



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. OS/E019 OF 2020

SATNAM SING CHANA.....PLAINTIFF

GURMUK SING CHANA

(Suing as the legal representatives of the Estate of Piara Sighn, Now Deceased)

-VERSUS-

JUTENDRA TRIKAMDAS SWALY.....1ST DEFENDANT

ANIL TRIKAMDAS SWALY.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. Vide Originating Summons dated 21st October 2020, the Plaintiffs herein have sought for the following Reliefs;
 - i. *Declaration that the caveats registered in respect of the Property known as L.R No. 37/244/16, I.R Number 13375/16 is irregular and unlawful.*
 - ii. *The Chief Land Registrar is hereby ordered to remove the caveat registered in respect of L.R No. 37/244/16, I.R Number 13375/16 denoted in paragraph [I] above.*
 - iii. *The Defendants are hereby restrained from interfering with the Property known as L.R No. 37/244/16, I.R Number 13375/16.*
 - iv. *The Honourable court do grant Damages to the Applicants in respect to the unlawful and illegal caveat registered in respect of the property known as L.R No. 37/244/16, I.R Number 13375/16 by the Defendants.*
 - v. *The Defendants do bear the costs of this Application.*
2. The subject Originating Summons Application is based and/or anchored on the grounds contained at the foot thereof and same is supported by the affidavit by the Plaintiffs herein on the 16th October 2020, and to which the Plaintiffs have attached and/or annexed various documents.
3. Following the filing and service of the Originating Summons, the Defendants herein duly entered appearance on the 19th November 2020, through the law firm of M/s Philip Muoka & Company Advocates. However, despite entering appearance, the Defendants failed and/or neglected to file a response to the Originating Summons.
4. Owing to the failure and/or neglect by the Defendants to file a Response to the Originating Summons, it is sufficient to note that the Originating Summons has thus not been opposed and the contents of the supporting affidavit thereto, thus remain uncontroverted.

DEPOSITIONS BY THE PARTIES:

THE PLAINTIFFS' CASE

5. The Plaintiffs herein has sworn a Joint Supporting Affidavit and in respect of which same have averred as hereunder:
6. The Suit Property namely, *L.R No. 37/244/16, I.R Number 13375/16*, belongs to and was registered in the name of Piara Sighn, now Deceased.
7. Besides, the Plaintiffs herein have further averred that during the life time of Piara Sighn now deceased, same entered into a Lease Agreement with the Defendants herein, who thus became tenants of the Deceased in the suit property.
8. It is further averred that despite the Defendants herein being tenants of the Deceased, the Defendants proceeded to and caused a caveat to be lodged and/or registered against the suit property, *albeit* without any reasonable cause and/or reasonable basis.
9. Be that as it may, the Plaintiffs have further averred that following the death of the Deceased, same sought for and obtained Grant of Letters of Administration, over and in respect of the Estate of the Deceased and thus the Plaintiffs are the duly constituted Administrators of estate of the Deceased.
10. It was further averred that upon being duly constituted as the Legal Administrators of the estate of the Deceased, the Plaintiffs herein engaged and/or otherwise retained an advocate to correspond with the Defendants, with a view to vacating and/or removing the unlawful caveat that was lodged against the title of the suit property.
11. The Plaintiffs have further averred that following the various correspondence that were exchanged between their advocates and the Defendants herein, the Defendants finally agreed and/or conceded to withdraw the illegal caveats and in this regard, the Defendants instructed their advocate on record, who thereafter wrote to the Plaintiffs' advocates on the 29th October 2018, forwarding a Notice of Withdrawal of caveat, duly executed by the Defendants.
12. Nevertheless, the Plaintiffs have averred that the Notice of Withdrawal of caveat which was sent and/or forwarded under cover of the letter dated the 29th October 2018, was not in the prescribed form and neither was same executed in accordance with the law and in this regard, same was thereafter declined by the office of the Chief Registrar.
13. It is further averred that subsequently, the plaintiffs advocate procured and obtained the requisite Notice of withdrawal of caveat and thereafter forwarded same to the Defendants through their advocate on record, for purposes of execution. For clarity, the Plaintiffs have further averred that the Notice of withdrawal of caveat was duly executed by both the Defendants and thereafter returned to the Plaintiffs advocate.
14. Similarly, the Plaintiffs have further averred that upon the receipt of the duly executed Notice of withdrawal of caveat, their advocate proceeded to and lodged same with the office of the Chief Registrar, for purposes of registration and further action.
15. However, the Plaintiffs have further averred that despite the lodgment of the Notice of withdrawal of the caveat, the office of the Chief Land Registrar has failed to act on the lodged instruments and instead the Chief Land Registrar has since insisted that the Defendants herein must physically present themselves at the offices of the Chief Land Registrar, prior to and before the caveats can be vacated and/or discharged.
16. Pursuant to the position taken by the Chief Land Registrar, the Plaintiffs have averred that same were constrained to look for the Defendants who were previously tenants in to the suit property, but who have since moved out of the suit property. In this regard, the Plaintiffs have averred that they have not been able to procure the attendance of the Defendants at the offices of the Chief Registrar.
17. In th premises, the Plaintiffs have thus averred that the caveats which were lodged by the Defendants, have thus remained undischarged to date. Consequently, the Title to and in respect of the suit Property, remains encumbered, todate.
18. Owing to the foregoing, the Plaintiffs have therefore approached this honourable court to procure and/or obtain an order to compel the Chief Land Legistrar to register the Notice of withdrawal dated the 20th November 2018 and or otherwise, discharge the offensive caveat without further and or undue delay.

Defendants case

19. It was pointed out that the Defendants herein, duly entered appearance , but however failed and/or neglected to file a Response to the Originating Summons.
20. Owing to the failure by the Defendants to file a Replying Affidavit or Response, to the Originating Summons, the Originating Summons herein has thus remained unopposed and/ or better still, uncontroverted.

Submissions

21. The Subject matter came up for hearing on the 19th October 2021, on which day the honourable court issued directions, pertaining to and/or concerning the manner of disposal of the Originating Summons.
22. It is worthy to note that the Honourable court directed that the Originating Summons be canvassed and/or disposed of by way of written submissions, to be filed and exchanged by the parties within set timelines.

23. Pursuant to and in line with the directions of the court issued on the 19th October 2021, the Plaintiffs herein proceeded to and filed written submissions in support of the Originating Summons.

24. Nevertheless, the Defendants herein, who had only entered Appearance, but, had not filed any Response to the Originating Summons, however failed to file their submissions.

Issues for determination

25. Upon evaluating and/or appraising the Originating Summons and the Affidavit in Support thereof, as well as the written submissions filed by and/or on behalf of the Plaintiffs and in the absence of any opposition by the Defendants, I find that the following issues are germane for Determination;

I. *Whether the Plaintiffs have laid a basis for the grant of the orders of lifting and or discharge of the caveat.*

II. *Whether the Plaintiffs are entitled to damages on the basis of the unlawful caveat or better still, whether Damages can be awarded on an Originating Summons:*

Analysis and determination

Issue number 1

26. The Plaintiffs herein have tendered and/or availed to the honourable court evidence to the effect that the suit property belonged to and/or was registered in the name of one Piara Sighn, now Deceased.

27. On the other hand, the Plaintiffs have further adduced evidence that following the Death of the Deceased, same were duly appointed as the Legal Representatives of the estate of the Deceased. In this regard, the Plaintiffs are therefore authorized and/or mandated to commence and/or originate the subject proceedings, for and/or on behalf of the estate of the Deceased.

28. Similarly, the Plaintiffs have also tendered evidence that the lodgment and registration of the caveat by and/or at the instance of the Defendants, was irregular and/or unlawful, insofar as the Defendants herein did not have any lawful claim and/or rights over the suit property, worthy of being protected vide a caveat.

29. On the other hand, the Plaintiffs have further availed to the honourable court evidence pertaining to the engagement between themselves and the Defendants, culminating into the execution of a Notice of Withdrawal of the caveat. For clarity, the Notice of withdrawal of caveat, was meant to vacate and/or discharged the offensive caveat, which had been lodged by the Defendants.

30. In view of the totality of the evidence, which has been reproduced hereinbefore, it is apparent that the lodgment and registration of the caveat was made without any lawful basis and in the absence of any legal claim by the Defendants.

31. At any rate, it appears that the caveat under reference, was merely meant and/or calculated to prejudice the rights and/or interest of both the Deceased, as well as the Plaintiffs herein, so as to defeat their mandate and/ or Legal Rights over the suit property.

32. Suffice it to say, that by virtue of being the Legal Representative of the Estate of the Deceased, the Plaintiffs herein are vested with absolute and exclusive rights to occupy, possess and use of the suit property without any limitations and restrictions, by any third-party subject only to the overriding interests. **See Section 28 of the Land Registration Act,2012.**

33. In the premises, I find and hold that the caveat that was lodged and/or registered by the Defendants herein, against the Title of the suit property, was meant to fetter and/or otherwise interfere with the Plaintiffs rights and/or entitlement to the suit property. Consequently, the registration of the caveat was illegal and thus unlawful.

34. In the premises, the Chief Land Registrar, be and is hereby ordered to discharge, rescind and/or vacate same forthwith.

Issue number 2

35. Other than the prayer for the Discharge and/or vacation of the caveat, lodged by and/or at the instance of the Defendants, the Plaintiffs have also sought for payment of Damages founded on the lodgment of the unlawful caveat.

36. Despite praying for Damages, it is worthy to note that the Originating Summons herein was heard on the basis of Affidavit evidence and therefore the only evidence on record is the affidavit sworn by the Plaintiffs, which has not alluded to any injury and/or any loss suffered, to warrant an award of Damages.

37. Suffice it to say, that save for instances like trespass to land, which are actionable per se and thus attract an award of Damages, even without proof of loss, in all other situations, it is incumbent upon the Plaintiff to put before the court evidence pertaining to the injury and the loss suffered, before an award of Damages can arise.

38. However, in the instant case, the Plaintiffs have merely thrown the Originating Summons unto to face of the court and sought to be awarded Damages. The Plaintiffs have not cared to delineate what loss and/or injury has been suffered and neither have same pleaded the

nature of Damages sought. For clarity, it is not clear whether the claim was General or Special Damages.

39. I am afraid that no Damages can be awarded in the manner sought by and/or at the instance of the Plaintiffs. Clearly, some foundation ought to have been laid to enable the court to appreciate the basis upon which the Damages are being claimed. Without such basis, the prayer for Damages herein has been mounted in *vacuum*.

40. Nevertheless, even assuming, that a foundation for award of Damages had been laid by the Plaintiffs, (*which is not the case*) I would still not be disposed to pronounce myself on the issues of Damages and or to award same, given that the subject suit has been commenced by way of Originating Summons, which does not envisage an award of Damages.

41. In support of the foregoing observation, I beg to restate the finding and holding of the court in the case of **Kenya Commercial Bank v Osebe (1982) eKLR**, where the honourable court observed as hereunder;

“Nevertheless, believing as I do that there was no power to award damages on this originating summons, I would allow the Bank’s appeal on that ground, with the result that the other questions raised, such as the measure of damages, do not now fall to be decided. I would allow this appeal, to the extent of setting aside the award of Kshs 180,000 damages and leave the respondent to pursue his remedy in this respect by suit, if so advised.”

42. Based on the foregoing Decision, it is my considered view that if the Plaintiffs were keen to pursue the issues of Damages, whatever such Damages entail, then such a course ought to have been pursued in the ordinary manner of pleadings and particularly, by way of Plaintiff.

43. In a nutshell, no Damages are awarded to the Plaintiffs.

Final disposition

44. Having reviewed the issues for determination, I come to the conclusion that the Originating Summons herein is merited and same is allowed in the manner following;

i. Declaration be and is hereby issued that the caveats registered in respect of the property known as L.R No. 37/244/16, I.R Number 13375/16 is Irregular and Unlawful.

ii. The Chief Land Registrar be and is hereby ordered to remove the caveat registered in respect of L.R No. 37/244/16, I.R Number 13375/16.

iii. The Defendants be and are hereby restrained from interfering with the property known as L.R No. 37/244/16, I.R Number 13375/16, in any manner, whatsoever.

iv. The claim for Damages be and is hereby Dismissed.

v. Costs of the suit to be borne by the Defendants.

45. It is so ordered.

46. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIRONMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant

Ms Shabana Osman for the Plaintiffs.