



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

MISC. ELC CASE NO. 30 OF 2018

PETER GICHARU NGIGE.....APPLICANT

VERSUS

TEDDY MULEHI MONYO

VIRGINIA WANJIRU MBUGU

WYCLIFFE SIRONGO OMIDO.....RESPONDENTS

RULING

Counsel for the 1st and 3rd respondent raise as a preliminary objection on point of that:-

- (a) That there is no suit properly before court for determination
- (b) That the suit has been commenced through unprocedural means and is thus fatally defective.

The background is that the respondents filed suit vide Kakamega HCC No. 58 of 2004 claiming purchaser's interest which suit was dismissed for want of prosecution on the 30th April 2018. He prays for the caution to be removed on the basis of such dismissal.

This court has considered the preliminary objection and the submissions therein. Section 73 of the Land Registration Act makes provision for the removal or withdrawal of a caution. This section provides as follows;

73. (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.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.*

It is clear that one of the ways a caution can be removed is by the court. This is seeking to enforce a right. Under Section 19 of the Civil Procedure Act, *every suit shall be instituted in such manner as may be prescribed by rules*. Order 3 Rule 1 prescribes the way in which suits should be instituted. It specifically provides that *“every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”* Suits in some instances can also be commenced through originating summons.

In the case of **Joseph Kibowen Chemjor vs William C. Kasera (2013) eKLR** Munyao J. held that;

It is therefore my considered view that an action for the removal of a caution needs to be commenced by way of Plaint in which suit the plaintiff needs to prove on a balance of probabilities why the defendant has no right to place the caution on his title and why the caution placed by the defendant needs to be removed

I concur with the authority above and respondents submissions that a party cannot seek to enforce a right through a miscellaneous application like this one. The facts are not before this court and there is no suit before me. I find this application has no merit and I dismiss the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE