



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC MISCE APPLI. NO.E015 OF 2021

AND

IN THE MATTER OF

TITLE NUMBER ELDORET MUNICIPALITY/BLOCK.5/71

AND

IN THE MATTER OF

ELDORET HIGH COURT DIVORCE CAUSE NO.8 OF 2019

AND

IN THE MATTER OF

KISUMU COURT OF APPEAL CIVIL APPLICATION NO.195 OF 2020

AND

IN THE MATTER OF

THE LAND REGISTRATION ACT NO.3 OF 2021

BETWEEN

CMM.....APPLICANT

VERSUS

LAND REGISTRAR, UASIN-GISHU COUNTY.....1ST RESPONDENT

MN.....2ND RESPONDENT

RULING

1. This is a ruling in respect of a Notice of Motion dated 26TH April, 2021 in which the applicant seeks removal of a caution lodged on **LR.No.ELDORET MUNICIPALITY/BLOCK xxx** (suit property). The suit property is registered in the name of the Applicant.
2. The Applicant and the 2nd Respondent were married but their marriage became a subject of divorce proceedings in Eldoret High Court Divorce Cause No.8 of 2019. The cautioner who is the 2nd Respondent brought proceedings in the divorce cause in which she sought for a declaration that the suit property was matrimonial property.
3. In a ruling delivered on 30th April, 2020, the court found that the suit property was not a matrimonial property. The 2nd Respondent then applied for stay of execution pending the filing of an Appeal against the said ruling. The court granted stay of execution pending the hearing and determination of the intended Appeal.

4. The 2nd Respondent filed an Appeal against the ruling of 30th April, 2020 before the court of Appeal in Kisumu. The Applicant in this matter filed a Notice of Motion dated 22nd December, 2020 in which he sought that the Appeal by the 2nd Respondent be struck out for having been filed out of time without leave. In a ruling delivered by the Court of Appeal on 19th March, 2021, the Applicant's Notice of Motion dated 22nd December, 2020 was allowed effectively terminating the appeal. It is on this basis that the Applicant has moved to court seeking an order directed at the Land Registrar to remove the caution which was lodged by the 2nd Applicant on the suit property on 10th August, 2019.
5. The Applicant contends that a charge over the suit property in favour of Equity Bank has since been discharged and that despite the Land Registrar being served with the discharge of charge as well as the rulings from court, the Land Registrar has declined to remove the caution arguing that he can only do so upon being served with a court order.
6. The Applicant therefore argues that in view of the court's ruling that the suit property is not matrimonial property and given the striking out of the Appeal, there is no reason for sustaining the caution over the suit property.
7. The 2nd Respondent opposed the Applicant's application based on a replying affidavit sworn on 18th July, 2021. The Applicant's application is frivolous and an abuse of the process of the court in that there is no substantive suit filed to sustain the same. The 2nd Respondent argues that the suit property is matrimonial home where their house stands and that the Applicant is the registered owner in trust for her and that in any case there is a pending Appeal against the ruling of the High court which held that the suit property was not matrimonial property.
8. The 2nd Respondent further argues that she contributed towards repayment of the loan to Equity Bank and that if the caution is removed, the Applicant will proceed to dispose of the suit property yet there are orders of maintenance of status quo pending the outcome of the Appeal before the Court of Appeal.
9. In a supplementary affidavit sworn on 10th August, 2021, the Applicant contends that Section 73(1) and (2) of the Land Registration Act, 2012 does not remove the power of this court from ordering removal of a caution and that stay orders which had been granted by the High Court have been overtaken by events due to the striking out of the Appeal filed by the 2nd Respondent in the Court of Appeal at Kisumu.
10. The parties herein were directed to file written submissions. The Applicant filed his submissions on 24th September, 2021. The 2nd Respondent filed her submissions on 6th August, 2021, whereas the 1st respondent filed his submissions on 12th October, 2021. I have considered the Applicant's application as well as the opposition to the same by the 2nd Respondent. I have also considered the submissions by the parties. The only issue for determination is whether the Applicant has made out a case for grant of an order removing the caution lodged by the 2nd Respondent on 10th August, 2019.
11. Under Section 73(1) and (2) of the Land Registration Act of 2012, there are three ways in which a caution may be removed. The first one is by the cautioner withdrawing the same. The second is through an order of the court. The third is through the Registrar upon application by any person interested in the removal.
12. In the instant case, the Applicant has opted to move the court for an order of removal. The Applicant has moved the court by way of Miscellaneous Application. It is important to note that in the instant case, all the facts leading to the lodging of the caution and the need of removal have been captured in the affidavits filed. Section 73(1) and (2) of the Land Registration Act of 2012 does not prescribe the mode in which the court order should be obtained.
13. In the instant case, there was absolutely no point for the Applicant to move the court by way of suit which will have called for evidence. As I have said hereinabove, the facts leading to the lodging of the caution and the move to remove the same have been captured through affidavits. There was no need for the Applicant to file a substantive suit when the interest of justice can be met by way of Notice of Motion in a Miscellaneous Application. In this regards, I agree with the decision of Lady Justice Omollo in the case of *Abel Walekhwa Namiya vs= Imma Machasio[2013]eKLR* where the judge ordered removal of a caution based on a Miscellaneous Application.
14. The cases relied on by the 2nd Respondent as well as the 1st Respondent in my view have glorified technicalities at the expense of substantive justice. What the judges in those decisions are saying is akin to the long held view that an Applicant in a suit for adverse possession had to come to court by way of originating summons. With time this view was discarded and nowadays a claim for adverse possession can even be raised through a counter claim.
15. In the circumstances of this case, I find that the Applicant's application is well merited. I allow the Notice of Motion dated 26th April, 2021 in terms of prayers (1) and (2). I make no orders as to costs because the parties herein are involved in divorce proceedings and it will not be appropriate to order costs.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET on this 11th NOVEMBER, 2021

E.O. OBAGA

JUDGE

In the virtual presence of;

Mr. Kuria for 1st Respondent

Court Assistant – Mercy

E.O. OBAGA

JUDGE