing. To further buttress its argument, the 1st Plaintiff produced in its Further Affidavit Certificates of Registration of a charge dated 12th November, 1992 given for the charge dated 17th August 1992 in favour of the Plaintiff; and another dated 27th February, 1998 for a Further Charge dated 26th January 1998 in its favour. I do however note that the Plaintiff, through its Originating summons, indicated that further facilities, besides the ones mentioned, were given to KPCU by the Plaintiff secured by the same property.

14. However, the Plaintiff did not produce any certificates of registration of charge in respect of the 2nd Further Charge dated 10th December, 2001 for a loan facility of Kshs. 37,000,000/ and 3rd Further Charge dated 5th July 2002 for a loan facility amounting to Kshs. 221,000,000. The question that then arises, is the failure to register these further facilities with the Commissioner provide sufficient cause for a Registrar’s caveat? I do hold the view that this is an issue that has to do with the formality of registration of charges with respect to Co-operative Societies. Though KPCU is a private entity, the 3rd Defendant is seized with the responsibility of enforcing the provisions of the Act, including Sections 51 and 52 thereof. There must be a reason why these provisions were entrenched in the Act and in my mind these were to facilitate the operations and regulation of co-operative societies for the benefit of the members. The sums advanced to KPCU were no mean feat as the same comprised of large sums of money. Probably, had the Ministry of Co-operative Development and Marketing known about these additional liabilities, maybe something would have been done to avert the crisis that now bedevil KPCU. Be that as it may, although the Plaintiff failed to meet the formalities of registration of the chargees as set out in Section 51 and 52 of the Co-operative Societies Act, I do not think that that failure invalidates the charges in any particular way. I hold the view that the same is not fatal to the rights accrued to the Plaintiff as the Chargee.

15. Having said that, I must emphasize that the statutory power of sale in this present case accrues to the Chargee by virtue of Section 69(1) of Indian Transfer of Property Act, 1959, which gives the mortgaged property either by way of public auction or private treaty. It is not disputed that KPCU is indebted to the Plaintiff to a tune of Kshs.643,978,558.05. This by any standards is a colossal amount of money whose non-payment arguably has a profound impact on the Plaintiff’s business operations. It is understandable that the 3rd Defendant would want to protect the interests of coffee farmers in the country which by and large would amount to the protection of public interest. The checkered past of KPCU Limited has been in the public gallery for a while now. I am well aware that the said entity is facing financial hardship and I can envisage that this has put considerable strain on the coffee farmers of this country. But can this “public interest” trump over the Plaintiff’s accrued interest. The Chargees that were not registered with the 3rd Defendant were made in 2001 and 2002. Why wait until 2010 to lodge the caveat? By then, the KPCU had gobbled all the advanced amount. It is my considered opinion that public interest dubbed “*the coffee farmers*” interest cannot be used to assist a defaulting party who has fully enjoyed loan facilities advanced to it to get away with its failure or refusal to honour its contractual obligations. Public Interest should be used as a shield rather than a sword. In the foregoing, I find that the 1st Defendant should not have registered the Caveat as he ostensibly did.

16. In the alternative, the 3rd Defendant did content that stringent formalities concerning the Charge documents as entailed in Section 51 and 52 of the Co-operative Societies Act Cap 489 Laws of Kenya were not met in all the loan facilities advanced to KPCU Limited by the Plaintiff and that it was essential for the 3rd Commissioner to lodge the caveat for registration to afford him an opportunity to inquire on the anomaly for the larger good of all the stakeholders, including coffee farmers, of KPCU. The 1st

Defendant therefore registered the Caveat for public interest. That may be so. But Sections 51 and 52 does not require the Chargee to effect the registration but the Co-operative Society itself. Why pass that burden to a lender. To my mind, once the provisions of the RTA and ITPA were satisfied by the Plaintiff it would be wrong to fetter its rights under those two legislations by imposing the obligation under the Co-operatives Act which is not meant for it but the borrower.

17. As to whether the Plaintiff should have been notified when the caveat of registration, I find that nowhere in the RTA is there a requirement for such a notice. The Authority referred to by the Plaintiff namely:- **MATOYA –VS- STANDARD CHARTERED BANK (K) LTD AND OTHERS (2003) 1 EA 140** show that the land in question was under a different regime, namely, the Registered Land Act, Cap 300 Laws of Kenya, further the issue had to do with the lodging of a caution and not a caveat in the suit property in question. The court is therefore not persuaded by the said authority. Further, Section 57(3) of the Registered Titles Act only makes reference to the registrar giving notice to the “Caveatee” who is registered proprietor not any other persons with interest in the land. Granted, at the time of the lodging the caveat had not yet come into force and therefore the Registrar was not bound by Article 47 and 50 as the Plaintiff contends.

18. Be that as it may, I note that by the 1st Defendant’s assertion, the said Caveat was registered on 1st May, 2010. Two years have lapsed since then. This period of time must have afforded the Commissioner the time he needed to inquire on any anomalies therein concerning the loans advanced to KPCU and taken action, if any. The Defendants should however note that the Caveat only serves as a temporary measure and should not be used to deprive the Plaintiff of its accrued statutory right of power of sale. The case of **BOYES –VS- GATHURE (1969) EA 385** the Court of Appeal echoed this principle when the court stated that:-

“a caveat is intended to serve a twofold purpose: on the one hand, it is intended to give the Caveator temporary protection, and on the other, it is intended to give notice of the nature of the claim to the person whose estate in the land is affected and to the world at large.” (Emphasis added)

In my view, the continued existence of the Caveat registered as number I.R 33813/32 over the suit property for over two years has adversely affected the Plaintiff. Caveats are not meant to be a permanent feature. Neither did the Defendants indicate how long they intended to keep the Caveat on the property.

19. In view of the foregoing, and in the exercise of judicial discretion, I shall allow the application in terms of declaration number 1, 2, 4, 5, 6 and 7 of the originating Summons dated 16th January, 2012.

Costs are awarded to the Plaintiff. It is so ordered.

DATED and delivered at Nairobi this 26th day of November, 2012.

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A. MABEYA
JUDGE