



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**

**Civil Case 1546 of 2000**

**CAPTAIN ERIC WANJAU.....PLAINTIFF**

**VERSUS**

**FRANCIS MBUGUA MWIHA.....DEFENDANT**

**RULING**

This is an application pursuant to the provisions of Section 57 (5), (6) and (8) of the Registration of Titles Act, and Order 36 rule 3B of the Civil Procedure Rules. It seeks the extension of the 45 days Notice which the Registrar of Titles issued on 5<sup>th</sup> May 2005, requiring the removal of a caveat on the suit land. The Plaintiff is asking that the notice should be extended until such time as the suit herein is determined, or until such period as this court may specify.

Section 57 (8) stipulates as follows:-

**“The caveator may, either before or after receiving the notice from the registrar, apply by summons to the court for an order to extend the time beyond the forty-five days mentioned in the notice, and the summons may be served at the address given in the application to the caveatee, and the court may, upon proof that the caveatee has been summoned and upon such evidence as the court may require, make such order in the matter, ex parte or otherwise, as it deems fit.”**

It is common ground, between the parties, that they had an Agreement. The said Agreement was entered into on 29<sup>th</sup> March 1993. The subject matter of that Agreement was a piece of land L.R. No. 12144/6 (now. 12144/32), I.R. No. 29214, which the defendant was to sell to the Plaintiff.

At some point in time, things went wrong, and the Plaintiff did not get the property, although he says that he had paid one-half of the purchase price. The other half was to have been paid upon registration of the transfer, in favour of the Plaintiff.

It is the Plaintiff's case that he has always been ready and willing to perform his part of the bargain, by paying the balance of the purchase price, immediately after the transfer to him is registered. However, the Plaintiff blames the Defendant for changing his mind about the sale, and instead opting to rescind the sale. The Plaintiff contends that the Defendant offered to refund the money already paid towards the purchase price. However, the Plaintiff does not want a refund of the money. He only wants the Defendant to transfer the suit property to him.

In an endeavour to safeguard his interests in the said property, the Plaintiff registered a caveat against the title, on 15<sup>th</sup> November 1999. Thereafter, on 29<sup>th</sup> August 2000, the Plaintiff filed this suit, for specific performance.

It is the contention of the Plaintiff that he has not actively prosecuted the case because the parties were negotiating. But the Plaintiff did not place before the court, evidence of the said negotiations. However, I also note that the Defendant did not deny that some negotiations were held between the two parties.

In any event, the Plaintiff has been served with Notice from the Registrar of Titles, requiring him to remove the caveat which he had had registered against the title to the suit property. It is that notice that has prompted this application.

It is submitted by the Plaintiff that unless this court extends the Notice, the caveat would be removed, whereupon the Defendant would then be at liberty to dispose of the said property. In the event that that happened, the Plaintiff fears that it would be to his detriment.

But the Defendant finds the application to be wholly unmeritorious. He points out that in the Agreement of sale, the parties had provided that the transaction was to be completed within 90 days. However, as it was not so completed, within the agreed period of time, the Defendant submits that the Agreement lapsed.

The Defendant also points out that the caveat was registered some seven (7) years after the Agreement for sale. He says that that was evidence of laxity on the part of the Plaintiff. The Defendant may be right in that regard, but that would not be material to the application before me. I say so because the caveat is in place. The fact that it was registered before the Defendant had any dealings in the land means that for as long as it remains registered, the caveat provides protection to the Plaintiff. To my mind, the Plaintiff could only be deemed to have been too lax if he had sought to register a caveat after the Defendant had transferred the suit property, to someone else.

Another issue raised by the Defendant was to the effect that the suit itself was time-barred, as it was filed some seven (7) years after the Agreement for sale. Not only that, but also the Plaintiff has not prosecuted the suit. For those reasons, the Defendant submits that this application, as well as the suit should be dismissed.

In my considered view, the twin issues raised by the defendant, regarding the lapse of the Agreement and also the contention that the suit itself may well be time-barred, are matters which deserve serious consideration. But I do not think that they ought to be given that consideration at this point in time, for two reasons:

(i) The issues have not been raised in the Defence.

And although they are points of law, which can therefore be raised at any stage of proceedings;

(ii) If I were to consider them, and may be, accept the Defendant's contentions, I would be dismissing the suit itself, yet there is no formal application before me, to that effect.

Having given due consideration to this matter, I hold the considered view that it is important to preserve the suit property until the suit is determined. If the caveat were to be removed before the suit was determined, the defendant would be entitled to sell-off the suit property to anybody else. If that were to

happen, the Plaintiff's main prayer, which is for specific performance would have been defeated, even before being given consideration on merit. For those reasons, I am minded to extend the Notice issued by the Registrar of Titles.

Accordingly, the Notice shall not take effect. It shall remain suspended until the suit is determined. And for the avoidance of doubt, the caveat will remain in force until the suit is determined.

However, the Plaintiff is directed to take steps within the next 30 days to fix the case for trial.

Meanwhile, the costs of this application shall be in the cause.

It is so ordered.

Dated and Delivered at Nairobi this 11th day of July 2005.

**FRED A. OCHIENG**

**JUDGE**