



**Agata v Land Registrar Narok (Miscellaneous Application
E001 of 2023) [2023] KEELC 21374 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21374 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
MISCELLANEOUS APPLICATION E001 OF 2023
CG MBOGO, J
NOVEMBER 9, 2023**

BETWEEN

CHRISPIN NYAMWAYA AGATA APPLICANT

AND

THE LAND REGISTRAR NAROK RESPONDENT

RULING

1. On the August 16, 2023 the Respondent filed a notice of preliminary objection dated August 10, 2023 challenging the case statement dated July 24, 2023 filed by the Applicant in court on even date on the following grounds: -
 1. That no application has been made by the applicant for consideration by the office of the Land Registrar as required under Section 73 (2) and (3) of the [Land Registration Act, 2012](#).
 2. That the applicant has not exhausted the statutory avenues available to him before filing this application.
 3. That the application is premature, a waste of judicial time and an abuse of the court process.
2. The notice of preliminary objection was canvassed by way of written submissions. On the October 17, 2023 the applicant filed his written submissions dated October 16, 2023 where he raised one issue for determination which is whether the preliminary objection is merited.
3. On this issue, the Applicant submitted that the root of this matter is basically a prayer to have the caution lodged on Title No. Cis Mara/Oleleshwa/169 removed. He submitted that Section 73 (1) of the [Land Registration Act](#) provides for three ways in which a caution can be removed i.e. by the



- cautioner, by the court or an order of the Land Registrar. The Applicant relied on the case of *Republic versus Chief Land Registrar; Ex parte, Mary Wamaittha Kaittany* [2021] eKLR.
4. The Applicant submitted that the Respondent did not give him a written notice of a caution and there is no evidence that the requisite notice was issued. Further, that he applied unsuccessfully to the Respondent to have the caution removed. He relied on the cases of *Republic versus Land Registrar, Laikipia County Ex-parte; Peterson Nguchu Kaburi* [2021] eKLR and *Christian Wafula Omusolo & 2 Others versus Pauline Jerotich & Another* [2019] eKLR.
 5. On October 23, 2023, the Respondent filed its written submissions dated October 19, 2023 and raised one issue for determination which is whether the preliminary objection is merited.
 6. The Respondent submitted that cautions are registered by the Land Registrar and that Section 73 of the *Land Registration Act* makes provision for the removal or withdrawal of a caution. The Respondent further submitted that the applicant never applied to remove the restriction as that would have been the first port of call. Further, that a reading of Section 73 (1) and (2) together with Section 78 of the *Land Registration Act* gives the impression that a Land Registrar ought to be moved first to remove the caution/restriction before moving to the court. The Respondent relied on the case of *Mwangi Rukwaro & Another versus Land Registrar* [2019] eKLR.
 7. The Respondent further submitted that the Applicant has not exhausted the available remedies as provided under Section 73 (2) of the *Land Registration Act* and as such, the application should be dismissed.
 8. I have considered the preliminary objection and the written submissions submitted by the parties herein and, in my view, the issue for determination is whether the notice of preliminary objection is merited.
 9. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd* (1969) EA 696 to mean: -

Per law, JA

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Newbold, P stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

10. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from



elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd vs Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

11. It is also this court’s opinion that in determining a preliminary objection, the court will also consider that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, where the court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

12. Before I embark on determining the merits of the preliminary objection, this court has to first determine whether what has been raised herein satisfy the ingredients of a preliminary objection. As the Court determines whether what the Respondent has filed amounts to a preliminary objection or not, the court will also be persuaded by the findings in the case of *Oraro vs Mbaja* (2005) 1KLR 141, where the Court held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

13. The Respondent contended that no application has been made by the Applicant for consideration by its office as required under Section 73 (2) and (3) of the *Land Registration Act* and as such, the Applicant has not exhausted the avenues available to him before filing this application. From my analysis, I am not satisfied that the preliminary objection raises a pure point of law.

14. The Applicant filed a case statement dated July 24, 2023, pursuant to Section 86 (1) of the *Land Registration Act* seeking the court’s opinion on following questions: -

1. Whether Beatrice Naserian Tompo meets the qualification of a cautioner as per Section 71 of the *Land Registration Act*, 2012. If she is entitled to claim any right to obtain an interest in that parcel of land, title no. CisMara/Oleleshwa/169.
2. Whether Beatrice Naserian Tompo who lodged and maintained a caution dated January 19, 2023 wrongfully and without reasonable cause is liable for the action of damages for the application as per Section 75 of the *Land Registration Act*, 2012.
3. Whether the Land Registrar has neglected his powers/duty to remove a caution as instructed in a letter dated April 27, 2023.
4. Is Chrispin Nyamwaya Agata, the applicant herein, entitled to an order of this Honourable court directing and/or compelling the Land Registrar, Narok to remove the caution on the title no. CisMara/Oleleshwa/169.
5. By whom are the costs of this application payable?



15. The case statement was supported by the affidavit of the Applicant sworn on July 24, 2023 and annexed to it were documents in support thereof.
16. The Respondent herein did not file a response to the case statement and instead filed the instant preliminary objection. The law on lodging and removal of cautions is found in Sections 72, 73, 74 and 75 of the [Land Registration Act](#).

“72. Notice and effect of caution

- (1) The Registrar shall give notice, in writing, of a caution to the proprietor whose land, lease or charge is affected by the caution.
- (2) A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court.

73. Withdrawal and removal of caution

- (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.
- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
- (5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee’s power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected
- (6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.

74. Second caution in respect of the same matter

The Registrar may refuse to accept a further caution by the same person or anyone on behalf of that person in relation to the same matter as a previous caution.



75. Wrongful cautions

Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person.”

17. Let me emphasize that a preliminary objection stems from the pleadings but the court in determining so, ought to restrict itself only to the pleadings and not the evidence. The Applicant herein alleges the caution was placed without his knowledge and /or notification contrary to the above provision of law. For this court to determine whether an application was made pursuant to Section 73 (2) and (3) of the *Land Registration Act*, it would have to comb through the evidence and in my view, that would defeat the essence of a preliminary objection.
18. Whereas I am of the view that the instant preliminary objection does not raise a pure point of law for the reason that this court would be required to comb through the evidence to determine whether it is merited, it would have been prudent for the Respondent to file its response to enable this court determine whether or not the Applicant followed the laid down procedure stipulated in law to file the case statement.
19. Having said that, the notice of preliminary objection dated August 10, 2023 lacks merit and it is hereby dismissed. Costs shall abide the outcome of the case statement. Mention on November 16, 2023 for further directions. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 9TH DAY OF NOVEMBER, 2023.

HON. MBOGO C.G.

JUDGE

