



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**MISC. APPLICATION NO. 45 OF 2018 (OS)**

**VIPINGO PROPERTIES LIMITED ..... APPLICANT**

**-VERSUS-**

**RANDOLPH TINDIKA ..... RESPONDENT**

**-AND-**

**THE REGISTRAR OF TITLES ..... INTERESTED PARTY**

**JUDGMENT**

*(Parties having entered into an agreement for sale of the suit properties which agreement was never completed but which led to the respondent registering caveats; parties entering into a subsequent agreement reviving the sale and making provision for removal of the caveats in the event that the respondent does not pay the balance of the purchase price within the completion period; agreement providing that payment be made against the completion documents; respondent not paying the balance of the purchase price within the completion period and maintaining the caveats in place; vendor now filing suit for removal of the caveats; respondent arguing that the interpretation of the agreement is that he must first be given the original completion documents before he can pay the balance of the purchase price; court holding that respondent needed to first make payment before he could be given the original completion documents; respondent not making payment within the stipulated time thus not entitled to maintain the caveats; judgment entered for the applicant)*

1. This suit was instituted by way of an Originating Summons filed on 30 October 2018. The applicant seeks the following orders: -

*a) That this honorable court be pleased to find that the caveats registered on 30 October 2015 against the titles C.R Nos. 60182, 60661, 60660, 60662, 60663 and 60843, in respect of properties Land Reference Nos. 5025/236, 5025/239, 5025/240, 5025/241, 5025/242, and 5025/249 (respectively) are wrongful.*

*b) That this honorable court be pleased to issue an order that the caveats registered on 30 October 2015 against the titles C.R Nos. 60182, 60661, 60660, 60662, 60663 and 60843, in respect of properties Land Reference Nos. 5025/236, 5025/239, 5025/240, 5025/241, 5025/242, and 5025/249 be and are hereby removed.*

*c) That the cost of this suit be provided for.*

2. The Originating summons is supported by an affidavit of Abdulla Mohamed Hussein the administrator of the applicant. He deposed that the applicant is the registered proprietor of the properties known as L.R Nos. 5025/236, 5025/239, 5025/240, 5025/241, 5025/242, and 5025/249 South Takaungu, Kilifi District (hereinafter, 'the suit properties'). He stated that in December 2014 and sometime in 2015, the applicant and the respondent entered into an agreement for sale of the suit properties, and the respondent paid Kshs. 12,311,070/= being deposit of the purchase price. He however, failed to raise the balance, and the said agreement was rescinded. He deposed that the respondent then went ahead and registered caveats against the properties claiming a purchaser's interest, hence the applicant was unable to sell the properties to other interested purchasers. On 12 August 2016, the applicant requested the respondent to remove the caveats, but the request was not complied with, and the applicant, on 1 September 2016, applied to the Land Registrar for the removal of the caveats. The respondent objected to the removal of the caveats. The parties then opted to enter into a new agreement on 2 June 2017 for the sale of the properties with the condition that, should the respondent fail to complete the transaction, he (respondent) would apply for the withdrawal of the caveats. He stated the respondent failed to complete the transaction despite the applicant being ready and willing to complete. He deposed that the applicant vide a letter dated 24 October 2017, informed the respondent of his breach of the agreement, and subsequently on 1 November 2017, the applicant applied to the Land Registrar to remove the caveats. He mentioned that on 26 March 2018, the Land Registrar notified the respondent about the applicant's application to remove the caveats, and that the said caveats would be removed upon expiry of 45 days, but they are yet to be removed. He is of the view that the refusal by the Land Registrar to withdraw the caveats is unlawful and it is in the interest of justice that the orders sought are granted.

3. The respondent replied to the applicant's motion vide a replying affidavit sworn by him. He acknowledged that they had an agreement for sale of the suit properties and he paid the deposit of the purchase price. He denied failing to raise the balance of the purchase price and deposed that he secured a loan from Equity Bank, and the said bank's advocate Messr. Mutunga & Co. Advocates, gave a professional undertaking to the applicant's advocates at that time, Messr. Atkinson Cleasby & Satchu Advocates. The undertaking was to effect that the bank was to pay the balance of the purchase price upon successful registration of the transfer of the properties in the respondent's favour and the charge in favour of the bank. He deposed that the applicant's erstwhile advocate failed to release the completion documents to the bank's advocate, and thus, the transfer in his favour and the charge in favour of the bank, could not be lodged for registration. He stated that it is for these reasons that he registered the caveats to protect his rights as a purchaser. He affirmed that thereafter, they entered into a new agreement on 2 June 2017. He thought that the motivation of the applicant in entering the new agreement was to get a way to have the caveats removed and not to complete the transaction. He asserted that the applicant was not ready to complete the transaction, as the completion documents that were to be exchanged with the purchase price, were never availed to him. He was of opinion that it is the applicant who did not fulfil its part of the bargain, and by his letter dated 8 November 2017 he rejected the applicant's unilateral rescission of the agreement. He deposed that even though the applicant forwarded copies of the purported completion agreement, the said copies were not in line with clause 4.1 of the agreement, which is an indicator that the applicant had never been ready, willing and able to complete the transaction. He added that the provisions of clause 4.1 were clear and unequivocal that the applicant was to avail the original completion documents to the respondent's advocate in exchange for the balance of the purchase price, which the applicant did not do. He alleged that the applicant forwarded copies of incomplete completion documents by a letter dated 15 November 2017. He claimed that while the transaction was pending completion, the applicant was involved in negotiations with other interested parties, who thereupon offered a higher price than that which was already agreed. He deposed that he objected to the removal of the caveats, in accordance with Section 73(4) of the Land Registration Act, and the next mandatory step was for the Land Registrar to hear both parties, therefore this suit is premature.

4. In response to the respondent's replying affidavit, the applicant filed a supplementary affidavit again sworn by Mr. Hussein. He deposed that the reason the first agreement could not be completed, and was rescinded, is because the respondent failed to pay the balance of the purchase price even after being given an extra 90 days. He added that in view of the respondent's failure to complete the sale, the respondent did not have the capacity or consent to charge the properties, and accordingly, the purported loan agreement dated 23 July 2015 and subsequent legal charge dated 7 August 2015 are both of no effect. He stated that the applicant at all material times acted in good faith and accommodated the respondent by entering into the second agreement which again the respondent failed to complete.

5. He deposed that it was an express term of clause 5 of the second agreement, that if the respondent failed to pay the balance of the purchase price, then the respondent would withdraw the caveats. He stated that the respondent's letter dated 8 November 2017 was responded to vide the applicant's letter dated 15 November 2017, that the applicant was ready and willing to complete the transaction and there was enclosed copies of all completion documents. He deposed that the respondent had been given numerous opportunities to complete the transaction, and despite the applicant having been ready, willing and able to complete the transaction, the respondent failed to fulfil his obligation, and consequently, the agreement was rescinded. He was of opinion that Section 73(4) of the Land Registration Act cannot be read in isolation, but together with Section 73(1) of the same Act, which provides that 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. He deposed that as a result of the caveats on the properties, the applicant has suffered and continues to suffer great loss and damage as it is unable to sell the properties to other intending purchasers.

6. The respondent replied to the supplementary affidavit by filing a supplementary affidavit of his own. He deposed that the applicant's allegations regarding the completion and charging of the suit properties are not factual. He stated that the applicant purports to read the second agreement narrowly and avoiding its obligation therein. He reiterated that it was the responsibility of the applicant to avail all the completion documents which were to be exchanged with the payment of the balance of the purchase price, but instead of availing the completion documents, the applicant purported to rescind the agreement. He maintained that the purported rescission was not only illegal, unlawful and wrongful, but of no legal consequence, and the issue of removal of caveats cannot arise as he has always been ready, willing and able to complete the transaction. He added that there was also the responsibility of the vendor to pay capital gains tax before the transfers are effected.

7. The matter proceeded orally with the deponents testifying in court and being cross-examined on their affidavits. The evidence is more or less in line with the depositions above. I only add that in his evidence, the respondent asserted that not only was he not provided with the completion documents, but he was not even provided with copies of the same, and for that reason, he could not pay the balance of the purchase price.

8. Both parties filed their final submissions and I have taken note of the submissions filed by Mr. Kahura, learned counsel for the applicant, and Mr. Tindika, the respondent, acting in person. I need to add that Mr. Tindika is also an advocate of the High Court of Kenya with about 26 years of practice. Mr. Kahura's general position was that there was a breach by the respondent in not paying the balance of the purchase price and owing to that breach, the applicant rescinded the agreement. He submitted that there was therefore no basis for the respondent maintaining the caveats. Counsel relied on the case of *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR* on the sanctity of contractual terms. On the performance of the obligations of the purchaser, counsel referred me to the case of *Parminder Singh Sagoo vs. Dourado & Another (1983) KLR 366*, *Christine Nyanchama Oanda vs. Catholic Diocese of Homabay Registered Trustees (2020) eKLR*, and *Nabro Properties Limited vs Sky Structures Ltd & 2 Others (2002) eKLR*. On removal of the caveats, counsel relied on the case of *Eng Mee Yong & Others vs V. Letutchumanan s/o Velayutham, Privy Council Appeal No. 25 of 1977*. He also referred me to the case of *Union Eagle Limited vs Golden Achievement Limited (1997) AC 514*, where the Privy Council allowed a vendor to rescind a contract where the purchaser was 10 minutes late in completing. On the allegation by the respondent that he never saw copies of the completion documents, counsel referred me to parts of the affidavits of the respondent, and pointed out that in them, he has deposed that he had received the copies. He asked that the suit be allowed with costs.

9. The respondent in his written submissions put forth that the applicant was in breach of Clause 4.1 of the agreement, by failing to provide the completion documents, and that is the reason why the balance of the purchase price was not paid. He submitted that if the applicant was sincere, he ought to have produced copies of the completion documents in court. He insisted that what were sent were schedules of the documents and not the documents themselves. He similarly relied on the case of *National Bank of Kenya Ltd vs Pipeplastic Samkolite* on the sanctity of contractual terms and further to the decisions in the cases of *Feba Radio (Kenya) Limited t/a Feba Radio v. Ikiyu Enterprises Limited, Civil Appeal No. 170 of 2013, Nairobi (2017) eKLR (CA)*, *Lucy Mwihi Mureithi vs. Sylvanus Ngaira Mukotsi, Civil Appeal No. 36 of 2016, Nyeri (2018) eKLR*, and *Five Fourty Aviation Limited vs Erwan Lanoë, Civil Appeal No. 55 of 2016 (2019) eKLR*. He submitted

that the motivation of the applicant was to sell the properties to another party and referred me to the decision in the case of *Michael Murithi Muthii vs. Cecilia Wanjiru Cooper & 3 others, Civil Appeal No. 159 of 2019, Mombasa (2021) eKLR (CA)*. He submitted that the caveats were lawfully registered to protect his interest as purchaser. He asked that the suit be dismissed with costs.

10. I have considered all the above and the authorities referred to by the parties in as much as I may not specifically quote them in my disposition.

11. The facts of the case are largely not in dispute. It is common ground that the applicant and respondent had a vendor/purchaser relationship, with the applicant as vendor, and the respondent as purchaser. They had a first agreement dated 4 December 2014 where five plots were being sold, which are LR numbers 5025/239, 5025/240, 5025/241, 5025/242 and 5025/249. The selling price for these five plots was Kshs. 102,475,400/=. A deposit of 10% of the purchase price was acknowledged in the sale agreement and completion was to be on 25 February 2015. There is a subsequent agreement which added a sixth plot, LR No. 5025/236, being sold for Kshs. 20,635,300/=. This agreement remained undated but it was certainly entered into in early 2015 for it had a completion date of 30 April 2015. Again the deposit of 10% was acknowledged as paid. In both agreements, the vendor's advocate was the law firm of M/s Atkinson, Cleasby & Satchu, whereas the purchaser used his own law firm as acting for him, that is M/s Tindika & Company Advocates. I have mentioned that the deposit for the purchase price in both agreements, in total Kshs. 12,311,070/=. was acknowledged and what was left was payment of the balance of the purchase price. For the first agreement, completion fell due on 24 February 2015, but no money was forthcoming from the respondent. This prompted the law firm of Atkinson, Cleasby & Satchu, to write to the respondent a letter dated 13 March 2015. In that letter, Mr. Satchu lamented that despite his efforts, and that of his clerk, to reach the respondent, the respondent was not answering their calls. When he was at last able to reach the respondent, an appointment for a meeting was made, but the respondent did not show up. In those circumstances, Mr. Satchu gave notice, that if the balance was not paid on or before 5 April 2015, the sale would be rescinded and the deposit forfeited. The respondent promptly replied to this letter on the same day and requested for an extension of 60 days. There are emails showing that this request was acceded to which would mean that completion was pushed to 5 June 2015 or thereabouts. Within this time, the respondent looked for financing and appears to have successfully obtained the same from Equity Bank who appointed the law firm of M/s Mutunga & Company Advocates. I have actually seen a letter from the law firm of M/s Mutunga & Company Advocates dated 2 June 2015 where they gave a professional undertaking in the sum of Kshs. 98,440,000/= and asked for the completion documents. It was said that this undertaking was rejected and I have seen that another one was done on 25 June 2015. It is not very clear why the transaction was not completed then, for there is a lack of documentation, but it could be that the amount of Kshs. 98,440,000/= did not cover the whole of the balance of the purchase price.

12. On 30 October 2015, the respondent registered caveats against all the six titles which prompted Mr. Satchu to write to the respondent, on 12 August 2016, demanding the removal of the caveats. Subsequently, on 1 September 2016, the applicant applied to the Land Registrar to have the caveats removed which was objected to by the respondent. The parties must have proceeded to enter into negotiations on how to salvage the sale which now led to the agreement dated 2 June 2017. There is common ground that this agreement superceded the earlier agreements and it is this agreement which is now the subject of the dispute.

13. This agreement of 2 June 2017 combines the sale of the six plots in issue which were being sold for the total sum of Kshs. 123,110,700/=. This time the vendor's advocates was M/s Kaplan & Stratton Advocates whereas Mr. Tindika maintained his own law firm as acting for him. This agreement acknowledges the deposit of 10% of the purchase price and had a completion date that was defined to mean "*on or before 90 days from the date of the agreement.*" There are two major clauses that are the subject of the dispute herein, that is, clause 4 and clause 5, and I will therefore set them down in full. They are drawn as follows:-

***"Clause 4. Completion and payment of the balance of the purchase price.***

*4.1. On or before the completion date, the purchaser shall pay the balance of the purchase price by RTGS to the vendor's advocate account against receipt by the purchaser's advocates from the vendor's advocates of the following completion documents (the 'completion documents')*

*(a) The original certificates of titles in respect of the properties;*

*(b) The transfers of the properties (each in triplicate) duly executed by*

*the vendor complete with passport size photographs of each of the vendor's directors who witnessed the affixation of the vendor's seal on the transfers;*

*(c) Copy of the Vendor's Certificate of Incorporation and PIN Certificate together with copies of the Identity Card/Passport and PIN Certificate of each of the directors of the Vendor who witnessed the affixing of the seal of the Vendor on the transfers;*

*(d) original rent clearance certificate for each of the Properties;*

*(e) the consent of the Commissioner of Lands to the transfer of each of the Properties;*

*(f) original rates clearance certificates for each of the Properties; and*

*(g) a duly completed stamp duty valuation form in the form prescribed by the Collector of Stamp Duty.*

*4.2. Upon receipt of the completion documents by the Purchaser's Advocates, the Purchaser's Advocates shall immediately proceed with stamping and thereafter present the transfers for registration in the name of the purchaser and undertake to use their best*

endeavours to complete registration within forty five (45) days of receipt of the Completion Documents. The Vendor's Advocates shall hold the Balance of the Purchase Price as stakeholder pending the completion of registration of the Transfers of the Properties for a period of forty five (45) days from the Completion Date, whichever is earlier.

4.3. In the event that the purchaser is being financed by any part of the balance of the purchase price, then the purchaser shall procure the issuance of the vendor's advocate of:

(a) A suitable and acceptable professional undertaking from the purchaser's financier's advocate to pay the financed amount to the vendor's advocates account within seven (7) days of the successful registration of the transfers in favour of the purchaser and the charge in favour of the financier. The undertaking shall be given by the financier's advocates within fourteen (14) days prior to the completion date on terms acceptable to the vendor and their advocate; and

(b) A suitable and acceptable professional undertaking from the purchaser's advocates that they will utilize the completion documents for the sole purpose of registration of the transfers in the name of the purchaser and the charge to be registered in favor of the financier and they will procure the financial amount within three (3) days of receipt of the registered documents.

4.4 The Outgoings of the Properties shall be apportioned on the Completion Date.

#### **Clause 5. Failure To Pay The Balance Of The Purchase Price.**

5.1. If for any cause whatsoever the sums due under clause 4.1 shall not have been paid by the due date or any part of the Purchase Price secured by the professional undertaking shall not be paid as mentioned under clause 4.3 within the stated period or if the Purchaser shall not have complied with any of his obligations under this Agreement, then:

5.1.1 the purchaser shall within seven (7) days from the Completion Date, apply for the withdrawal of or cause to be withdrawn the Caveats at the Mombasa Lands registry and forward a copy of the application which has been received by the said registry to the Vendor's Advocates; and

5.1.2 the vendor will be entitled to serve a completion notice of twenty one (21) days upon the Purchaser for the payment of the Balance of the Purchase Price failing which the Vendor shall after the expiry of the completion notice be entitled at its sole discretion to either:

(i) charge interest at the Interest Rate on the outstanding balance of the Purchase Price from the date it is due until the date of payment of the Purchase Price in full (both dates inclusive); or

(ii) rescind the Agreement and the Deposit shall stand forfeited to the Vendor absolutely by way of agreed liquidated damages (the parties acknowledging that the forfeiture of such amounts represents a genuine estimate of the loss that the vendor will suffer as a result of the Purchaser breaching his obligations in this agreement). In such event the Purchaser shall immediately proceed to withdraw the Caveats at the Mombasa Lands registry and forward a copy of the application for the withdrawal of caveats which has been received by the said registry to the Vendor's advocates.

5.2 In the event of failure by the Vendor to comply with any of the conditions hereof, then the Purchaser shall be entitled to serve a notice in writing to the Vendor requiring the Vendor to remedy the breach within a period of twenty one (21) days from the date of the notice and in default the Purchaser shall be entitled to rescind the contract or to sue the Vendor for specific performance or any other remedies. In the event that this agreement is rescinded by the Purchaser, following the Vendor's failure to comply with any of the conditions hereof, the Vendor shall refund to the Purchaser the Deposit and any other payments made by the Purchaser to the Vendor without interest.

14. It will be recalled that the agreement was dated 2 June 2017 and the completion date was to be within 90 days, which would be 31 August 2017 or so. On 31 August 2017, there was an exchange of emails between Rita Karau of M/s Kaplan & Stratton Advocates, and the respondent. The respondent inquired whether the transfers have been engrossed which was confirmed by Ms. Karau. Ms. Karau also wrote stating that she has the completion documents and attached copies of them to her email. She asked for remittance of the balance of the purchase price to an account which she provided. The money did not come and the vendor rescinded the agreement. On 24 October 2017, a letter was written to the respondent, informing him of the rescission and further demanded that the respondent removes the caveats pursuant to Clause 5.1.2 of the agreement within 7 days. The respondent replied on 8 November 2017, objecting to the rescission of the agreement. He contended that the vendor has not prepared the completion documents in accordance with the agreement. He also added that the vendor is responsible for payment of Capital Gains Tax, without which the transaction could not be completed. The vendor replied through her advocates, vide a letter and email dated 17 November 2017, affirming that the vendor has been ready and willing to complete the transaction. Both letter and email stated that there is enclosed copies of the completion documents listed on an attached schedule. On the Capital Gains Tax, the respondent was advised that the court had declared that requirement unconstitutional and a copy of the decision was attached.

15. In his evidence, the respondent asserted, that he never even got the copies of the completion documents thus the position that it is the vendor who has been in breach. I do not believe the respondent when he says that he never got to see copies of the completion documents. If no copies had been attached in the emails and letters, you would expect that the respondent would reply and point out that there was nothing attached. This was not done and I am not persuaded that no copies of the documents had been sent to him. In fact, I believe that they were. In his own affidavits, the respondent deposed that he received copies of the completion documents, only making a general allegation that they were not in line with clause 4.1 of the agreement, without pointing out what exactly was missing. But I do not even think the basis of the respondent's case is that he was not supplied with the copies. It is his contention that he needed to be availed the completion documents (meaning in their original form) before he could make payment, and that because the applicant did not hand over to him these documents, then he could not have been expected to make payment.

16. That position of the respondent is flawed. The agreement of the parties did not require that the original completion documents first be handed over to the respondent before he could make payment. What the agreement stated at clause 4.1. is that *“the purchaser shall pay the balance of the purchase price by RTGS to the Vendor’s Advocates Account against receipt by the Purchaser’s Advocates of the (completion documents).”* This is supposed to be a contemporaneous action where you pay and you get the completion documents. Unless it is explicit in the agreement, I do not think that there is a vendor, who will surrender complete original documents of title and transfer, when he/she has not seen the money or at least proof that the money exists. Neither can you have a situation of a stalemate where the one person in the transaction is waiting for the other to move first. My interpretation of the agreement is that payment preceded receipt of the completion documents though the receipt of the documents was to be immediate upon payment. If there was doubt in the mind of the respondent as to whether payment was to be made first, then, since the applicant had demonstrated that he had the completion documents, the respondent needed to demonstrate that he had the money. He did not. If the respondent doubted the existence of the completion documents in their original form, nothing barred him from asking to be allowed to inspect the same before he could make payment. If he inspected them and found some documents missing, he could point this out, so that the vendor can obtain and provide the missing document. In addition, if the respondent was doubtful on whether to pay or not, he ought to have referred to the Law Society Conditions of Sale (1989) which were applicable to the transaction. Clause 4 (1) of the above Conditions of Sale provides as follows:- *Completion shall, unless otherwise agreed in writing between the parties or their advocates and the advocates for any mortgagee, take place at the office of the vendor’s advocate or, if required by the vendor at least five (5) working days prior to the completion date, at the officer of the vendor’s mortgagee or his advocate.*

The respondent does not say that he went to the offices of the vendor’s advocate on the completion date, armed with proof that he had the money and was ready to transfer it, and despite that, he was denied the completion documents. If he went there and he was never shown the original completion documents, and yet he was ready to pay, that would be a different matter altogether.

17. There is no need of beating around the bush; the reality of the matter is that the respondent actually did not have the balance of the purchase price and was stalling the transaction. If he had the money, he would at least have shown it, if not paid it outrightly. The fact that he did not pay the money, or show that it was available, means that the money was not there. To start blaming the applicant, that he first ought to have handed over the original completion documents is a red herring. Even in the course of these proceedings, the respondent never demonstrated that he had the money ready, and that he was willing to pay the balance of the purchase price.

18. I have elaborated above what the respondent could have done if he truly had the balance of the purchase price with him. In addition, he could as well have procured an undertaking to pay the balance on receipt of the completion documents, but he did not. He also had remedy under Clause 5.2 to serve notice upon the vendor, requiring the vendor to remedy the breach. No such notice was sent. Moreover, he had the remedy to rescind the contract if he thought that the vendor was in breach. He did not exercise this remedy. Further, he had the remedy of suing for specific performance. He never did. If the fear of the respondent was that he may pay the money and not get the completion documents, this would be unfounded, because clause 4.2 of the agreement was to the effect that the balance of the purchase price would not be released to the vendor until registration of the transfer is effected, or for a period of 45 days from the completion date. The respondent was not at risk of losing any money. In fact, it was the vendor who was at risk if he gave out his title and completion documents without first having been satisfied of the availability of the purchase price. We should also not forget that the law firm acting for the respondent, was no different from the respondent himself. Thus, forwarding completion documents to the purchaser’s advocate was the same as sending the documents to the respondent himself, and in such circumstance, there would be no guarantee to the vendor.

19. It is clear to me that the respondent did not have the balance of the purchase price. I regret to inform the respondent that it was actually him who breached the sale agreement by failing to avail the balance of the purchase price on or before the completion date.

20. On the removal of the caveats, the sale agreement actually addressed it in clause 5. If the respondent failed to make payment, he was obligated to withdraw the caveats within 7 days. He did not, and in such instance the applicant was fully entitled to come to court to have an order to remove the said caveats.

21. Removal of caveats/cautions is covered in Section 73 of the Land Registration Act, Act No. 3 of 2012, which provides as follows :-

*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.*

22. It will be seen from the above, that under Section 73(1) a caution may be removed in three ways. First, by the cautioner himself; second

by an order of court; and thirdly, by the Land Registrar, following the procedure provided. The applicant has approached this court for the order of removal of the caution and I am persuaded that she has every right to the said orders. I have demonstrated above that the respondent is not entitled to those cautions remaining in place. He did not complete the agreement within time and the applicant rescinded it. It follows that the respondent no longer has any proprietary right to protect by maintaining the cautions/caveats. I am persuaded that the applicant has made out a case for the grant of the orders sought in this Originating Summons. I allow it and grant prayers 1 and 2. On costs, the respondent will pay the costs of the suit to the applicant.

23. Before I close, I feel the need to say something about advocates representing themselves. In as much as they may have the legal expertise, and they have the right to represent themselves, on my part, I would encourage advocates to seek independent professional advice and assistance, rather than acting and/or representing themselves. When an advocate acts for himself, he loses the critical impartiality and advice of an independent person. In the end, the advocate may many times end up acting like any other unrepresented layman, and may suffer the same ills that a good number of laymen acting in person suffer, such as being overly emotional or unnecessarily combative. It is not surprising, as there is no professional to put forth a different opinion for deliberation, to calm and reassure the client, and to bear the weight and tension of litigation. Being a litigant is stressful enough; saddling oneself with the additional responsibility and weight of acting in the litigation, instead of passing that burden to an independent advocate, can end up being an emotional rollercoaster, which can cloud thought and good judgment. In this instance, the respondent, who I have already mentioned is an advocate, acted for himself in the sale transaction and in the court proceedings. In the event, whatever advice he gave himself, has certainly not helped his cause. I feel that he robbed himself of the benefit of objective independent legal advice that may have ended up being of immense benefit to him. I hope that advocates will take heed to instruct other counsel when they are undertaking personal transactions and/or having cases in court.

24. Judgment accordingly.

**DATED AND DELIVERED THIS 9<sup>TH</sup> DAY OF FEBRUARY 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**