



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC MISC.APPL. NO. 13 OF 2019**

**BEATRICE AKELO MBOYA.....1<sup>ST</sup> APPLICANT**

**ROBERT PKEW ALEUTUM.....2<sup>ND</sup> APPLICANT**

**RAEL CHEPKEMOI KASIWA.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**JOSHUA MBOYA.....RESPONDENT**

**RULING**

1. This is a ruling on an Originating Summons dated 9/5/2019 and filed on the same date in this matter. It was brought by the applicants who seek the following orders:-

**(a) That this court be pleased to order that the caution registered against Title No. Trans-Nzoia/Kipsoen/432 be removed forthwith.**

**(b) That the respondent be ordered to pay costs of this application in any event.**

2. The Originating Summons is brought under **Sections 73 (1)** of the **Land Registration Act 2012** and **Order 37 Rule 3** of the **Civil Procedure Rules**. The application is supported by sworn affidavits of 1<sup>st</sup> and 2<sup>nd</sup> applicants both dated 8/5/2019. In summary the 1<sup>st</sup> and 2<sup>nd</sup> applicants state that one *Elisha Ooro* is the owner of the suit land while the 1<sup>st</sup> applicant holds a power of attorney ; that *Elisha* needs urgent medical attention and the 1<sup>st</sup> applicant has been meeting all the medical expenses; that *Elisha* authorized the 1<sup>st</sup> applicant to sell the land for **Ksh 10,000,000/=** and she sold the land to the 2<sup>nd</sup> and 3<sup>rd</sup> applicants who paid in full and took possession of the property; that a transfer in the 2<sup>nd</sup> and 3<sup>rd</sup> applicant's favour can not be registered due to a caution that the respondent has placed on the title; that the placing of a caution on the land is unlawful. A copy of the power of attorney and the sale agreement are attached to the application. An affidavit of the 2<sup>nd</sup> applicant has also been filed.

3. The respondent filed his response vide replying affidavit sworn on 12/6/2019. In that affidavit he depones that he is *Elisha's* biological son; that the said *Elisha* is old, sickly and senile and incapable of authorizing the 1<sup>st</sup> applicant to hold a power of attorney and the entire family should be involved in the management of the property; that the respondent has also disposed of his assets to finance the medical expenses of *Elisha*; that the 1<sup>st</sup> applicant's alleged power of attorney was forged; that besides the 1<sup>st</sup> applicant's alleged power of attorney another alleged power of attorney in the name of *Josephine Achieng Mbuya* exists and that a magistrate's court has found the 1<sup>st</sup> applicants alleged power of attorney to be forged;

4. The 1<sup>st</sup> applicant filed further affidavit on 18/7/2019 and the respondent filed further affidavit on 20/11/2019. The applicants filed written submissions on 3/3/2020.

**DETERMINATION**

5. The issues that arise from the application are as follows:

**(a) Whether the caution should be removed.**

**(b) Who should pay the costs of the application?**

6. The issues are addressed herein under:

***(a) Whether the caution should be removed.***

7. This court has considered the allegations and the counter allegations in this matter. This is a matter that goes beyond the removal of a caution registered over the suit land. It involves other issues such as propriety of the sale and distribution of the assets of a person said to be senile and incapable of handling his own affairs. None of the parties is the registered owner of the suit land. The interests of the applicant would have to be concretely established by evidence before this court can sanction any dealings with the suit land, and that can not be achieved in this limited forum of this summons. There are procedures for the assumption of the management of the estates of persons under disability, just as there are regarding deceased persons. In this court's view those processes cannot be established to have been followed in this application. In this court's opinion there is no possibility that the matters raised by the parties herein can be adequately ventilated without a substantive hearing of a full suit in which the parties may give evidence in proof of their respective claims. I find that the application has no merits. As long as there are claims of forgery of the power of attorney held by the 1<sup>st</sup> applicant it is not safe to grant the orders sought in this summons.

***(b) What Orders should issue?***

8. In the light of the foregoing the originating summons dated 9/5/2019 is hereby dismissed with costs to the respondent.

It is so ordered.

**Dated, signed and delivered at Nairobi via electronic mail on this 29<sup>th</sup> day of May, 2020.**

**MWANGI NJOROGI**

**JUDGE, ELC, KITALE.**