



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC. MISC. APPLICATION NO. 67 OF 2019**

**SABINA SOMOINE PARTEYIE.....APPLICANT**

**VERSUS**

**COUNTY LANDS REGISTRAR KAJIADO.....1<sup>ST</sup> RESPONDENT**

**GRACE NEKALA KOIYIET.....2<sup>ND</sup> RESPONDENT**

**RULING**

By a Notice of Motion application dated the 18<sup>th</sup> July, 2019, the Applicant seeks for the following orders:

**1. Spent.**

**2. Spent.**

**3. This Honourable Court be pleased to direct the County Land Registrar, Kajiado to withdraw the caution lodged by the 2<sup>nd</sup> Respondent over Title No. KJD/KAPUTIEI-NORTH/46847.**

**4. Costs be provided for.**

The Application is premised on the grounds that the Applicant is the registered proprietor of Title No. KJD/KAPUTIEI-NORTH/46847 and the 2<sup>nd</sup> Respondent has lodged a caution over the said property claiming 'beneficial interest'. The Applicant insists the caution lodged by the 2<sup>nd</sup> Respondent is irregular, illegal and not founded on any legal basis as the 1<sup>st</sup> Respondent did not notify her of the same. Further, the Applicant wishes to sub-divide her property and distribute it among her family during her lifetime in order to avoid squabbles in future and it is only fair as well as just for this Court to direct the 1<sup>st</sup> Respondent to withdraw the said caution on her property. The application is further supported by the affidavit of SABINA SOMOINE PARTEYIE.

The 2<sup>nd</sup> Respondent GRACE MEKALA KOIYIET opposed the application and filed a replying affidavit where she avers that she is the wife to the late ERICK KOIYIET PARTEYIE who passed away on 9<sup>th</sup> June, 2018. She confirms placing a caution on land parcel number KAJIADO/KAPUTIEI NORTH/46847 to protect her late husband's interest. She deposes that the Applicant is her mother in law, who filed Succession Cause vide Nairobi High Court Succession Cause 1134 of 1994 in respect to her late father in law's estate. Further, in the said succession proceedings, KAJIADO/KAPUTIEI NORTH/1794 which belonged to her deceased father in law, was to be registered in the Applicant's name to hold in equal shares in trust for her children. She claims after the Grant was confirmed, the Applicant proceeded to subdivide the aforementioned land into equal shares for her children. Further, that KAJIADO/KAPUTIEI NORTH/ 46847 belongs to her late husband and the original title was given to him by the Applicant for purposes of transfer but her husband died before doing so. She states that her home is on the said parcel of land where her husband including two children are buried. Further, all the children of the deceased indicated in the succession cause were each given their individual titles by the Applicant. She insists the Applicant's claim that she intends to subdivide KAJIADO/KAPUTIEI NORTH/46847 is false since she already subdivided the mother title KAJIADO/KAPUTIEI NORTH/ 1794. She reiterates that the distribution alleged was done along time ago as per the confirmed Grant of the estate of JEREMIAH PARTEYIE SHUKU. Further, what remains to be done is for the Applicant to sign the transfer forms to her so as to obtain a title in her name since the said land belonged to her late husband.

The Applicant filed a supplementary affidavit where she reiterated her claim and contended that the 2<sup>nd</sup> Respondent is not a beneficiary to the estate of JEREMIAH PARTEYIE SHUKU and lacks the legal capacity to implead on behalf of the estate of her late son ERIC KOIYET PARTEYIE without taking out Letters of Administration in respect to the said estate. She insists she is the registered proprietor of KAJIADO/KAPUTIEI NORTH/ 46847. She denies that the Respondent and her children have ever resided on the said land.

The application was canvassed by way of written submissions.

## Analysis and Determination

Upon consideration of the Applicant's Notice of Motion dated the 18<sup>th</sup> July, 2019 including the respective affidavits and rivaling submissions, the only issue for determination is whether the caution registered against land parcel number KAJIADO/KAPUTIEI NORTH/46847 should be removed.

The Applicant has sought for removal of the caution vide this miscellaneous cause and only furnished court with an extract from the Green Card and a Letter from her advocate addressed to the 2<sup>nd</sup> Respondent. In her submissions, she has reiterated her claim and insists she is entitled to the orders as sought. She contends that the caution lodged by the 2<sup>nd</sup> Respondent over Title Number KJD/KAPUTIEI-NORTH/46847 is irregular and illegal. Further, that this court is not clothed with the jurisdiction to deal with the issues raised by the 2<sup>nd</sup> Respondent. To buttress her averments, she relied on Section 72(1) and 73(1) of the Land Registration Act 2012 as well as the following persuasive decisions: **Beatrice Wambui Maina vs. The Attorney General & Anor. ELC. Case No. 486 of 2017 where the court favourably cited the case of Daniel Njagi Muramiti vs. Peter Ndwiga & Anor; Mamut Hardware vs. The Chief Land Registrar & Anor. ELC. Misc. Civil Application No. 569B of 2016 and Magdalene Wambui vs. Charles King Kigwe & Anor. ELC. No. 45 of 2019.**

The 2<sup>nd</sup> Respondent in her submissions insists the caution is regular/legal to protect her interest. She submits that the Applicant should give her, her late husband's share so that there can be peace and harmony among the family. She urges the court to decline the request for withdrawal of the caution until this land matter is resolved between the parties and for the Applicant to sign the transfer forms to enable her obtain title to suit land.

I will proceed to make reference to certain legal provisions governing registration and removal of 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.'**

While Section 73 of the Land Registration Act 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.**

**(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.'**

In the case of **Joseph Kibowen Chemjor vs William C. Kiseru [2013] eKLR**, Justice Munyao Sila observed as follows; *'I am alive to the provisions of Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be "pleadings", goes beyond a mere technicality. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of "suit by a letter" which Mr. Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party. If I am to allow the current "pleadings" to stand, I do not see how this matter will be determined without prejudice being caused to the defendant. Even if no prejudice will be caused to the defendant I would rather strike out this application at this stage, which will only invite minimal cost, rather than to allow the proceedings to stand, and thereafter be at a loss on how to thereafter proceed with the matter. The former action will benefit all parties and is certainly the lesser of the two evils.'*

In this instance, I note the Applicant has sought for removal of the caution claiming the suit land belongs to her. I note certain issues have arisen in respect to the dispute herein. Further, from the annexures in the respective affidavits, I note the suit land actually emanated from KAJIADO/KAPUTIEI NORTH/5273 which was a resultant subdivision of KAJIADO/KAPUTIEI NORTH/1794 that belonged to the estate of the late JEREMIAH PARTEYIE SHUKU who was the father to ERIC KOIYET PARTEYIE, the 2<sup>nd</sup> Respondent's late husband. It is also evident in the aforementioned succession proceedings that ERIC KOIYET PARTEYIE was listed as a beneficiary of the estate of the late JEREMIAH PARTEYIE SHUKU. In the circumstance, while associating myself with the decision cited above, I find that the fulcrum of the dispute that led to the registration of the caution is a substantive issue and it would be pertinent if this matter was set down for hearing. I find that this miscellaneous cause as it stands is incompetent and will proceed to strike it out and direct the Applicant to file a substantive suit.

Since the Applicant and 2<sup>nd</sup> Respondent are family members, each party do bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**