

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APPL. NO.143 OF 2014

MARY ANYANGO OKECH..... APPLICANT

VERSUS

NYAKUNDI MAECHE NYAIGOTI RESPONDENT

RULING

1. The application before me was brought by way of Notice of Motion dated 7th August, 2014. In the application, the applicant has sought an order for the removal of the Caution that was lodged by the respondent against the title of all that parcel of land known as **LR. No. Kamagambo/Kong’udi/604** (hereinafter referred to only as “**the suit property**”) on 16th July, 2014. The application is supported by the Affidavit of the Applicant sworn on 7th August, 2014 in which the applicant deposed that she is the registered proprietor of the suit property which was hitherto registered in the name of her father in law one, **Anderikus Ogalo Wao** (hereinafter referred to as “**Ogalo**”). The applicant deposed further that the respondent caused a Caution to be registered against the title of the suit property claiming that a portion thereof had been sold to him which sale she (the applicant) is not aware of. The applicant contended that the Caution lodged by the respondent against the title of the suit property has no basis and that the same is intended to deprive the applicant the enjoyment of her proprietary rights over the property.
2. The applicant’s application was opposed by the respondent through a replying affidavit sworn on 16th September, 2014. In his affidavit, the respondent stated that the Caution complained of by the applicant was placed for good and lawful cause namely, to protect his interest as a purchaser of a portion of the suit property. The respondent deposed that he purchased a portion of the suit property measuring 1 ha. From Ogalo sometimes in the year 1986 at a consideration of Ksh.14,000/= and that Ogalo died in the year 1997 before transferring the said portion of the suit property to him. The respondent deposed that the applicant in her capacity as the administrator of Ogalo caused the suit property to be transferred to her name in the month of July, 2014 and the Caution in dispute was lodged in the same month to stop the applicant from dealing with the suit property before satisfying his (the respondent’s) claim over a portion of the property. The respondent deposed that he has filed a suit against the applicant before this court claiming the said portion of the suit property by adverse possession which suit is pending hearing and determination. The respondent contended that the application herein has been brought in bad faith and that the same lacks merit. When the application came up for hearing before me on 15th December, 2014, the advocates who appeared for the parties relied entirely on the contents of the affidavits filed herein in support of and in opposition to the application.
3. I have considered that applicant’s application together with the affidavit filed in support thereof. I have also considered the affidavit by the respondent filed in opposition to the application. I am satisfied that the applicant is the registered proprietor of the suit property. The applicant has annexed to her affidavit in support of the application, a copy of official search dated 28th July, 2014 which shows that she was registered as the proprietor of the suit property on 16th July, 2014. The said certificate of official search shows further that on the same date when the property was registered in the name of the applicant, a Caution was also registered against the title of the suit property in favour of the respondent. A copy of the said Caution was not produced in court but from the search aforesaid, it is indicated that the respondent lodged the Caution to protect “**purchaser’s interest**”. The Caution was registered under **Section 71(1)** of the Land Registration Act, 2012. That section provides expressly as to who can lodge a Caution against a title to land. A Caution can be lodged by a person, who claims a right to obtain an interest in land, lease or

- charge which is capable of creation by an instrument registerable under the said Act or a person who is entitled to a license over the land or a person who has presented a bankruptcy petition against a proprietor of land, lease or charge. For the respondent to be able to maintain the Caution registered against the title of the suit property, the respondent has to show that he has an interest in the nature set out above.
4. As I have already stated above, the respondent is claiming “purchaser’s interest”. The respondent has annexed to his affidavit a copy of an agreement that was made between the respondent and Ogalo, deceased, who was the previous owner of the suit property under which Ogalo sold to the respondent a portion of the suit property measuring 1 ha. The applicant is the administrator of the estate of Ogalo. The respondent has contended that he has lodged a Caution against the title of the suit property to protect his interest in the said 1 ha. portion of the suit property. The agreement that was made between the respondent and Ogalo gave the respondent a contractual right to have a portion of the suit property measuring 1 ha. registered in his name subject to the fulfilment of the terms of the said agreement and the provisions of the law. That right entitles the respondent to lodge a Caution against the title of the suit property under the provisions of section 71(1) of the Land Registration Act aforesaid.
 5. The validity or otherwise of the agreement between Ogalo and the respondent is not for determination in these proceedings. That issue will be determined in the civil suit that the respondent is said to have filed against the applicant before this court seeking title to a portion of the suit property by adverse possession. The applicant is also not barred from bringing her own suit to challenge the validity of the said agreement which is the basis of the respondent’s caution herein. As things stand now though, I am satisfied that the Caution complained of by the applicant was properly lodged. I am of the view that no prejudice would be suffered by the applicant if the same remains in place pending the hearing and determination of Kisii High Court Civil Suit No.356 of 2014 (O.S) that the respondent has lodged against the applicant to establish his interest in the disputed portion of the suit property. If the respondent fails in those proceedings, the Caution herein would be without any basis and the applicant would be at liberty to move the court for the removal of the same.
 6. The upshot of the foregoing is that the application dated 7th August, 2014 has no basis. The same is accordingly dismissed. Each party shall bear its own costs.

Delivered, dated and signed at Kisii this 6th day of February, 2015.

S. OKONG’O

JUDGE

In the presence of:-

Mr. Ojala for the Applicant

Mr. Bigogo h/b for Abisai for the Respondent

Mr. Mobisa Court Clerk

S. OKONG’O

JUDGE