



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND MISC. CIVIL APPL. NO. 287 OF 2012**

MARIA NGANGI GWAKO .....APPLICANT

VERSUS

CHARLES MWENZI NGANGI ..... RESPONDENT

**RULING**

1. What is before me is the Applicant’s application that was brought by way of Notice of Motion dated 31<sup>st</sup> October 2012 seeking an order for the removal of the Caution lodged by Charles Mwenzi Ngangi, the Respondent herein on 8<sup>th</sup> August, 2012 on the title of the parcel of land known as **LR. No. Wanjare/Bokeire/1467**(hereinafter referred to as “**the suit property**”) which is registered in the name of the Applicant. The application was brought on the grounds that the Applicant is the registered proprietor of the suit property and that the Respondent without any lawful cause or basis caused a Caution to be registered against the title of the suit property thereby encumbering the Applicant’s right to deal with the suit property. The Applicant claimed that she is desirous of selling the suit property to a third party to meet her personal needs but has been prevented from doing so by the said Caution. The Applicant’s application was opposed by the Respondent. Through a replying affidavit sworn on 31<sup>st</sup> December, 2012 the Respondent contended that he has a right to lodge a Caution against the title of the suit property to prevent the Applicant from selling the same. The Respondent contended that as a family, they were landless and that as an act of charity, the Catholic Church at Tabaka purchased the suit property for them and had the same registered in the name of their mother, the Applicant so that they may have somewhere to live. The Respondent claimed that he has resided on the suit property for over twenty years and that the sale of the suit property by the Applicant would render him destitute and homeless. The Respondent denied the Applicant’s claim that the Applicant wants to sell the suit property to meet her medical expenses.
2. When the application came up for hearing on 21<sup>st</sup> February, 2013, Mr. G. J. M. Masese, advocate appeared for the Applicant while the Respondent appeared in person. Mr. Masese submitted that the Applicant has proved through a certificate of official search dated 31<sup>st</sup> October, 2012 that she is the registered proprietor of the suit property and that she has been so registered since 2<sup>nd</sup> August, 1976. He submitted that the Applicant has sold a portion of the suit property so that she gets money for treatment but she has been unable to transfer the said portion to the purchaser because of the existing Caution on the title of the suit property by the Respondent. The Applicant’s advocate submitted further that it is not in dispute that the Applicant is the registered proprietor of the suit property and that the suit property is not ancestral land. He submitted that the Applicant bought the suit property and that she did not inherit the same. He submitted that the Respondent’s objection to the application is not legally tenable. He submitted that the Caution by the Respondent should not have been registered at all in the first place because the Respondent has no interest in the suit property that can be protected by a Caution. He pointed out the fact that there is ancestral land which is intact and which the Applicant will distribute to her children the Respondent included. Mr. Masese submitted that a proprietor’s right to deal with his land cannot be encumbered save as provided in law. He urged the court to allow the Applicant’s application.
3. In response to the Applicant’s advocate’s submissions, the Respondent submitted that he is the Applicant’s eldest son and that he has no father. He submitted that the Applicant is illiterate and as such had no money to buy the suit property. He reiterated the contents of his affidavit in reply to

the application that the suit property was bought for the family by a catholic priest, one, Father Walter of Tabaka Catholic Mission. He submitted that he has been residing on the suit property since his childhood and that the suit property is the only home that he knows. He denied any knowledge of an ancestral land owned by the Applicant. He submitted that he placed a Caution on the title of the suit property because he found sand placed on a portion of the suit property that had been allocated to him. He submitted that the suit property had been divided among the four (4) sons of the Applicant the Respondent included save that they had not been issued with separate titles. He submitted that it is his portion of the suit property that the Applicant has sold an act which he found not fair at all. He submitted that if the sale goes through he will have nowhere to go with his children.

4. I have considered the Applicant's application and the response to it by the Respondent. 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 a certificate of official search dated 31<sup>st</sup> October, 2012 which shows that she was registered as the proprietor of the suit property on 2<sup>nd</sup> August, 1976. The said certificate of official search confirms further that on 8<sup>th</sup> August, 2012 a Caution was registered against the title of the suit property in favour of the Respondent. A copy of the said caution has also been exhibited by the Applicant. According to the said Caution, the same was lodged by the Respondent to protect his interest as "**beneficiary/son**". It is the Applicant's contention that the Respondent has no basis for lodging a Caution on the title of the suit property. The Caution in favour of the respondent was lodged on 3<sup>rd</sup> August, 2012 after the repeal of the Registered Land Act Cap. 300 Laws of Kenya. The same must therefore have been registered under section 71 of the Land Registration Act, 2012. Section 71 of the Land Registration Act, 2012 ("**the Act**"), provides for persons who can lodge a Caution on the title of land registered under the said Act. A Caution can only 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 registrable 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 lodge and maintain a Caution against the title to the suit property, the Respondent has to show that he has an interest in the nature set out above. As I have already stated above, the Respondent lodged the said Caution to protect a "beneficiary/son's interest" that he claimed to have over the suit property. Under the provisions of section 71 of the Act aforesaid, a beneficiary/son's interest is not protectable by a caution. I am in agreement with the submission by the advocate of the Applicant that the Respondent's Caution should not have been accepted for registration in the first place. The Respondent has contended that he is the eldest son of the Applicant and that the suit property was purchased for the Applicant by a Good Samaritan so that the Applicant can settle her family which was landless. The Respondent has contended that he is entitled to lodge a Caution against the title of the suit property so as to prevent the Applicant from disposing of the same an act that would render him landless. I am unable to appreciate the interest that the Respondent is claiming over the suit property. The suit property is registered in the name of the Applicant. Whether the same was purchased by the Applicant or by a Good Samaritan for her does not change her legal rights over the suit property. The Respondent may have a claim against the Applicant based on possession or trust but such claims are not protectable by a caution and cannot support the Respondent's plea for the Caution herein to remain in place. When a Caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said Caution and the need for it to remain in place. It is my finding that the Respondent has failed to discharge this burden. The Applicant has demonstrated that she is the registered proprietor of the suit property and that the Respondent has no basis for continuing to have a Caution lodged against the title to the suit property. In the absence of any reasonable cause shown by the Respondent as to why the said Caution should not be removed, the application for the removal of the same must succeed.
5. As I have stated above, the Respondent may have a valid claim against the Applicant with respect to the suit property which although not protectable by a Caution may be safeguarded by other remedies available in law. In order not to compromise the rights if any that the Respondent may have over the suit property and which cannot be ventilated in these proceedings, I will allow the Applicant's application dated 31<sup>st</sup> October, 2012 in terms of prayer (2) thereof but make a further order that the Caution shall not be removed until after the expiry of thirty (30) days from the date

hereof. This will give the Respondent time to take whatever steps he may deem appropriate to safeguard his rights if any on the suit property. In view of the relationship between the parties, each party shall bear its own costs.

**Delivered, dated and signed at Kisii this 7<sup>th</sup> day of February 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Sagwe h/b for G. J Masese for the Applicant

N/A for the Respondent

Mobisa Court Clerk.

**S. OKONG'O**

**JUDGE**