



REPUBLIC OF KENYA



**KENYA LAW**  
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**Basil & another v Njendu; Safari Leisure Motels Limited & 2  
others (Third party) (Environment & Land Case 1 of 2024)  
[2025] KEELC 4073 (KLR) (Environment and Land) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4073 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE 1 OF 2024  
EK WABWOTO, J  
MAY 28, 2025  
(FORMERLY MOMBASA ELC CASE NO. 229 OF 2020)**

**BETWEEN**

**SURJEET SINGH BASIL ..... 1<sup>ST</sup> PLAINTIFF**

**DR SEEMA BASIL ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KAMAU NJENDU ..... DEFENDANT**

**AND**

**SAFARI LEISURE MOTELS LIMITED ..... THIRD PARTY**

**PATRICK WAMAE ..... THIRD PARTY**

**THE LAND REGISTRAR, MOMBASA ..... THIRD PARTY**

**JUDGMENT**

1. Vide an Amended Complaint dated 24<sup>th</sup> March 2022, the Plaintiffs sought the following reliefs:-
  - a. A declaration that the 5<sup>th</sup> Defendant (the Land Registrar) had no jurisdiction to register the caveats by Eliud Timothy Mwamunga dated 12<sup>th</sup> March 1996 and by Kamau Njendu dated 8<sup>th</sup> April 1999 against L.R No. 13909/12 registered as CR. No. 25140 (herein after referred to as the suit premises) and that the registration of those caveats was null and void.
  - b. A declaration that the Prohibitory Order dated 24<sup>th</sup> August 2021 issued in Civil Suit No. 328 of 1997 and registered against the suit premises lapsed under the provisions of Section 4(4) of the *Limitation of Actions Act* and has no force of law.



- c. A mandatory injunction compelling the 5<sup>th</sup> Defendant to remove the said caveats and the Prohibitory Order and to register the transfer of the suit premises in favour of the Plaintiffs.
  - d. A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (Eliud Matu Wamae and Patrick Wamae) as directors of the 1<sup>st</sup> Defendant (Safari Leisure Motels Limited) knew of the Prohibitory Order and the said Caveats and that their failure to disclose those encumbrances to the Plaintiffs irrespective of their invalidity was fraudulent and constituted a breach of the 1<sup>st</sup> Defendant's warranties under clause 12 of the sale agreement dated 23<sup>rd</sup> September 2016.
  - e. General, punitive and aggravated damages against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally.
  - f. General, punitive and aggravated damages against the 4<sup>th</sup> Defendant for maintaining his invalid caveat against the suit premises and refusing to remove it.
  - g. Interest on General, Punitive and Aggravated damages.
  - h. Costs of and incidental to this suit to be paid by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly and severally.
2. The Plaintiffs claim against Safari Leisure Motels Limited, Patrick Matu Wamae, The Land Registrar, Mombasa and The Public Trustee (Adminstrator of the Estate of Eliud Timothy Mwamunga) who were initially the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants was withdrawn and the claim against Eliud Matu Wamae who was initially the 2<sup>nd</sup> Defendant abated. This only left Kamau Njendu initial sued as the 4<sup>th</sup> Defendant as the sole Defendant in the matter. The the 4<sup>th</sup> Defendant hereafter referred to as the Defendant filed an amended statement of defence dated 8<sup>th</sup> February 2023.
  3. The Defendant here with the leave of the court also took out notice to the third parties and third-party proceedings were undertaken herein. The Third Parties filed their responses and effectively participated in the proceedings.

### **The Plaintiff's case**

4. The Plaintiffs averred that by the sale agreement dated 23<sup>rd</sup> September 2016, Safari Leisure Motels Limited agreed to sell and the Plaintiffs agreed to purchase the property known as L.R No. 13909/12 (Original No. 13909/10/2) delineated on Land Survey Plan No. 170612 registered at Mombasa as CR No. 25140 for Kshs. 25,000,000/= . It was averred that the agreement contained a warranty by in Clause 12(iii) that the vendor was not to the best of its knowledge threatened by any litigation, arbitration or administrative proceedings relating to the suit premises. It also contained further warrants in Clause 12(vi) and (viii) that the vendor had to the best of its knowledge disclosed to the purchaser all material information relating to the property and undertook to immediately disclose to the Plaintiffs in writing any event or circumstance which may arise or become known to it after the date of the agreement and prior to completion which is inconsistent with any of the warrants.
5. It was also averred that prior to entering into the agreement and paying the purchase price, the Plaintiffs had conducted a search on the title of the suit premises and obtained certificates of postal search as at 2<sup>nd</sup> June 2016, 23<sup>rd</sup> September 2016 and 17<sup>th</sup> January 2017 all of which showed that the suit premises were not encumbered in any manner.
6. It was further averred that after payment of stamp duty and presenting the transfer for registration the same could not be registered on account of a caveat by Eliud Timothy Mwamunga (deceased) dated 12<sup>th</sup> March 1996, a caveat by the Defendant, Mr. Kamau Njendu dated 8<sup>th</sup> April 1999 and a prohibitory



order dated 24<sup>th</sup> August 2001 issued in Civil Suit No. 328 of 1997 all of which were registered against the Certificate of Title for the suit premises but were not reflected in the Certificate of Postal Search. According to the Plaintiffs, the vendor was aware of the encumbrances but failed to disclose the same to them.

7. It was stated that the said caveats were fraudulent, illegal, null and void particulars of which were pleaded at paragraph 17 of the Plaintiffs' amended plaint dated 24<sup>th</sup> March 2022.
8. During trial Surjeet Singh Basil testified as PW1 on behalf of the Plaintiffs.
9. PW1 adopted and relied on his statement dated 16<sup>th</sup> November 2020, further witness statement dated 24<sup>th</sup> January 2022 and the Plaintiffs' bundle of documents dated 16<sup>th</sup> November 2020, further list and bundle dated 24<sup>th</sup> January 2022, further supplementary bundle dated 24<sup>th</sup> June 2022 and a further list and bundle dated 1<sup>st</sup> September 2022.
10. On cross-examination by Counsel for the Defendant, he stated that the Defendant was not a party to the said agreement dated 23<sup>rd</sup> September 2016. He also stated that due diligence was done before purchase.
11. He also stated in cross examination that when they did the search there was no caveat. He further stated that a notice was issued to the Land Registrar to remove the caveat but could not remember when exactly it was issued. He also stated that he has not attended any proceedings for removal of the caveat before the Land Registrar and neither was he a party to the arbitration proceedings.
12. When re-examined, he stated that the 1<sup>st</sup> Third Party executed the transfer and gave them the original title. He also stated that the copy of the title does not any restriction of a caveat. The search that was done before payment did not show any encumbrances. The caveat was discovered after payment of the purchase price had been made.

### **The Defendant's case**

13. The Defendant filed an amended statement of defence dated 8<sup>th</sup> February 2023.
14. It was pleaded that pursuant to Clause 25 of the sale agreement, disputes resulting from the said agreement dated 23<sup>rd</sup> September 2016 between the parties could only be resolved vide the mechanism expressly agreed upon and not through this court.
15. The Defendant averred that he registered a caveat on or about the 8<sup>th</sup> day of April 1999 against all that parcel known as L.R No. 13909/12 (Original No. 13909/10/2) CR No. 25140 which caveat was duly registered as CR No. 25140/4. It was averred that the said caveat was registered pending the outcome of the arbitration proceedings between him and the 1<sup>st</sup> Third Party.
16. It was further averred that in a bid to compel him to remove the caveat, Eliud Mwamunga (Deceased) filed High Court Civil Case No. 253 of 2002 (O.S) wherein the High Court delivered its ruling on 16<sup>th</sup> December 2002 where it was held that before the caveat was so registered, the Land Registrar had considered the reasons for the caveat and deemed it fit to so register it.
17. The particulars of fraud, illegality and jurisdiction of this court to hear the matter were denied.
18. It was stated that the instant proceedings cannot obscure the proceedings before the Arbitration over the same subject matter as the same would be a belated Appeal to the decision in MSA HCCC No. 253 of 2002.(OS)



19. During trial, the Defendant testified as the sole defence witness in support of his case. He relied on his witness statement dated 22<sup>nd</sup> February 2021, bundle of documents dated 22<sup>nd</sup> February 2021 and 23<sup>rd</sup> August 2024 in his evidence in chief.
20. Upon cross-examination by Counsel for the 3<sup>rd</sup> Third Party, he stated that he indeed made an application for registration of the caveat. He had not been summoned by the Land Registrar to attend any proceedings. The caveat is still in force. He does not have any claim against the Land Registrar.
21. On cross-examination by Counsel for the Plaintiffs, he stated that he applied for the registration of the caveat. He filled a form which was presented to the Land Registrar. He gave the reasons for application of the caveat. His interest was indicated as money owed to him by the 1<sup>st</sup> Third Party. His fees was in respect to professional services rendered. The caveat was to cushion him on what was owed. The professional services were rendered in the 1990's. He wants the caveat to be retained until payment of his fees.
22. When asked about the status of the arbitration proceedings, he stated that he could not remember when they last took action on the arbitration proceedings. He also stated that the Arbitrator's fees had not been paid.
23. When re-examined, he stated that the application for the caveat was made to the Land Registrar. The arbitration proceedings have not been concluded. His fees had not been paid. He lodged the caveat to safeguard his fees.

#### **The case of the 1<sup>st</sup> Third Party**

24. The 1<sup>st</sup> Third Party supported the Plaintiffs case. Patrick Matu Wamae testified as its witness during trial. He relied and adopted his witness statement dated 11<sup>th</sup> October 2024 and bundle of documents of the same date in his evidence in chief.
25. It was his testimony that he never engaged the Defendant but dealt with a different company upon which some payments were made. He also stated that he became aware of the caveat after he had done some search. He is not to blame for the caveat. There was no caveat when the land was sold to the Plaintiffs.
26. Upon cross examination by Counsel for the Defendant, he stated that he never dealt with Kamau Njendu but dealt with Gitutho and Associates. He also stated that he did not collect the arbitration award. They did not pay the Arbitrator's fees of Kshs. 50,000/= He also stated that he was aware that some money was paid to the Defendant.
27. On further cross examination, he stated that the searches for 2<sup>nd</sup> June 2016 and 23<sup>rd</sup> September 2016 did not have any encumbrances. The search for 3<sup>rd</sup> May 1999 which indicated the land to be in Voi showed that the same had a caveat dated 12<sup>th</sup> March 1996. He also stated that he has never appeared before the Land Registrar for the removal of the caveat. The property had no encumbrances at the time of the agreement.
28. When cross-examined by Counsel for the Plaintiffs, he stated that the Defendant had not produced any application for a caveat before this court. The Defendant never lend them any money. The notification for registration of the caveat had 13 cancellations. He did not know which Land's Register issued the caveat. The Defendant equally had an obligation to pay and collect the award.
29. He also stated in cross examination that he had signed the indemnity on 2<sup>nd</sup> December 2018 before Birir Advocate. The file in respect to the suit property was initially missing at the Land's Registry. The



Lands Registry never notified them of the said caveat. The case between them and the Plaintiffs was settled and withdrawn and the original title handed over to the Plaintiffs.

30. When cross-examined by Counsel for the 3<sup>rd</sup> Third Party, he stated that the indemnity was prepared because the file could not be traced. The searches were done based on the records at the lands office and at that time there was no caveat. The caveat was not in existence when the transfer was being done. They have not done anything to ensure the removal of the caveat.
31. When re-examined, he stated that the title was never charged. They have never received the arbitration award.

### **The case of the 3<sup>rd</sup> Third Party**

32. Mike Sego Manyarkiy a Land Registrar based in Mombasa testified on behalf of the 3<sup>rd</sup> Third Party. It was his testimony that according to their records, the parcel number 13909 was registered on 7<sup>th</sup> February 1994 in the names of Eliud Timothy Mwamunga. The same was transferred to Safari Leisure Hotels Limited on 28<sup>th</sup> December 1994 and a caveat was registered on 27<sup>th</sup> March 1996 in favor of Eliud Mwamunga which was later removed and that there was another caveat by Kamau Njendu which he did not have a copy of its application in the file.
33. He also stated that a prohibitory order was registered on 9<sup>th</sup> August 1999 from Civil Suit No. 98 of 1997 prohibiting and restraining the registered owner from transferring, charging or dealing otherwise with the property. He also stated that the indemnity was registered on 19<sup>th</sup> December 2013. He also stated that there were two parallel registers. Safari Leisure Motels Limited had made an application for reconstruction of the file after the original file was missing.
34. He also stated that according to their records, he is unable to tell whether the registered owner was aware of the said caveat.
35. When cross-examined by Counsel for the 1<sup>st</sup> Third Party, he stated that there were two files in respect to the suit property due to the reconstruction made on 19<sup>th</sup> December 2013. The registered owner may not know of any encumbrances if he was not notified. There is no limitation period of caveats. He was not aware if the objection was determined. The said objection was received on 16<sup>th</sup> November 2021. There is no entry to confirm that the second file was closed.
36. When cross-examined by Counsel for the Defendant, he stated that his office is the custodian of all the documents. He also stated that he was not aware of judicial review proceeding challenging the entries made in the file. The search dated 23<sup>rd</sup> September 2016 did not have any encumbrances. The notice for removal and objection was issued during the pendency of this suit.
37. Upon cross-examination by Counsel for the Plaintiffs, he stated that the caveat was registered in the 1990's and he did not agree that the applicable law was Registration of Title Act. He also stated that he was not familiar with Section 4 of the *Limitation of Actions Act* Cap. 22. The prohibitory order was dated 24<sup>th</sup> August 2001 and 12 years had lapsed as at December 2013. His office did not have powers to lift the prohibitory order unless directed by the court.
38. On further cross examination, he stated that the commencement date for the *Land Registration Act* was sometimes in 2012. The caveats were issued before the commencement of the said Act. He further stated that the *Land Registration Act* and the *Land Act* should apply. He also stated that he would not have been in a position to register the caveat by the Defendant had the same been submitted to him.



39. On further cross examination, he stated that he had not seen the notification for registration of the caveat. The two files were opened on the same day. The searches which were carried out showed that the property was free from any encumbrances.

### **The Plaintiffs submissions**

40. The Plaintiffs filed written submissions dated 21<sup>st</sup> March 2025 and supplementary submissions dated 22<sup>nd</sup> April 2025. Pursuant to the directions issued by the court, Learned Counsel Kinyua Kamundi was also allowed to highlight the said submissions on behalf of the Plaintiffs on 29<sup>th</sup> April 2025.
41. The Plaintiffs submitted on the following issues:-
- i. Did Kamau Njendu, the Defendant, file any application with the Registrar of Titles for the registration of any caveat against the suit premises?
  - ii. If the Defendant, Kamau Njendu, applied for the registration of any caveat was the claiming any interest capable of creation by an instrument registrable under the Registration of Titles Act? If not, was entry number 4 on the registration of the 4<sup>th</sup> Defendant's caveat claiming Chargee's interest fraudulent, invalid and null and void?
  - iii. Which law governs Entry No. 4 of the purported caveat registered on 8<sup>th</sup> April 1999 by the Defendant, Kamau Njendu?
  - iv. Did Kamau Njendu apply to the Court under Section 57(8) of the Registration of Titles Act to extend the caveat beyond 28 days after receiving notice from the Land Registrar? If not, was the Land Registrar obliged to delete Entry No. 4 concerning the purported caveat?
  - v. Did Kamau Njendu by means of corruption cause the registration and maintenance of the caveat against the suit premises?
  - vi. Did the caveat by Kamau Njendu prevent the Plaintiffs from registering the transfer and developing the suit premises with 381 apartments and other amenities?
  - vii. Whether the Plaintiffs are entitled to an order compelling the Land Registrar to remove the caveat registered against the suit premises by the Defendant, Kamau Njendu by deleting Entry No. 4.
  - viii. What is the quantum of general, punitive, exemplary and aggravated damages payable by the Defendant, Kamau Njendu, to the Plaintiffs?
  - ix. What is the appropriate order on costs?
42. On whether Kamau Njendu filed any application for registration of the caveat, it was submitted that there was no evidence that he paid for the same. There was no instrument or document lodged with the Registrar of Titles and thus there was no caveat and the Defendant could not and did not pay for the registration of a non-existent caveat. It was also submitted that the suit premises is registered under the Registration of Title Act Cap. 281 (repealed) and all transaction and documents and instruments under the transaction of the Registration of Title Act, Cap. 281 (repealed) could only be done by Registrar of Title and not by Land Registrars. The court was urged to find that entry number 4 for that alleged caveat was made fraudulently and corruptly and is therefore null and void. It was also submitted that the Defendant had been caught up in a corrupt scheme.
43. Counsel also submitted that under Section 57(1) of the Registration of Titles Act no caveat was registrable by any person claiming architectural or professional fees and that if the Defendant wished to



preserve the property pending his payment he would have filed an application before the High Court. It was further submitted that during trial, the Land Registrar and Kamau Njendu could not show a copy of the caveat claiming architectural and professional fees or one claiming charges interest.

44. On the applicable law as at the time the purported caveat dated 8<sup>th</sup> April 1999 was registered, it was submitted that the law applicable to the suit premises in 1999 is the Registration of Titles Act, a statute repealed on 2<sup>nd</sup> May 2012 under Section 109 and the Schedule to the [Land Registration Act](#) No. 3 of 2012. The RTA applied and continues to apply to Entry No. 4.
45. It was further submitted that under Section 107(2) of the [Land Registration Act](#), 2012 on Saving and Transitional Provisions any right, interest, title, power or obligation acquired, accrued, established or coming into force or exercisable before 2<sup>nd</sup> May 2012 shall continue to be governed by the law applicable to it immediately prior to 2<sup>nd</sup> May 2012. There is therefore no argument that the law applicable to the impugned caveat is the Registration of Titles Act.
46. It was argued that the said issue was relevant and material to the caveat because the caveat was not registrable under Section 57(i) of the RTA, since it was not paid for and because it appears to have been registered by a Land Registrar and not by a Registrar of Titles. As earlier submitted Land Registrars had no jurisdiction over any land registered under the Registration of Titles Act.
47. It was contended that under Section 57(8) of the Registration of Titles Act (repealed) the Registrar of Titles was obliged to delete entry number 4 to remove “the caveat” because Kamau Njendu did not obtain a Court order extending “the caveat” and because there was no caveat at all.
48. It was further submitted that in the absence of a court order extending the purported caveat, the Land Registrar had a statutory duty under Section 57(8) of the Registration of Titles Act to delete entry number 4 to remove the purported caveat 28 days after that notice.
49. It was further submitted that Kamau Njendu did not apply to the court for the removal of the caveat and that the same continued to exist by means of corruption.
50. It was argued that the caveat has prevented the Plaintiffs from registering the transfer and developing the property with 381 apartments and other amenities. It was also argued that the same constitutes a violation of the Plaintiffs right to property as stipulated under Article 40 of the [Constitution](#) of Kenya.
51. On whether the Plaintiffs are entitled to the order compelling the Land Registrar to remove the caveat, it was argued that under Section 75 of the RTA (repealed) the court can order the deletion of Entry No. 4 to remove the purported caveat on the grounds of actual fraud.
52. In respect to the reliefs sought, the Plaintiffs submitted for an award of general punitive and aggravated damages against the 4<sup>th</sup> Defendant for Kshs. 45,565,017.00 and Kshs. 12,480,000.00 respectively together with interest from the date of judgment until its payment in full.
53. The court was also urged to dismiss the third party proceedings for the reasons that allowing the third party proceedings would conflict with the award gathering dust with the Arbitrator. The court was also urged to award costs of the suit to the Plaintiffs.

### **The Defendant’s submissions**

54. The 4<sup>th</sup> Defendant filed written submissions dated 26<sup>th</sup> March 2025 and Learned Counsel Mr. Achoka also highlighted the said submissions on behalf of the Defendant.
55. Citing the case of *Dina Management Limited =Versus= County Government of Mombasa & 5 Others* (2023) eKLR, it was submitted that the Plaintiffs were the authors of their own misfortune for having



purchased the property without due diligence. It was also submitted that at the time of purchase the Defendant had already registered the caveat on 8<sup>th</sup> April 1999 to secure his own interest against the registered owner.

56. While submitting on the legality of the caveat, it was argued that the High Court in Mombasa in MSA HCCC NO. 253 OF 2002 (OS) had been moved to remove the caveat but declined and no appeal had been lodged against the said decision.
57. Citing Section 73 of the *Land Registration Act*, it was argued that the Plaintiffs are prematurely before this court for non-compliance with the said provision since the Registrar has not determined the said dispute.
58. In respect to the arbitration proceedings, it was submitted that the arbitration proceedings are still pending and that pursuant to the letter dated 15<sup>th</sup> September 2020, the Defendant had demonstrated his willingness to withdraw the caveat if the 1<sup>st</sup> Third Party would pay him the amount he claimed as being the reason to place the caveat. The court was urged to dismiss the suit.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Third Parties' written submissions**

59. The 1<sup>st</sup> and 2<sup>nd</sup> Third Party filed brief written submissions dated 10<sup>th</sup> April 2025, aligning themselves with the Plaintiffs submissions. It was submitted that the caveat purported to have been placed against the suit property was actually registered as a charge yet the arbitration proceedings between the Defendant and the 1<sup>st</sup> Third Party was in respect of fees and not a loan so as to register a charge.
60. It was submitted that the arbitration proceedings were eventually determined by the arbitrator retired Justice Torgbor. The Defendant recourse was to get the award and proceed to the High Court under Section 36 of *Arbitration Act* for its enforcement.
61. It was further submitted that while the Defendant had claimed that the award could not be delivered because of Kshs. 50,000/= which the 1<sup>st</sup> Third Party was to pay nothing stopped him from paying and demanding a refund from the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties.
62. It was also submitted that the Defendant did not have a legal right to place the said caveat since caveats and cautions could only be placed by a person claiming purchaser's interest, beneficial interest, spousal interest, Lender or Chargee and when there is a pending legal dispute.
63. Reliance was made to Section 76 of the *Land Registration Act* which is similar to Section 67 of the Registration of Titles Act (repealed) and submitted that the Defendant was given notice but did not act within 28 days and thus the purported caveat was rendered void.
64. It was also submitted that the Plaintiffs and 1<sup>st</sup> and 2<sup>nd</sup> Third Parties compromised the suit and there is no reason whatsoever why the Plaintiffs should not be allowed the ownership of the land. The Defendant has no right over the subject matter. He should have filed suit in court if the arbitration proceedings were frustrated. He cannot do so now because he is time barred. This court lacks jurisdiction in assisting him. He should file suit in a commercial court.

### **The 3<sup>rd</sup> Third Party's written submissions**

65. The 3<sup>rd</sup> Third Party filed written submissions dated 14<sup>th</sup> April 2025. It was submitted that there was no illegal action on behalf of the Land Registrar when the caveat was placed. The same was procedurally placed. it was also submitted that the Plaintiffs application to remove the caveat was not successful as there was an objection by Kamau Njendu.



## Analysis and Determination

66. The court has considered the parties pleadings, evidence and submissions. The court has also considered the relevant legal framework and jurisprudence and the salient issues for determination in respect to this suit are as follows:-
- i. Whether the caveat registered in respect to L.R No. 13909/12 (Original No. 139/10/2) CR No. 25140 is valid.
  - ii. Whether the Plaintiffs are entitled to the reliefs sought.
  - iii. Whether the Defendant is entitled to be indemnified by the third parties.
  - iv. What orders should issue as to costs.

### Issue No. (i)

#### Whether the caveat registered in the suit property is valid

67. It was the Plaintiffs case prior to entering into the sale agreement and paying the purchase price, they had conducted a search on the title of the suit premises and obtained certificates of postal search as at 2<sup>nd</sup> June 2016, 23<sup>rd</sup> September 2016 and 17<sup>th</sup> January 2017 all of which showed that the suit premises were not encumbered in any manner. It was also their case that the transfer of the said property to their favour could not be completed owing to a n unknown caveat which had been registered by the Defendant.
68. Evidence was tendered to the effect that the purported caveat was registered on 8<sup>th</sup> April 1999. The said caveat was registered before the enactment of the Land Registration Act of 2012. It was registered under the repealed Registration of Titles Act and the court agrees with the submissions made by the Plaintiffs Counsel that the applicable law is the repealed Registration of Titles act (RTA).
69. The Interpretation and General Provisions Act, Cap 2 Laws of Kenya at Section 23 (3)(b) provides that,
- “where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not –
- “(b) .....affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed.”
70. The import is that though the Registration of Titles Act was repealed wholly by the Land Registration Act, 2012, it will apply in this case since the caveat was registered before the commencement of the said Act.
71. Section 57(1) and (2) of the Registration of Titles Act stipulates as follows:
72. 57(1) and (2) respectively of the Registration of Titles Act provide:-
- “1. Any person claiming the right, whether contractual or otherwise, to obtain some defined interest in any land capable of creation by an interest 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 with which the land is situated forbidding the registration of any dealing with the 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.”

2. A caveat shall be in form P in the First Schedule, and shall be verified by the oath of the caveator or his agent, and shall contain an address within Kenya at which notices shall be served.”

73. In the instant case, there was no evidence tendered to the effect that the Defendant had any registratable interest in the land or in any manner as prescribed under Section 57 (1) of the Repealed RLA. The testimony of the Land Registrar was to the effect that he could not have registered the said caveat. The Defendant and the Land Registrar in their cross-examination could not produce the application made before the said caveat was registered.

74. 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 registratable under the Act.”

75. 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.”

76. The Defendant in defending the existence of the said caveat urged this court to make reference to the ruling delivered on 16<sup>th</sup> December 2002 in respect to the Mombasa HCCC No. 253 of 2001 (OS) Eliud Mwamunga vs Kamau Njendu wherein the court declined to remove the caveat. The court has perused the said ruling and notes that in the said matter, the Plaintiffs were not parties therein, the said proceedings were not subjected to a trial unlike the instant case and further the court did not have the benefit of considering the issues raised in this matter since the sale agreement between the parties was on 23<sup>rd</sup> September 2016. As such, the same cannot herein in the manner that has been submitted by the Defendant and this court is not bound to consider the same.

77. In view of the foregoing, it is the finding of this court that the purported caveat registered on 8<sup>th</sup> April 1999 against the suit property in favour of the Defendant is invalid null and void.

#### **Issue No. (ii)**

#### **Whether the Plaintiffs are entitled to the reliefs sought**

78. The Plaintiffs sought for several reliefs as enumerated in their plaint and this court having found that the purported caveat is valid, it is evident that the same ought to be removed.

79. On the removal of the caveat, this court makes reference to the relevant provisions of the repealed RTA. The relevant provisions on the lodging, removal and or withdrawal of caveats was section 57 thereof.



80. Section 57(5) empowered the Court either ex-parte or otherwise to make such an order as it deemed fit against a caveator once it was satisfied that the caveator had been duly served with a summons to show cause why the caveat should not be withdrawn.
81. In this case, there was evidence tendered during trial that the Defendant, who is the caveator was duly notified of the Plaintiffs intention to have the said caveat removed but he chose to object to the same and the Land Registrar testified that he was unable to remove the same unless otherwise directed by the Court. The Court is further convinced from the evidence adduced that the Plaintiffs are indeed the legitimate proprietor of the land. The caveat lodged against the title to the land prohibits all dealings in the land absolutely. The Plaintiffs case that they have been prejudiced and inconvenienced by the unreasonable maintenance of the caveat on its title to the suit land is therefore valid. A caveat should only serve as a temporary measure and should not be used to limit or deprive a party of right to the property in eternity. The Court of Appeal echoed that principle in the case of *Boyes –Vs- Gathure (1969)* (Supra). The protection of the right over property afforded by Article 40 of the *Constitution* is to be enjoyed by the proprietor except where the property is found to have been unlawfully acquired.
82. In view of the totality of the evidence, which has been reproduced hereinbefore, it is apparent that the lodgement and registration of the caveat was made without any lawful basis and in the absence of any legal claim by the Defendant.
83. Accordingly, the court's finding is that the caveat lodged as entry number 4 on the title to suit land should be removed.
84. In respect to the prayers of general, punitive and aggravated damages against the Defendant for maintaining the said caveat against the suit premises, the Plaintiffs submitted and urged the court to award them the sum of Kshs. 45,565,017.00 and 12,480,000/= together with interest. However, the Plaintiffs did not lay any basis for grant of the same and hence the court is not convinced to grant the same.

### **Issue No. (iii)**

#### **Whether the Defendant is entitled to be indemnified by the third parties**

85. The third party proceedings in the present case were instituted by the defendant under Order 1 rule 15 of Civil Procedure Rules (CPR). Upon being served the third parties participated in the suit. By order 1 rule 15, CPR a third party can dispute a plaintiffs' claim in the suit as against the defendant or dispute his own liability to the defendant or dispute both. In the present case the third parties disputed defendant's claim. After the third party enters appearance, the defendant giving third party notice is required to apply to the court for directions and if the court is satisfied that there is a proper question to be tried as to liability of the third parties may:

“Order the question of such liability as between the third party and the defendant giving notice, to be tried in such manner, at or after the trial of suit, as the court may direct; and if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party”.

86. As rule 22 of order 1 Civil Procedure Rules provides the defendant is required to apply for directions, “if a third party enters appearance pursuant to third party notice”. The rule does not require that directions be applied for after the third party files a defence. It seems to me that it is at the hearing of the third party summons for directions that the third party can apply for leave to file a defence to the defendant's claim. It is also at the hearing of third party summons for directions that the trial Judge



should direct whether or not a trial between the defendant and third party should be held, and, if so, at what stage and the extent to which the third party can participate in the trial between the plaintiff and defendant regarding the defendant's liability to the plaintiff.

87. In the instant case, directions were issued that the trial between Plaintiffs and defendant should precede the trial between the defendant and third parties is the usual direction given in cases where a defendant claims indemnity from a third party.
88. From the evidence that was tendered, the suit property is already in occupation by the Plaintiffs save for its transfer which has not been completed as against the Plaintiffs. During trial, the Defendant did not lead any evidence against the actions of the third parties herein, he did not demonstrate nor provide any evidence as to how he ought to be indemnified by the third parties and as such the said third party proceedings are for dismissal.

#### **Issue No. (iv)**

#### **What orders should issue as to costs.**

89. Although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court for good reason directs otherwise. Looking at the circumstances of this case, the Court notes that the suit against the third parties who were initially defendants was settled and withdrawn leaving the same to proceed against the Defendant and this also affected the initial prayers that had been sought by the Plaintiffs. Having this in mind this court directs that each party to bear own costs of the suit.

#### **Final Orders**

90. From the foregoing analysis this court makes the following final orders:-
- a. A declaration is hereby issued that the Registration of the purported caveat dated 8<sup>th</sup> April 1999 against LR No. 13909/2 registered as CR No. 25140 (suit premises) is null and void.
  - b. A mandatory injunction be and is hereby issued compelling the Land Registrar/3<sup>rd</sup> Third Party herein to remove forthwith the said caveat and to register the transfer of the suit premises in favour of the Plaintiffs.
  - c. The third party proceedings herein are hereby dismissed.
  - d. Any other relief not expressly granted is deemed as declined.
  - e. Each party to bear own costs of the suit and third party proceedings.

Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 28<sup>TH</sup> DAY OF MAY 2025.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Mr. Achoka for the Defendant.

Mrs. Waswa for 3<sup>rd</sup> Third Party.

Mr. Birir for 1<sup>st</sup> and 2<sup>nd</sup> Third Parties.



No appearance for Plaintiffs.

Court Assistant: Mary Ngoira.

