



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC MISC. APP. CASE NO. E. 2 OF 2020**

NANCY WITAMBUKA AMBULA

ROSE IKAMBILI AMBULA .....APPLICANTS

VERSUS

COUNTY LANDS REGISTRAR, KAKAMEGA..... RESPONDENT

**RULING**

The application is dated 23<sup>rd</sup> September 2020 and is brought under Order 51 rules 1 and 2 of the Civil Procedure Rules 2010; Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Section 73 (1) of the Land Registration Act No. 3 of 2012 seeking the following orders:-

1. That this application be certified urgent, service thereof be dispensed with, and with the leave of court the application be heard ex-parte.
2. That the County Lands Registrar Kakamega be and is hereby ordered to give effect to the applicant's application for the removal of the caution dated September, 13, 2020 placed by a third-party Cautioner on February 13, 2007 on Kakamega/Lumakanda/3274.
3. That the County Lands Registrar Kakamega be and is hereby ordered to give effect to the applicants' application for transmission of title for land title Kakamega/Lumakanda/3274 from the deceased proprietor by estate administrators to the 1<sup>st</sup> applicant; Nancy Witambula Ambula as heir, pursuant to the confirmation of grant issued by the High Court at Eldoret on September 8, 2020.
4. That the costs of this application be provided.

This application is based on the grounds that the matter in issue concerns directions from court on matters that have been definitely dealt with by courts of competent jurisdiction. The applicants are Administrators of the Estate of the Late Richard Mise Imbuchi the deceased proprietor of the parcel of land known as Kakamega/Lumakanda/3274 by virtue of a confirmed grant of representation issued on September 8, 2020 following a protracted succession cause that lasted eight years. A third party to this application had placed a caution on Kakamega/Lumakanda/3274 on March 13, 2007 claiming proprietorship to Kakamega/Lumakanda/3274, and subsequently filed an objection to the applicant's grant of representation in succession cause number 316 of 212 and filed suit in ELC Kakamega 400 of 2017 in furtherance of claims of proprietorship to Kakamega/Lumakanda/3274. The cautioner's plaint in ELC Number 400 of 2017 Kakamega was dismissed for being time barred on February, 26, 2019 and the third-party cautioner preferred no appeal against the suit to sustain the caution. The Cautioner's objection in Succession Cause Number 316 of 2012 Eldoret was dismissed with the court ruling that Kakamega/Lumakanda/3274 was part of the estate of the late Richard Mise Imbuchi. In the grant of representation issued by the High Court in Eldoret on September 8, 2020, the High Court directed that Kakamega/Lumakanda/3274 be transmitted to the 1<sup>st</sup> applicant Nancy Witambula Ambula. The applicants sought to file a withdrawal of caution application dated September 13, 2020 and an application for transmission of title dated September 13, 2020, in favour of the 1<sup>st</sup> applicant with the County Lands Registrar Kakamega. The respondent declined both the application for withdrawal of caution and transmission of title on grounds that the respondent would only act on an order of the court/or a formal withdrawal of the caution by the third-party Cautioner. The applicants are reasonably apprehensive the third-party cautioner would not be persuaded to withdraw the caution. The applicants approach the court for orders directing the County Lands Registrar to remove the caution and register the transmission of title on the premise of their apprehension that not unless this matter is heard as a matter of urgency, the issue of succession to the estate of the late Richard Mise Imbuchi will continue to be a protracted affair and consequently, occasioning significant financial burden on the applicants and particularly the 1<sup>st</sup> applicant who is the heir to the deceased.

This court has considered the application and the submissions therein. The respondent was served but failed to enter any response. It is clear this application is seeking to enforce a right. Under Section 19 of the Civil Procedure Act, *every suit shall be instituted in such manner as may be prescribed by rules*. Order 3 Rule 1 prescribes the way in which suits should be instituted. It specifically provides that *"every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."* Suits in some instances can also be commenced through originating summons.

In the case of **Joseph Kibowen Chemjor vs William C. Kasera (2013) eKLR** Munyao J. held that;

*"It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no "action" being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no "action". In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues*

*between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings”.*

I concur with the authority above that a party cannot seek to enforce a right through a miscellaneous application like this one. It is my considered view that seeking an order directing the Kakamega Land Registrar to discharge the caution registered to the land parcel Kakamega/Lumakanda/3274 is an enforcement of a right. The facts are not before this court and there is no suit before me. I find this application has no merit and I dismiss the same with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 26<sup>TH</sup> OCTOBER 2020.**

**N.A. MATHEKA**

**JUDGE**