



**Nyaberi & another v Akoth & another (Environment & Land Case  
3 of 2020) [2022] KEELC 3747 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3747 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 3 OF 2020  
CA OCHIENG, J  
JUNE 9, 2022**

**BETWEEN**

**FRANCIS PIUS OMWERI NYABERI ..... 1<sup>ST</sup> APPLICANT**

**REBECCA NYABOKE OMWERI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BEATRICE AKOTH ..... 1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. What is before Court for determination is the Applicants' Originating Summons Application dated the 21<sup>st</sup> January, 2020 brought pursuant to Order 37(5) of the [Civil Procedure Rules](#) and Section 78(2) of the [Land Registration Act](#). The Applicants seek the following orders:
  1. The caveat/restriction placed on land reference number Mavoko Municipality 27770/761 IR No. 132725 be removed.
  2. The costs of the originating summons be borne by the respondent.
2. The Application is premised on the grounds on the face of it and the supporting affidavit of Francis Pius Omweri Nyaberi, the 1<sup>st</sup> Applicant herein where he deposes that the 1<sup>st</sup> Respondent sued him claiming purchaser's interest in LR 2277770/761 IR No. 132725 hereinafter referred to as the 'suit land'. Further, that the said suit being Machakos ELC 19 of 2017 was dismissed. He explains that the 1<sup>st</sup> Respondent caused a caveat or restriction to be registered against the suit land. He insists the 1<sup>st</sup> Respondent having unsuccessfully lost her claim against him and the co-applicant, ought to have applied to have the caveat removed. He contends that the Land Registrar had been notified of the Judgement and Decree of the court but insisted that the caution can only be removed pursuant to a



court order. He reiterates that there is need to issue ancillary relief to the extent that the caveat ought to be removed as the Respondent's claim on the suit land as purchaser has been dismissed.

- 3 The Application was opposed by the 1<sup>st</sup> Respondent who filed a Replying Affidavit where she deposes that the caveat in question was registered on 23<sup>rd</sup> May, 2013 and not after Judgment as alluded to, by the Applicants. She explains that there is pending before the Court of Appeal at Nairobi Civil Appeal No. 248 of 2018 *Beatrice Okoth vs Francis Pius Omweri Nyaberi & Rebecca Nyaboke Omweri t/ a Topland Motors General Agencies* challenging the Judgment. Further, the caveat cannot be removed as it would defeat the essence of the Appeal. She claims the Applicants approached the Registrar of Titles to remove the caution without disclosing that there was a pending Appeal. Further, the Title Deed to the suit land was deposited by the Applicants' pending completion of the sale with their then advocates Messrs Omariba & Co. Advocates who are still in possession of the same. She avers that the 1<sup>st</sup> Applicant has employed all manner of unorthodox means to try and coerce his then advocate Mr. Gekonde Omariba to release the title to him in vain despite having knowledge of the ongoing appeal. She reiterates that there is nothing urgent to warrant the removal of the caveat.
- 4 The Applicants' filed a supplementary affidavit sworn by the 1<sup>st</sup> Applicant where he reiterates his averments above and confirms there is a pending Appeal. He insists there is no order obtained by the 1<sup>st</sup> Respondent restraining them from dealing with the suit land. Further, that an Appeal does not operate as a stay of execution. He contends that the 1<sup>st</sup> Respondent ought to have obtained appropriate orders from the Court of Appeal. Further, that the advocate who has the title and the Registrar of Titles are colluding to defeat the ends of justice as they have declined to release the said title despite being served with the impugned Judgment including the Decree. He avers that the decision of the court cannot be ignored and there is justification for removal of caveat.
- 5 The application was canvassed by way of written submissions.

### **Analysis and Determination**

- 6 Upon consideration of the Applicant's Originating Summons dated the 21<sup>st</sup> January, 2020 including the respective affidavits and rivalling submissions, the only issue for determination is whether the caveat/ restriction placed on land reference number Mavoko Municipality 27770/761 IR No. 132725 should be removed.
- 7 The Applicants have sought for removal of the caveat/restriction placed on land reference number Mavoko Municipality 27770/761 IR No. 132725. In their submissions, they have reiterated their claim and insist they are entitled to the orders as sought. To buttress their averments, they relied on the following decisions: *Peter Sulao Mwalagaya V Murtaza Bandali* (1980) eKLR and *Eliud Timothy Mwamunga V Kamau Njendu* (2002) eKLR.
- 8 The 1<sup>st</sup> Respondent in her submissions insists the caveat should be retained to protect her interests as the Appeal she filed is still pending. She insists at the time of lodging the caveat, the suit land was not part of litigation. To support her arguments, she relied on the following decisions: *Ahmed Ibrahim Suleiman & Another V Noor Khamis Surur* (2013) eKLR and *David Macharia Kinyuru V District Land Registrar, Naivasha & Another* (2017) eKLR.
- 9 I wish to make reference to the various legal provisions within the *Land Registration Act* which deal with restrictions: Section 76 of the *Land Registration Act* provides that:
  - (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and



hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge. (2) A restriction may be expressed to endure— (a) for a particular period; (b) until the occurrence of a particular event; or (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register. (2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.”

10 While Section 77 of the *Land Registration Act* provides that:

(1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction. (2) An instrument that is inconsistent with a restriction shall not be registered while the restriction is still registered except by order of the court or of the Registrar.”

11 Further Section 78 of the *Land Registration Act* stipulates that:

(1) The Registrar may, at anytime and on application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction. (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.”

12 In this instance, I note the Applicants have sought for removal of the restriction claiming the suit land belongs to them. I note certain issues arose in court in respect to the dispute herein. From the annexures in the respective affidavits, it is evident the 1<sup>st</sup> Applicant actually sold suit land to the 1<sup>st</sup> Respondent who paid part of the purchase price. Further, the 1<sup>st</sup> Respondent had filed a suit for specific performance which was dismissed and is subject to an Appeal at the Court of Appeal. The Title to the suit land is still in the custody of the advocate who was handling the transaction. In so far as the Applicants’ hold title to the suit land but since the 1<sup>st</sup> Respondent’s claim herein revolves around specific performance over land with evidence in court pointing to the fact that the 1<sup>st</sup> Applicant indeed received part of the purchase price; and since the matter has not been heard as well as determined by the Court of Appeal, in the interests of justice while relying on the legal provisions cited above, I opine that it is pertinent if the restriction or caveat subsisted over the suit land to protect the substratum of the suit until the said Appeal is determined. In the circumstances, I will decline to make an order for its removal.

13 It is against the foregoing that I find the Notice of Motion dated the 21<sup>st</sup> January, 2020 unmerited and will disallow it.

14 Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9<sup>TH</sup> DAY OF JUNE, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

