



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC MISC. APPLICATION NO. 8 OF 2019

IN THE MATTER OF TITLE NO. PROPERTY KNOWN AS PLOT NUMBER 664 – RESIDENTIAL /OLE KASASI TRADING CENTRE (CURRENT NUMBER B66)

IN THE MATTER OF: AN APPLICATION BY HUSSEIN ALI DIMA AND BALKHISA QAADIR, TO REGISTER A CAUTION AGAINST PROPERTY KNOWN AS PLOT NUMBER 664 – RESIDENTIAL/ OLE KASASI TRADING CENTRE (CURRENT NUMBER B66)

IN THE MATTER OF: THE LAND REGISTRATION ACT, NO. 3 OF 2012, SECTION 71(1) AND 71(2) LAWS OF KENYA

HUSSEIN ALI DIMA.....1ST APPLICANT

BALKHISA QAADIR.....2ND APPLICANT

VERSUS

THE LAND REGISTRATION (KAJIADO LANDS OFFICE).....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

SOFIA MOHAMMED SARAH.....3RD RESPONDENT

RULING

What is before Court for determination is the Applicants' Notice of Motion dated the 29th January, 2019 where they seek orders to compel the Land Registrar Kajiado to register a caution dated the 17th January, 2019 on plot number 664 – Residential/ Ole Kasasi Trading Centre (Current Number B66) hereinafter referred to as the 'suit land'. It is premised on the summarized grounds that the Applicants purchased the suit land from Francis S. Tameno on 20th December, 2004. Further, that the suit land was a subject to litigation in Civil Suit No. 361 of 2009 Kajiado Resident Magistrate's Court, which suit escalated into Civil Appeal No. 142 at Machakos High Court and now Chief Magistrate's Court Case no. 337 of 2014. The interests of the Applicants who are bona fide purchasers for value is at risk. On 17th January, 2019, the 2nd Applicant presented the Caution dated 17th January, 2019 to be registered but the 1st Respondent declined to do so. The 1st Respondent's refusal to register the caution without reasons or grounds is an affront to the Applicants' Constitutional right to property.

The Application is supported by the affidavit of the 2nd Respondent BALKHISA QAADIR where he reiterates their claim above.

The application is opposed by the 3rd Respondent SOFIA MOHAMED SARAH who filed a replying affidavit where she deposes that the Court lacks jurisdiction to entertain this application. She explains that the Applicants filed a case against her at Kajiado, which was transferred to Machakos and finally Naivasha. She claims in the said case, the parties and the subject matter is the same being OLE KASASI PLOT No. 664 RESIDENTIAL B 66. She insists this application ought to have been filed in the parent file. She contends that there is no indication that the Land Registrar has refused to caution the land.

The Applicants and the 3rd Respondent filed their submissions which I have considered.

Analysis and Determination

Upon consideration of the application dated the 29th January, 2019 including the parties affidavits and submissions, the only issue for determination is whether the 1st Respondent should be compelled to register a caution in respect of plot number 664 – Residential/ Ole

Kasasi Trading Centre (Current Number B66).

The Applicants submit that the Court has jurisdiction to deal with this matter. They further submit that they are entitled to the orders sought. They have relied on the case of **Three Ways Shipping (K) V KPA (2012) eKLR** to support their argument.

The 3rd Respondent has submitted that this type of application falls within the ambit of judicial review since it seeks mandatory orders. She has relied on the case of **Republic Vs Kenyatta University Ex parte Applicant & 7 Others (2018) eKLR** to buttress her argument. She further submits that the Applicants have failed to demonstrate that the 1st Respondent declined to register the caution.

.Section 71 (3) and (4) of the Land Registration Act provides that: **‘(3) 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.’**

I note the Applicants have not annexed a copy of the Application for caution purported to have been rejected by the 1st Respondent. Further, there is already an active case relating to the dispute over the suit land. Section 71(4) of the Land Registration Act gives the Land Registrar the power to accept and or reject a caution. Since the act of registering a caution is administrative, I opine that the Applicants should have sought for orders of judicial review if indeed the Land Registrar declined to register the same or filed an application for injunction within the now Chief Magistrate’s Court Case no. 337 of 2014.

Based on the evidence before me as well as my analysis above, I find the instant application premature and will disallow it.

Costs will be in the cause.

Dated, Signed and Delivered in Kajiado this 1st day of October, 2019

CHRISTINE OCHIENG

JUDGE