



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC MISC. APPLICATION NO. 9 OF 2017

PETER NG'ANG'A WAMAITHA.....APPLICANT

VERSUS

GEOFFREY MAINA WACHIRA.....1ST RESPONDENT

GRACE WAMBUI WAMAITHA.....2ND RESPONDENT

LAND REGISTRAR, KIAMBU.....3RD RESPONDENT

RULING

Before this Court is a Notice of Motion Application dated **20th February 2017**, seeking for an order that the 3rd Respondent removes a caution allegedly entered against land parcel No. **Kabete/Muthumu/T305**, on **21st October 2013**, at the behest of the 1st Respondent.

The application is premised on the grounds stated on the face of the application and the Supporting Affidavit by the Applicant dated **20th February 2017**. The applicant has attached two annexures namely a copy of the title deed issued on **21st October 2008**, in the name of the Applicant and a certificate of search dated **10th February 2017**, which confirms existence of a caution made on **21st March 2013**, by the 1st Respondent.

According to the Applicant, the land initially belonged to his late mother **Wamaitha Nganga**, being land parcel No. **Kabete/Muthumu/T10**, which upon dividing it, gave rise to two subdivisions among the two existing beneficiaries;- the Applicant and the 2nd Respondent. They each got parcel No. **Kabete/ Muthumu/T305** and **Kabete/Muthumu/T306**, respectively.

The Applicant avers that unknown to them, the original title deed was always in the custody of their uncle, though they assumed it was lost and/or misplaced, hence causing the 3rd Respondent to gazette it and after the expiry of the Gazette Notice, a new title deed issued so as to formalize the subdivision and eventual issuance of new title deeds in favour of the beneficiaries. While aware of the above, the Applicant avers that the 2nd Respondent got hold of the old title deed and allegedly sold the land to the 1st Respondent, who went ahead and registered a caution on **21st March 2013**, in relation to parcel No. **Kabete/Muthumu/T306**.

It is with this background that the Applicant now seeks for the orders sought. The Respondents were duly served with the application but none filed any responses particularly the 3rd Respondent who had sought for more time to respond to the application.

This Court gave directions for disposal of the application by way of written submissions. Unfortunately, only the Applicant filed his written submissions dated **24th January 2018**.

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."

The Applicant herein alleges the caution was placed without his knowledge and /or notification contrary to the above provision of law. There is however no indication whether the Applicant ever approached the 3rd Respondent to complain and or seek to have the alleged wrongful caution removed. Similarly, it is evident that the Applicant herein made an application in line with **section 73(2), (3), and (4)** of the Land Registration Act seeking to notify the 3rd Respondent to remove the said Caution. The applicant is objecting to the continued existence of the said caution.

Be that as it may, this court is called upon to find that the conduct of the 1st and 3rd Respondents is wrongful in line with **section 75** of the **Land Registration Act**. Other than the official search attached to the affidavit in support of the application, the Applicant has not brought before this Court any certified records indicating that indeed there was any involvement of the 2nd Respondent in causing the caution to be registered and/or substantiating the alleged sale of the initial land to the 1st Respondent by the 2nd Respondent. The above notwithstanding, the Court is satisfied that the Respondents were duly served with the application herein, but have not opposed the same. In the circumstances and in absence of any Replying Affidavits in opposition to the application, this Court finds and holds that the facts as presented by the applicant are true and the Court proceeds to make a finding that the Respondents have shown no justification as to why the **Caution** registered on **21st March 2013**, against land Parcel **No. Kabete/ Muthumu/T305**, should continue to exist.

The Court has also noted that the caution has been in existence for inordinately long time and if there was any purchaser's rights or interests by the 1st Respondent against either the applicant or his sister, the 2nd Respondent, would have raised up his claim if any with the Applicant.

As held in *Ahmed Ibrahim Suleimani & Anor vs Noor Khamis Surur (2013)eKLR*:-

"The essence of registering a caution or a caveat is to act as a stop gap measure to enable the cautioner or caveatee to initiate action to establish his or her interest."

A caveat or caution cannot thereof be for an indefinite period or for posterity.

As stated above, the Respondents have not responded to the application and made a justification for the continued existence of the said caution. This Court is persuaded by the finding in *Maria Nganga Awako vs Charles Mweuzi Nganga (2014)Eklr*, where the Court held thus:-

"Where a caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said caution and the for it to remain in place..... in the absence of any reasonable cause shown The application for the removal of the same must succeed."

The actions of the Respondents led to the Applicant to file this suit. In view of the foregoing, this Court finds the application dated **20th February 2017**, is merited and the same is allowed entirely in terms of prayer **No. 2** with costs to the Applicant.

Dated, signed and Delivered at Thika this 29th day of July 2021.

L. GACHERU

JUDGE

29/7/2021

Court Assistant – Dominic

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Kimani holding brief for Mr. Gathii for the Applicant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

L. GACHERU

JUDGE

29/7/2021