



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

MISC APPLICATION NO E002 OF 2022

JOSEPHINE KILUTI MWENDWA.....APPLICANT

VERSUS

THE LAND REGISTRAR KWALE.....RESPONDENT

RULING

INTRODUCTION

1. This ruling is the subject of the Applicants Notice of Motion application dated 2nd February 2022. The application is filed pursuant to section 73 of the Land Registration Act and order 51 of the Civil Procedure Rules seeking the following orders;

That the honorable court do issue an order compelling the respondent to remove a caution dated 8/11/2013 against land title number Kwale/Shimoni/73 illegally and unlawfully lodged by one Purity Wachera.

2. The application is based on the grounds stated thereon and supported by an affidavit sworn by Josephine Kiluti Mwendwa the Applicant where she deposes that she is the sole and absolute owner of Kwale/Shimoni/73 the suit land. She states that she has been in possession of the suit land and has never transferred or alienated the same. That on 2/12/2013 a caution was registered over the said land by one Purity Wachera and which action was not communicated to her. She further avers that the cautioner is not known to her and that the caution has denied her the opportunity to exercise her proprietary rights over the suit property. She further stated that she had written a letter dated 3/2/2015 to the Respondent requesting for the removal of the caution but to date the same had not been done. She pleaded that the law under Section 71 of The Land Registration Act did not permit the cautioner to lodge the said caution. Further that under section 73 of the Land Registration Act this court is empowered to remove the said caution. She reiterated that no prejudice will be suffered by the respondent in the event that the caution is removed and prayed for the respondent to be compelled to remove the caution dated 8/11/2013.

3. This application was fixed for hearing on 22nd February 2022. An affidavit of service sworn by Maureen Akoth Onago on 16th February was filed. This court was satisfied that the Respondent was duly served with the hearing notice for this application. The Respondent has however failed to file a response over the instant application.

4. From the pleadings filed herein, the only issue for determination is whether the caution registered on the suit land should be removed. Before addressing this issue, this court deems it necessary to first delve into the rationale or objectives of the regime of cautions. This can be deduced from the provisions of section 71 of the Land Registration Act 2012 which stipulates that;-

Lodging of cautions

1. A person who— (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act; (b) is entitled to a licence; or (c) has made an application for a bankruptcy order against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge. (2) A caution may either— (a) forbid the registration of dispositions and the making of entries; or forbid the registration of dispositions and the making of entries; or (b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution. A caution shall be in the prescribed form, and the Registrar may require the cautioner to support the caution by a statutory declaration. (4) The Registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under this Act. (5) Subject to this section, the caution shall be registered in the appropriate register.

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.

5. From the above provisions a caution therefore is meant to secure the interests of a third party who claims a right or an interest in a specific piece of land including a licence. It is contended by the Applicant that the cautioner did not have a right to lodge the caution herein. Indeed from the above provisions the Registrar has powers to register such caution upon application by the party desiring to lodge the same or may do so on his own motion. The Registrar may also reject a caution if they find the same to be unnecessary or whose purpose can be effected by the registration of an instrument under the Act. In my view the Registrar must have therefore found the caution herein was necessary except that the Applicant has deposed that they were not notified of the same as proprietor or absolute owner of the land herein. At this juncture it is not possible to state whether they had a genuine interest or not in the absence of materials or facts on what informed the Registrar to register the same. I therefore disagree with the Applicants averment that no prejudice will be suffered by the respondent/cautioner in the event that the caution is removed. A requirement for notice is also imposed in mandatory terms under Section 72(1) of the Act where the Registrar must give notice, in writing, of a caution to the proprietor thus the complaint by the Applicant that they were not notified.

6. Section 73 of the Land Registration Act makes provisions on removal of a caution and stipulates thus:

‘(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.

The power to remove the caution is therefore vested in the Cautioner, the Registrar as well as the court. The procedure to be adhered to for removal of the caution has been clearly set out in the foregoing provisions. The import of the above-mentioned sections is clear that the Applicant ought to have invoked the process provided for in section 73 by making an application to the registrar to have the caution removed. The spirit of these provisions is that the cautioner should be informed of intention to remove the caution and be given an opportunity to be heard in the form of an objection. The obligation to notify the cautioner is placed upon the Registrar. The applicant has deposed that she had written a letter dated 3/2/2015 to the Respondent requesting for the removal of the caution but to date the same had not been done. However, this letter has not been annexed. The Applicant has also attached a form – see ‘JKM-2’ requesting for the removal of the caution through her advocates herein.

7. While this court is vested with power to make an order for removal of a caution, my interpretation of Section 73 is that the cautioner has the first opportunity to remove the said caution. The general spirit for natural justice and right to be heard runs through the said provisions both in placing and removal of a caution. The process as provided under the law should be exhausted before this court can exercise its power to remove the same more so when the Registrar found it necessary to register the same. Should it be established after notification that the cautioner no longer has an interest in maintaining the caution, then the Registrar is well guided under the law.

8. The upshot of the foregoing is that the following orders hereby issue

1. The Notice of Motion application dated 2nd February 2022 is hereby stayed pending the outcome of the process under Section 73 of the Land Registration Act.
2. That the Applicant shall commence the process of removal of the caution afresh.
3. That the Respondent shall ensure compliance with the procedure for removal of the caution as stipulated under the law.
4. That this order shall be served upon the Respondent.
5. I make no orders as to costs.

DELIVERED AND DATED AT KWALE THIS 3RD DAY OF MARCH, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr Gichara Kimani.....for Applicant

No Appearancefor the Respondent

Mr. Denis Mwakina.....Court Assistant.