



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**ELC MISC. CASE NO.07 OF 2018(OS)**

**IN THE MATTER FOR REMOVAL OF CAUTION LAND TITLE NO. MAKUENI/KIKUMINI/754**

**BETWEEN**

**WAMBUA KINGOO MUTYANYAA .....APPLICANT**

**VERSUS**

**PHILIP MUSYIMI KITUKU ..... 1<sup>ST</sup> RESPONDENT**

**BEATRICE NZILANI KINGOO ..... 2<sup>ND</sup> RESPONDENT**

**MUNINI KINGOO.....3<sup>RD</sup> RESPONDENT**

**REGISTRAR OF LANDS MAKUENI REGISTRY .... 4<sup>TH</sup> INTERESTED/RESPONDENT**

**RULING**

1. By his Originating Summons expressed to be brought under Order 37 of the Civil Procedure Rules, the Land Registration Act, 2012, The Environment and Land Act, the Constitution of Kenya and all enabling provisions of the law, the Applicant prays for the following orders against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondents and the Interested Party/Respondent: -

**1) THAT the caution lodged on the land title NO. MAKUENI/KIKUMINI/754 by the respondents on 30/6/16 have no legal basis is hereby removed and withdrawn by the order of this honorable court.**

**2) THAT the Respondents have no beneficial interest and or whatsoever interest in the land title NO. MAKUENI/KIKUMINI/754 owned by the Applicant who have title as their interest if any was finally determined in Machakos ELC Case No.121 of 2004 and Makueni ELC Case No.4 of 2017 between the parties.**

**3) THAT the court be at liberty to issue any other such orders and directions as deemed fit and just.**

**4) THAT cost of the summons be borne by the Respondents.**

2. The summons is predicated on five (5) grounds on its face and is supported by the affidavit of Wambua Kingoo Mutyanyaa, the Applicant herein, sworn at Nairobi on 20<sup>th</sup> June, 2018.

3. The Originating summons is dated 20<sup>th</sup> June, 2018 and was filed in court on 21<sup>st</sup> June, 2018.

4. The summons is opposed by the Respondent vide the replying affidavit of Philip Musyimi Kituku, the 1<sup>st</sup> Respondent herein sworn at Machakos on 16<sup>th</sup> July, 2018 and filed in court on 16<sup>th</sup> July, 2018.

5. In paragraphs 4, 5, 6, 7 and 8 of his affidavit, the 1<sup>st</sup> Respondent has deposed that the summons are misconceived, full of misrepresentation and non-disclosure of material facts, that they were awarded the suitland by the tribunal, that there is an application pending for transfer of land in their favour, that the suitland is an ancestral land and they were born and raised on it and that reliance on HCCC 121 of 2004 that was dismissed for want of prosecution is misplaced and mischievous.

6. Further the Respondents filed Notice of Preliminary objection dated 30<sup>th</sup> October, 2018. They contend that: -

**1) The suit herein has abated by dint of Order 24 Rule 3(2).**

**2) That a bated suit is a non-existent prior to it being revived.**

7. The Applicant passed on the 19<sup>th</sup> July, 2018 and consequently, by a Notice of Motion application dated 20<sup>th</sup> August, 2019 and filed in court on even date, the deceased Wambua King'oo Mutwanyaa was substituted on the 26<sup>th</sup> September, 2019 with Regina Syombua Mutsya.

8. The summons was disposed off by way of written submissions. By the time of writing this ruling, it is only the Applicant's Counsel who had filed her submissions.

9. Her submissions were that the Respondents' suits that had been filed laying claim to the suit property were dismissed and determined in Makueni ELC Case No.4 of 2017 and Machakos ELC Case No.121 of 2004 hence no claim or property interest lies capable of being protected by restriction and/or caution. The Counsel termed the issues raised in the Replying Affidavit as moot and cannot be the basis to resist the present application for lifting of the caveat.

10. The Counsel urged the Court to allow the application as prayed. She referred the Court to **section 73 of the Land Registration Act** which provides for the withdrawal of caution. At **section 73(1)** of the Act, it is provided as follows: -

“A caution may be removed by the cautioner or removed by an order of the court or, subject to subsection (2), by order of the Registrar.”

11. The Counsel was of the view that the Respondents had not demonstrated any reasonable cause, proprietary interest or prejudice that they will suffer if the caution is removed. The Counsel pointed out the caution denies the Applicant his constitutional right to enjoyment of property. The Counsel went on to submit that in any event, any proprietary interest that may accrue to the Respondent can be ventilated before a court of law and not by lodging a caution.

12. In his supporting affidavit, the Applicant has annexed in paragraph 2 of his affidavit, title deed number Makueni/Kikumini/754 and marked A. The proprietor of the aforementioned land is Wambua King'oo Mutwanyaa, the deceased applicant. In paragraph 4, the Applicant has annexed a copy of certificate of official search which confirms that proprietor of the aforementioned land parcel Makueni/Kikumini/754 in the proprietorship section of the certificate is Wambua King'oo Mutwanyaa. It goes on to show that on 30<sup>th</sup> September, 2016, one Philip Musyimi c/o Beatrice King'oo who was claiming beneficiary interest lodged a caution over the said land. As was correctly submitted by the Applicant's Counsel, the procedure for the removal of the caution is as provided in Section 73 of the Land Registration Act.

13. The Respondent's suit together with the Applicant's counterclaim in Makueni ELC No.4 of 2017 were both dismissed on 17<sup>th</sup> July, 2017 for want of prosecution. The same fate befell the 1<sup>st</sup> to 3<sup>rd</sup> Respondent's suit in Machakos ELC case number 121/2014 as can be seen from the annexure C in paragraphs 5 of the Applicant's supporting affidavit. I would therefore agree with the Applicant's Counsel that the issues raised by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents in their replying affidavit are moot and cannot be the basis for opposing the prayers sought by the Applicant.

14. It is not lost on me that even though the Respondents filed the Notice of Preliminary Objection on 31<sup>st</sup> October, 2019, they did not endeavor to prosecute it.

15. The 4<sup>th</sup> Respondent who is the Land Registrar Makueni was served with this application and neither entered appearance nor did he file his response. I therefore see no reason why this Court cannot order for the removal of the caution lodged by Philip Musyimi on 30<sup>th</sup> September, 2016. In the circumstances, therefore, I see no reason why the orders sought by the Applicant and more prayer 1 and 4 of the application cannot be granted. As for prayer 2, it is clear that the issue of beneficial interest claimed by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents was not determined on merit in Machakos ELC Case No.121 of 2004 and Makueni ELC Case No.4 of 2017 as both suits were dismissed for want of prosecution.

16. The upshot of the foregoing is that the application has merits and I hereby proceed to allow it in terms of prayers 1 and 4.

Signed, dated and delivered at **Makueni** via email this **29th** day of **April, 2020**.

**MBOGO C. G.,**

**JUDGE.**

**Court Assistant - Mr. Kwemboi**