



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

MISC JR APPLICATION NO. 109 OF 2019

IN THE MATTER OF JUDICIAL REVIEW UNDER ORDER 53 (1) (2) (3) & (4) OF THE CIVIL PROCEDURE REVISED (2010) RULES, SECTION 13 OF THE ENVIRONMENT AND LAND ACT, SECTION 73 OF THE LAND REGISTRATION ACT, 2012 ON THE REMOVAL AND/ OR LIFTING OF CAUTION REGISTERED IN THE LAND REGISTRY OFFICES & ALL OF THE LAWS OF KENYA FOR LEAVE TO APPLY FOR ORDER OF MANDAMUS & PROHIBITION

AND

IN THE MATTER OF LEAVE COMPELLING THE 1ST AND 2ND RESPONDENTS TO REMOVE AND LIFT THE CAUTION REGISTERED AGAINST ALL THAT PARCEL OF LAND KNOWN AS LAND REFERENCE NO. KAJIADO/ MAILUA/ 4670 AGAINST ITS OWN DECISION ON 17TH JULY, 2019

AND

IN THE MATTER OF AN APPLICATION BY THE APPLICANT

JACKSON N. MARASUA.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR, KAJIADO.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

By a Notice of Motion dated the 9th December, 2019 brought pursuant to sections 8 and 9 of the Law Reform Act, Sections 1, 1A, 3, 3A of the Civil Procedure Act, Order 40 Rules 2(1), 3 (3), 4(1), 53(1) (2) & (3) of the Civil Procedure Rules, Section 150 of the Land Act, Section 73(1) of the Land Registration Act and Section 13(1) of the Environment and Land Court Act, the Applicant seeks for the following:

1. An order of Prohibition against the office of the 1st Respondent herein by themselves, their agents and personal assigns from dealing with any matter pertaining to all that parcel of land known as Land Reference No. KAJIADO/ MAILUA/ 4670 as to placing a caution without any legal, proper and/or justified cause.
2. An order of Mandamus compelling the 1st and 2nd Respondents by themselves, their agents and/or representatives to forthwith remove and/ or lift the caution registered against all that parcel of land known as Land Reference No. KAJIADO/ MAILUA/ 4670 this being their statutory obligation as mandated by law.
3. Costs of this application be provided for.

The application is premised on the Statutory Statement and verifying affidavit sworn by JACKSON MARASUA. In the Statutory Statement the Applicant contends that the 1st and 2nd Respondents have failed to adhere with the provisions of the Constitution and sections 73 (1), (2), (3) and (4) of the Land Registration Act. Further, the 1st and 2nd Respondents have failed to realize the Applicant is the registered owner of land reference No. Kajiado/ Mailua/ 4670 hereinafter referred to as the 'suit land' and has a right to property as enshrined in Article 40 of the Constitution. He claims the reasons for the registration of the caution by the cautioner to the effect that the land was illegally acquired by the Applicant as the same was meant to have been community land allegedly in accordance with the Area List and therefore marked as ' Public Utility' is farfetched, baseless as well as misplaced. Further, that the 1st and 2nd Respondents have failed to establish a good reason and/ or justifiable cause to continue registering the caution against the suit land. He insists the 1st and 2nd Respondents are being improperly

motivated and decided to follow their own discretion in this matter and are guilty of abuse of power including due process of law. He contends that based on the decision made on 17th July, 2019, the 1st Respondent abdicated from its statutory obligation and expectation by his deliberate refusal to lift the caution against the registered land.

In the verifying affidavit sworn by Jackson N. Marasua, he deposes that he is a member No. 1040 of the Mailua Group Ranch that allocated him land. He confirms being registered owner of the suit land and was issued with his title deed on 15th January, 2014. He claims to have bought the suit land from his brother Mr. Lenkai. Further, that upon conducting a search at the Kajiado Land Registry, he discovered that a caution had been registered against the suit land. He learnt that the reason for the registration of the caution by the cautioner was to the effect that he had illegally acquired the suit land as it was meant to be community land in accordance with the Area List and therefore marked as 'public utility'. He contends that the caution was registered four (4) years after he had acquired the land. Further, the cautioners were the same office bearers or officials of the Committee that was allocating land at Mailua. He states that the cautioners failed to disclose that they were pending rivals in a pending case in this court and did not produce any documentary proof that he indeed acquired the suit land illegally. He explains that he sought for the caution to be lifted and on 22nd May, 2019, the 1st Respondent convened a hearing in the presence of the Cautioner. Further, on 17th July, 2019, the 1st Respondent delivered his ruling to the effect that parties either lodge a suit in court or before the National Land Commission Management Board. He insists the 1st Respondent abdicated from his statutory obligation under the provisions of section 73(1), (2) and (3) of the Land Registration Act as he would have just proceeded to remove the caution. He avers that he is now prejudiced and being treated unfairly as a caution has been registered on his land without good reason. He reiterates that 1st and 2nd Respondents will suffer no prejudice if the application is allowed.

The Respondents though duly served as evident in the Affidavits of Service sworn on 27th November, 2019 and 11th December, 2019 and filed in Court, failed to enter appearance nor file a response to the application herein. The Application was hence undefended.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 9th December, 2019 including the Statement of facts; Verifying Affidavit as well as the annexures thereon, the only issue for determination is whether the applicant is entitled to orders sought in the said application.

It is not in dispute that the Applicant is the current registered proprietor of the suit land as evident in the Certificate of Title dated the 15th January 2014, which was annexed to the verifying affidavit. It is further not in dispute that a caution was entered against the said suit land by the 1st Respondent. Further, that the Applicant sought for the removal of the said caution but the 1st Respondent declined to do so. The Applicant has hence sought for orders of mandamus and prohibition to compel the 1st and 2nd Respondents to remove the caution over the suit land and be restrained from interfering with it.

In the current case, the Respondents failed to file any replying affidavit to controvert the Applicant's averments. I note the Applicant annexed a copy of a report by the 1st Respondent dated that 17th July, 2019 that culminated from a meeting convened on 22nd May, 2019 to discuss the removal of the Caution. I have reproduced excerpts from the said report herebelow: **'the said parcel of land was as a result of a subdivision of Kajiado/ Mailua/ 969 vide a consent to subdivide dated 2nd August, 2010 serial No. 440940, according to available records with the Green Card in our Registry. The same parcel of land was transferred to one Ntoyoto Marasua Lempesai on 15th January, 2014 and issued with a title deed on the same date. In support of the above findings, the same title is supported by the Registry Index Map (RIM). However, the Respondents produced area list retrieved from County Land Adjudication Office Kajiado dated 14th May, 2019 and showing the said parcel is reserved as a conservancy. However, to Counter the Area List, the Applicant herein also produced an Area List from the said Group Ranch showing the same land having been allocated to one Daniel Lenkai. It is trite clear that the Applicant herein was issued with a title deed for the said parcel of land as at 15th January, 2014. The Claim that the same is a public utility arose 4 years after the same was transferred to the Applicant. It is also noteworthy that some of the officials who took part in the preparation of the subdivisions from the original 969 and subsequent transfer of the resulting numbers to the Applicant now deny.....In the premise, having considered all the evidences, I am of the considered opinion that I have no jurisdiction to deliberate on the issues at hand and especially claims on Public Utility.....Therefore I hereby direct the parties herein, to present their case to the National Land Commission and present a report for our action. In alternative the parties can herein can proceed to court for orders to remove the caution and direction on Public Utility Claim. In the premise, the status quo remains pending the availability of the quoted reports or court orders.**

'The Court of Appeal in the case of Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR described judicial review as follows: "Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange – versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.'

In the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996**, the Court of Appeal while highlighting the circumstances under which a party can seek an order of mandamus, cited, with approval, **Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89** and stated thus:

"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

Section 71 of the Land Registration Act provides that: **' 71. (1) A person who— (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act; (b) is entitled to a licence; or (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge. (2) A caution may either— (a) forbid the registration of dispositions and the making of entries; or (b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution. (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. (5) Subject to this section, the caution shall be registered in the appropriate register.'**

While section 72 of the Land Registration Act stipulates that: **' (1) The Registrar shall give notice, in writing, of a caution to the proprietor whose land, lease or charge is affected by the caution. (2) A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court.'**

Further 73 of the Land Registration Act states 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.'**

From the legal provisions cited above, it is clear that the 1st Respondent had an administrative role to play in respect to the registration and removal of caution. Further, this role had to be in tandem with the provisions of the Land Registration Act, Fair Administrative Action Act as well as Article 47 of the Constitution. From the 1st Respondent's report which I have quoted above, I note he indeed confirmed that based on the documents within their records, the Applicant was indeed the owner of the suit land. Further, that the persons claiming that the Applicant's land was public utility were the said officials who had subdivided parcel 969 and allocated the land to the initial owner that in turn transferred it to the Applicant. The 1st Respondent further observed that the claim that the suit land was a public utility plot arose four years after the Applicant had been registered as a proprietor of the land. Despite these observations, he still failed to remove the caution and instead referred the dispute to Court and the National Land Commission. To my mind, he abdicated his responsibility since there was no other reason for the caution to subsist in respect to the suit land. Further, I find that he failed to act appropriately as required by the Land Registration Act, the Fair Administrative Action Act and the Constitution. Article 47 of the Constitution is very clear that every person has a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair with reasons given for the said action.

In relying on the facts as presented including the two cited judicial authorities, I find that failure by the 1st Respondent to remove the said caution after the hearing and noting that there were proper documentation to support the registration of the Applicant as proprietor of the suit land is against the rules of Natural Justice and violated the Applicant's Constitutional right to property. I opine that since the Respondents did not controvert the averments herein, it amounts to an admission on their part. Further, failure to remove the caution over land which a party legally acquired yet the 1st Respondent was mandated by law to do so contravenes the Constitutional principles of reasonability and procedural fairness as the basic rules of natural justice were not observed in the process herein. From a keen perusal of the legal provisions cited above, I note a caution cannot over land cannot subsist indefinitely. Since at this juncture, there was no reason given for the subsistence of the said caution on the suit land, I hold that the same should be removed.

On the issue of costs, since this generally abides the outcome of the suit, I find that the Respondents should be made to bear the same.

It is against the foregoing that I find the Notice of Motion dated 9th December, 2019 merited and proceed to allow it in the following terms:

1. An order of Prohibition be and is hereby issued against the office of the 1st Respondent herein by themselves, their agents and personal assigns from dealing with any matter pertaining to all that parcel of land known as Land Reference No. KAJIADO/MAILUA/ 4670 as to placing a caution without any legal, proper and/or justified cause.
2. An order of Mandamus be and is hereby issued compelling the 1st and 2nd Respondents by themselves, their agents and/or representatives to forthwith remove and/ or lift the caution registered against all that parcel of land known as Land Reference No. KAJIADO/ MAILUA/ 4670 this being their statutory obligation as mandated by law.
3. Costs of this application is awarded to the Applicant.

Dated signed and delivered via email this 28th day of April 2020

CHRISTINE OCHIENG

JUDGE