



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC MISC APPLICATION NO. 24 OF 2017

KIPTUYA NGERECH TOO.....PLAINTIFF/RESPONDENT

-V E R S U S-

PERIS WANGUIMACHARIA1ST DEFENDANT/APPLICANT

LAND REGISTRAR-NYANDARUA.....2nd DEFENDANT/RESPONDENT

RULING

1. Before me is a Notice of Motion dated 27th March 2017 brought under the provisions of Section 73 (1) of the Land Registration Act, Order 51 Rule 1 of the Civil Procedure Rules, and Sections 1A and 3A of the Civil Procedure Act and any other enabling provisions of the law wherein the Applicant seeks for orders to issue compelling the 2nd Respondent herein to remove the caution registered by Peris Wangui Macharia, the 1st Respondent herein, in parcel of land known as Nyandarua/Mawingo Salient/5270.

2. The Applicant also prayed for the cost of this application to be provided for.

3. The application is supported by the sworn affidavit of the Applicant and based on the grounds that:-

- i. The Applicant is the registered owner of that parcel of land known as parcel No. Nyandarua/Mawingo Salient/5270.
- ii. That the Applicant has sub-divided the suit land herein and sold portions of the same to third parties herein who are currently in possession and occupation.
- iii. That the 1st Respondent has registered a caution on the entire suit property despite their being other people in occupation and possession of the same.
- iv. That the 1st Respondent has no interest whatsoever whether as a purchaser and/or otherwise to enable her register the caution on the suit land.
- v. That the caution has made it impossible for the purchasers to process their title deeds for portions they purchased and it is in the best interest of justice that the same be removed.
- vi. That the actions of the 1st Respondent are violating the rights and interests of the proprietors of the suit property.
- vii. That in the interest of justice, the orders sought herein ought to be granted.

4. After the filing of the said application, there was an attempt by parties to settle the matter out of court but when the negotiations failed, parties agreed by consent to dispose of the application by way of written submissions. The application was served on the District Land Registrar Nyandarua, but he did not enter any appearance nor file response to the application. Save for the 2nd Respondent, Parties filed their respective submissions and highlighted on the same on the 14th May 2018.

Applicant's case.

5. The Applicants case was to the effect that he was the registered proprietor of the suit land herein and that he had sub divided the same and sold it to third parties herein who have been unable to procure their title deeds to their respective parcels of land due to the caution that was registered by the 2nd Respondent through the instructions by the 1st Respondent.

6. That the dispute is between the 1st Respondent and her husband one Peter Gitau Kinyanjui who bought 2 acres of land from the Applicant, which land has now been cautioned by the 1st Respondent.

7. The Applicant relied on Section 71 of the Land Registration Act which provides for instances when one can lodge a caution on a parcel of land.

8. The Applicant's contention is that he did not enter into any agreement with the 1st Respondent herein on the said parcel of land and therefore she had no justifiable reason, as is provided for under Section 71 of the Land Registration Act, to lodge the caution. That the burden of proof was upon her to show reasons why the caution should not be removed. The Applicant relied on the case of **Andrea Gishore Onditi vs Andrew Mogusu Kereu and 2 others [2013] eKLR** to buttress their point.

9. That further, the 1st Respondent cannot litigate through the Applicant herein she ought to have filed her case against her husband because she was causing distress to third parties. That her claim against her husband cannot be litigated through the placing of a caution on the entire suit of land. That she ought to have placed the caution on the intended sub-division of the 2 acres. That her right cannot be enforced where rights of others were prejudiced. Reliance was put on the case of **Pryson Makokha Tabata vs Charles Weskesa Wanyama [2014]eKLR**

10. That Section 73 of the Act stipulates that the caution could either be withdrawn by the cautioner or removed by an order of the court or Registrar.

11. That there was no dispute between the Applicant and the 1st Respondent in regard to the ownership of the suit land and so the Application herein should be allowed.

Respondent's case.

12. The Application was opposed by the 1st Respondent who submitted that indeed it was not disputed that the Applicant herein was the proprietor of the suit land and that he had sub-divided the same and sold portions to third parties.

13. That the 1st Respondent's husband, one Peter Gitau Kinyanjui was one of the persons who had bought two (2) acres of land from the Applicant wherein he and his family, including the 1st Respondent, had settled therein since 1998. The land had thus become their matrimonial home.

14. That when she discovered that her husband had sold one (1) acre of the suit land to a third party without her consent, she decided to place a caution on the same.

15. That the original mutation of the suit land had clearly marked out the excision of the two (2) acres of land being her family entitlement wherein the Applicant herein, in collusion with her husband, re-drew the same and subdivided the two acres into two portions of one (1) acre each with the intention of transferring the second one (1) acre to one John Kimani Chege.

16. The 1st Respondent submitted that she was ready to remove the caution if the mutation instrument could be re-drawn to its original status so that the illegal sale is resolved.

17. The 1st Respondent also faulted the Applicant's suit stating that the same was incompetent, bad in law and an abuse of the court process on account of the procedure adopted to institute it. That the same ought to have been instituted through a plaint not a miscellaneous application. They relied on the case of **Joseph Kibowen Chemjor vs. William C. Kiseru [2013] eKLR**.

18. The Respondent also relied on the provisions on Section 71(1) of the Land Registration Act upon which the Respondent registered the caution to the support their actions. They also relied on Section 28 (a) of the Act to submit that the same recognizes the spousal right over matrimonial Property as an overriding interest that subsist without there being noted on the land register.

19. That the caution registered by the 1st Respondent was to protect her matrimonial interest in the suit land which was justifiable in the circumstance and that the Applicants Application ought to be dismissed with costs.

20. I have considered the submission by both counsel to the parties as well as the authorities and the annexures herein.

21. The specific issue herein is whether the applicant could commence proceedings on a removal of a caution by way of a Miscellaneous Application. There is also the general question on how proceedings ought to be instituted in court.

22. The lodging of caution on any property is governed by *Section 71(1) of the Land Registration Act*, which provides:-

“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)...

c) ...

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.”

23. Therefore, from the above provision of law, a person who lodges caution over any property is one who claims right whether contractual or otherwise. The 1st Respondent in her application claimed that the property was matrimonial property.

24. The essence of a caution is to forbid the registration of dispositions in the subject land because the cautioner is apprehensive that such registration may obliterate his interest in the land. Cautions are registered by the Land Registrar.

25. 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.

26. Thus cautions may be removed in three ways.

(a) By withdrawal of the same by the cautioner.

(b) By removal by order of the court.

(c) By removal by order of the Registrar.

27. Under Order 3 Rule 1 of the Civil Procedure Rules the same requires that:

Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

28. The “other manner” prescribed in Order 37 is the Originating Summons which may be taken out in respect of matters stipulated in that Rule. The removal of a caution is not however one of the specified ‘manner’ under the provisions of Order 37.

29. The precursor to the Land Registration Act (LRA) is the Registered Land Act (RLA). Order 37 Rule 8, provides that applications under the Registered Land Act (RLA) other than under Sections 120, 128, 133, 138, 143, and 150 shall be made by originating summons. The removal of cautions under the RLA was contained in Section 133 of the statute. It will be noted that Section 133 is not one of the sections in which applications could be made by way of Originating Summons.

30. The above rule specifically excludes the use of Originating Summons for applications under Section 133 of the Registered Land Act.

31. Section 107 of the Land Registration Act, which contains savings and transitional provisions, preserves certain rights which were exercisable immediately prior to the commencement of the said statute. It states as follows:-

(1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

32. Section 133 of the Registered Land Act having been expressly excluded from the use of Originating Summons, the only other way that application could have been made was by way of a Plaint. It could not have been made by way of Notice of Motion.

33. In the case of **Joseph Kibowen Chemjor vs William C. Kisera [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.

34. I associate myself with these sentiments. Accordingly, I find that the Applicant does not have any suit before the court and that the Miscellaneous Notice of Motion dated 27th March 2017 is fatally defective and is incompetently before this court. The application is struck out, with costs to the Respondent.

Dated and delivered at Nyahururu this 10th day July of 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE