



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 253 OF 2002 (O.S)

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT CHAPTER 281, LAWS OF KENYA

BETWEEN

ELIUD TIMOTHY MWAMUNGA APPLICANT

AND

KAMAU NJENDU RESPONDENT

RULING

Originating Summons brought under Section 57(5) of Registration of Titles Act, Chapter 281 Laws of Kenya and Order 36 Rule 3B of the Civil Procedure Rules and Section 3A of the Civil Procedure Act is seeking two main orders. These are – First an order that the Defendant/Respondent, Kamau Njendu do attend this Honourable court and show cause why the caveat registered by him against Title Number L.R. 13909/12 C.R. 25140 should not be withdrawn by an order of the court; and secondly that the caveat registered by the Defendant/Respondent as C.R. No.25140/4 against Title No. LR 13909/12 C.R. 25140 be withdrawn and removed forthwith by the District Land Registrar. It is also seeking costs and any other or further order that the court may make as suits the circumstances of this case.

The reasons for seeking the same orders were in the Affidavit of the Applicant Eliud Timothy Mwamunga. Although the same Affidavit is lengthy, the relevant parts of it are that the Applicant had some dealing with the present registered owner of the suit land which went sour and ended in court where the Applicant won the case against the registered owner of the suit land and he now wants to execute that Decree against the suit land as he has an attachment order in the form of a prohibitory order against the title of parcel of land known as L.R. Number 13909/12. Earlier he had registered a caveat against the same title and the caveat against L.R. 13909/12 was registered as C.R. No.25140/3.

He now wants to proceed with execution and sell the said property through a court broker to recover the decretal amount which now totals KSh.1,200,000/-. However he cannot do so because after he registered his caveat C.R. No.25140/3, the Respondent also registered a caveat C.R. No.25140/4 against the same title of parcel of land known as L.R. Number 13909/12. He wants the same to be removed as his caveat was first and should take precedent over the Respondent's caveat, and further because according to him the interest that the Respondent seeks to protect by his caveat is incapable of being protected by the registration of the caveat and that in view of the same, the Respondent's caveat against the said property it unlawful and improper. There were several annexures to the same Affidavit.

The Respondent opposed the application and filed four grounds of opposition which were that the application is bad in law and incurably defective; that the application is an abuse of the court process; that the prayers sought are inconsistent and/or duplex; and that the application is such that it causes prejudice to the Defendant/Respondent. The Replying Affidavit in opposition is sworn by Kamau Njendu, the Respondent and states mainly that the application is incompetent according to Section 57(5) of Chapter 281, and Order 36 Rule 3B of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Rules; that prayer 2 is presumptive and in bad faith; that he had earlier on agreed to withdraw his caveat against part of the property 12/CR No.25139/4 title No.25139 and he has done so, that he had not been given any notice as to the prohibition till this application was served upon him; that as his caveat was legally and lawfully registered; the applicant has no locus standi to challenge its legality; that the arbitration that necessitated his registering the caveat has been heard and nearing completion; and that the applicant should not be allowed to enjoy all fruits available to the detriment of the Defendant who is also entitled to the same fruits. Section 57(5) of Registration of Titles Act states as follows:

“The proprietor or other person claiming land may, by summons, call upon the caveator to attend before the court to show cause why the caveat should not be withdrawn, and the court may, upon proof that the caveator has been summoned, and upon such evidence as the court may require make such order in the matter, either ex -parte or otherwise, as it deems fit; and, where a question of right or title requires to be determined the proceedings shall be as nearly as may be in conformity with the rules of the court in relation to civil causes.”

The side note is written “opposing caveat.” This provision means that the applicant coming under it has to prove that he is either a proprietor of the land in question or that he is a person claiming the land in question. Secondly, it also means that the first step is to call upon the caveator (in this case the Respondent) to attend before court and show cause why the caveat should not be withdrawn. Whether the caveator appears or not after service, if the court is satisfied that the caveator has been served (which proof must be availed by the applicant), then the court having heard evidence can make an appropriate order. It is clear that if the caveator does not appear then the court will make an exparte order upon the evidence adduced by the Applicant. If the caveator attends, the court will make an interparte order having heard evidence from both sides.

It seems to me from the above and from strict reading of Section 57(5) of the Registration of Titles Act that the Respondent’s allegation that in the application before me prayer two is presumptive is not far fetched. It clearly presumed that the Respondent would show no cause as to why the caveat should not be withdrawn. In fact, my reading of the provision makes me feel that only one order should have been sought and that is the order in prayer one of the originating summons. All the submissions that were advanced before me should have been only in respect of the same as showing cause as to why the caveat registered by the Respondent against Title Number L.R. 13909/12, C.R. 25140 should not be withdrawn. I will therefore treat prayer 2 as irrelevant as it is indeed presumptive.

I now turn to consider whether the applicant is a proprietor or is a person claiming land. Only those two can proceed to make the application under Section 57(5). The applicant is certainly not proprietor of the subject land. At paragraph 2 of his affidavit he says:

“THAT at all material times, Safari Leisure Motels Limited (hereinafter to be referred to as the company) was the duly registered owner of a parcel of land known as L.R. No.13909/12 C.R. No.25140 situated at Voi Municipality.”

The proprietor of the subject property is Safari Leisure Motels Limited. Is the applicant claiming this land? I have perused the Affidavit in support and I cannot see that evidence that the Applicant is claiming this land. The Applicant wants to sell the subject land in execution of an order of court issued against the Proprietor but is not claiming the land. He intends to claim it in execution but he has no specific claim against the land as yet. It appears to me that Miss Osino is right in her submission that to succeed under Section 57(5), the applicant has to bring himself within the requirements of that Section i.e. that he is a proprietor or he is a person claiming land in question.

It seems to me interesting that whereas in the provisions of Section 57(5) the word caveator is used to denote the person whose caveat is sought to be withdrawn, there is no provision that another caveator would also seek withdrawal of a caveator's caveat. If that provision was meant to allow one caveator to seek withdrawal of another caveator's caveat, nothing would have been easier than to say so. All that would have been added after the words "or other person claiming land" would have been "or another caveator in respect of the same land" so that the three, i.e. proprietor, other person claiming land and another caveator in respect of the same land would have been afforded the same opportunity to call upon the caveator to show cause. On my part, I cannot see any specific provisions in section 57 which allows one caveator to force another caveator to withdraw his caveat even through the courts of law even if the caveat sought to be withdrawn was registered after the first caveat.

Unfortunately I have not had the benefit of any authorities on the same. The Applicant also raised the question of his caveat having a stronger effect as he has now obtained prohibitory order against the suit land. He therefore should be allowed to execute against the property as he has a court order whereas the Respondent's arbitration proceedings have not matured as yet. This looks a very attractive and novel argument. However, before one buys it, one has to find out if the same court order was given by the court with the knowledge that there was another caveat registered on the property. If the court was not made aware of the same then it would be wrong to assume that it takes precedent over the other caveat. Just by way of an analogy, if the court orders a particular property to be attached, that does not stop an objector from coming on to the scene and one cannot say that as attachment was by court order, the objector must be ignored.

The word caveat is defined in the Concise Oxford Dictionary as "a warning or proviso. A process in court to suspend proceeding. (Let a person beware)." Thus registered earlier or later, it is an entry in the Register that warns all an sundry who may have any dealings in the subject land that some other interest on that land also exists, and so even if one is armed with an order of prohibition, he is still warned of other interests. Lastly, the Applicant stated that Respondent's interest is not capable of being protected by caveat which the Respondent registered. Mr. Okong'o in addressing me on this point referred me to Section 57 (1). I do not read that allegation in Section 57(1). In any case the Registrar had considered the question and had registered the caveat. If the Applicant felt the Registrar registered an interest that cannot be protected by registration of the caveat, then the Applicant had to come to court through other procedures and certainly not this one. I do not think the court can make that finding without a proper application before the court. I do accept the Respondents contention that the Applicant lacks locus standi to challenge the legality of the Respondent's caveat in this application and in the way he is purporting to do it. In conclusion, I find no merit in this application. I dismiss it with costs to the Respondent. Orders accordingly.

Dated and delivered at Mombasa this 16th Day of December 2002.

J.W. ONYANGO OTIENO

JUDGE