



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**MISCELLANEOUS CIVIL APPL. NO. 86 OF 2013**  
**ESTHER NASAMBU MAKOKHA.....APPLICANT**  
**VERSUS**  
**ABIGAEL M'MBONE LUMBASI.....RESPONDENT**  
**RULING**

1. This is a miscellaneous civil application brought under section 3 and 3A of the Civil Procedure Act and section 73 of the Land Registration Act. It seeks for orders to remove a caution lodged by the Respondent on L.R. no. Ndivisi/Khalumuli/3301 and costs of the application be provided for. The application is supported by the affidavit of Esther Nasambu Makokha. The Applicant deposes that she is the registered owner of the land in question. The Respondent lodged a caution on this title and which action she was not happy with.

2. She wrote to the Land Registrar to remove the caution and annexed a copy of that letter. The Land Registrar in response issued notices to the Respondent which notices the Respondent did not act upon. Neither did the Land Registrar remove the said caution hence her present application to this court seeking to have the caution placed on her title removed.

3. The Respondent swore a replying affidavit to challenge the application. She began by deposing that the application lacks merit. That the Applicant is aware of the existence of Bungoma High Court *civil appeal No. 99 of 2010* slated or hearing on 31.10.2013 in which the same land is the subject matter of the dispute. She annexed the record of appeal in the case referred to demonstrate her point.

4. It is her case that the Applicant is entitled to parcel no. 3315 while herself (Respondent) is entitled to L.R. 3301. The Applicant has sold their pieces of land with intention to disinherit her. She denied being summoned by the Land Registrar for purposes of removing the caution. She concluded by deposing that the Applicant has not shown any good reason why the caution should be removed. She urged the court to dismiss the application with costs.

5. I have read the pleadings together with the annexures' and considered the oral submissions presented by each of the advocates for the parties. It is not disputed the Applicant is the registered owner of the subject land. It is also not disputed that there is a caution restricting this title. The caution was lodged on 26<sup>th</sup> January 2010 by the Respondent. What is in dispute is whether the caution ought to be removed or not.

6. The Applicant contends the Respondent has no registrable interest in the land. The Respondent thinks otherwise and in paragraph 5 of her affidavit says;

***“That both the Applicant and Respondent are co-wives and the Applicant is entitled to Ndivisi/Khalumuli/3315 and the Respondent to Ndivisi/Khalumuli/3301 both parcels are subject of contention before the appellate court.”***

The Respondent also denied receiving any notice from the Land Registrar of intention to remove the caution. The Applicant on her part in the further affidavit deposes at paragraph 3 that the Tribunal’s findings awarded the Respondent L.R.Ndivisi/Khalumuli/3315. Therefore in her view there is no justification for the caution on L.R. 3301.

7. I have had occasion to peruse the record of appeal annexed in the replying affidavit. From this record, the tribunal awarded the Respondent L.R. Ndivisi/Khalumuli/3315 measuring 0.38 ha and directed the Applicant to execute transfer documents in favour of the Respondent. In default, the Court Executive Officer was to execute the transfer documents. The Applicant not being happy with this finding preferred an appeal against it. She listed four grounds in her memorandum of appeal in which she questioned the jurisdiction of that Tribunal. The appeal Bungoma HCCA no. 99 of 2010 is pending determination.

8. The Applicant is trying to depose that the Tribunal awarded the Respondent L.R. 3315 while she retained 3301. I find the line taken by the Applicant as an attempt to execute the decree as was adopted in Bungoma CMC land case no. 8 of 2010 partially for her convenience. The award has been challenged in full and not in part. The Applicant has not withdrawn that appeal. She has also not executed documents that would enable the Respondent get land title 3315 as awarded to her. Although 3301 was not listed as in dispute, it is mentioned in the award the subject of the pending appeal.

9. The orders sought in this application are therefore premature and ought to await the outcome of the pending appeal. The Applicant has the option of withdrawing that appeal and signing the transfer documents to transfer one of the parcels to the Respondent. If that is done, the Respondent would have no reason to keep the caution lodged on L.R no. 3301 to remain in force. Until that step is taken, this court finds the present application as malicious and/or an abuse of the court process. The same is dismissed with costs to the Respondent.

**Dated, Signed and Delivered** in Bungoma this 6<sup>th</sup> day of JUNE 2014.

**A. OMOLLO**

**JUDGE**