



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 138 OF 2013**

**MESHACK OKUMU OTIENDE ..... 1<sup>ST</sup> APPLICANT**

**JOSHUA MWONYA MWONYA ..... 2<sup>ND</sup> APPLICANT**

**ERICK OWUOR OBADO ..... 3<sup>RD</sup> APPLICANT**

**MICHAEL OTIENO OTIENDE ..... 4<sup>TH</sup> APPLICANT**

**VERSUS**

**CHARLES ODONGO NGANI ..... RESPONDENT**

**RULING**

1. The 1<sup>st</sup> applicant is the registered proprietor of all that parcel of land known as **LR No. Kamagambo/Koluoch/450** (hereinafter referred to as “**the suit property**”). The 1<sup>st</sup> applicant has claimed that he purchased the suit property from one, Vitalis Nyalele Opiyo sometimes in the year 1973. In the year 1989, the 1<sup>st</sup> applicant is said to have sold the suit property to the 2<sup>nd</sup> applicant and, the 3<sup>rd</sup> and 4<sup>th</sup> applicant’s father, one, Samson Dande, deceased (hereinafter referred to only as “**the deceased**”). The suit property was however for reasons which are not clear from the record not transferred to the 2<sup>nd</sup> applicant and the deceased. The respondent has claimed that his deceased father, one, Zakayo Ngani, also purchased a portion of the suit property measuring 3 acres from the original owner thereof, the said Pitalis Nyalele Opiyo in the year 1975 and that from the year 1980 to date, he has occupied the said portion of the suit property without any interruption. It has been claimed that on 19<sup>th</sup> March, 2012 the respondent lodged a caution against the title of the suit property on the allegation that the 1<sup>st</sup> applicant who is the registered owner thereof is deceased.
2. In the month of April, 2013, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicant’s applied to the Land Registrar Migori for the removal of the respondent’s caution. The 2<sup>nd</sup> to 4<sup>th</sup> applicants contended that the 1<sup>st</sup> applicant had sold to them the whole of the suit property including the portion that is occupied by the respondent. They contended that the respondent is an intruder on the suit property and as such should vacate the same. The respondent objected to the removal of the said caution. The respondent maintained that his deceased father purchased a portion of the suit property measuring 3 acres under his occupation and that he lodged a caution against the title of the suit property when someone destroyed the boundary of the portion of the suit property under his occupation. The respondent told the Land Registrar that his wish was to have the suit property sub-divided so that he may have a title for the portion of the suit property measuring 3 acres which is under his occupation. The Land Registrar, Migori District heard both parties and in a ruling that was delivered on 22<sup>nd</sup> April, 2013, found that the dispute between the 2<sup>nd</sup> to 4<sup>th</sup> applicants and the

respondent concerned ownership of land and as such, he had no jurisdiction to determine the same. The Land Registrar advised the parties to seek remedy in court. In the meantime, he ordered that the caution registered against the title of the suit property should remain in place.

3. The 2<sup>nd</sup> to the 4<sup>th</sup> applicants seems not to have been satisfied with the decision of the Land Registrar, Migori aforesaid. They have now joined forces with the 1<sup>st</sup> applicant who was not a party to the proceedings before the Land Registrar, Migori and brought the Notice of Motion application before me which is dated 25<sup>th</sup> June 2013. The application was filed on 25<sup>th</sup> June, 2013 shortly after the decision by the Land Registrar. In their application that was brought under section 73 (1) and 75 of the Land Registration Act 2013, the applicants have sought the following orders;
  - i. **The honourable court be pleased to make an order lifting the caution lodged against land title No. Kamagambo/Koluoch/450 by Charles Odongo Ngani on the allegation that the applicant is dead.**
  - ii. **The honourable court be pleased to make an order of declaration that the caution was lodged wrongly and without reasonable grounds and that the respondent is liable to pay damages if sued for.**
  - iii. **The costs of this suit (sic) be provided for in favour of the applicants.**

The applicants' application was brought on among other grounds that; the 1<sup>st</sup> applicant is the registered proprietor of the suit property and the respondent has trespassed thereon. The applicants have contended that the respondent induced the District Land Registrar to lodge a caution on the title of the suit property on false allegation that the registered proprietor thereof is dead and that he was in the process of instituting succession proceedings to enable him administer his estate. The applicants contended that the registration of the said caution was obtained unlawfully and through fraud and as such the caution should be lifted. The applicants contended further that the law provides for damages in the event of a caution being found to have been lodged unlawfully.

4. The application was opposed by the respondent. Through a replying affidavit sworn on 12<sup>th</sup> May 2014, the respondent contended that his late father bought a portion of the suit property measuring 3 acres from the original owner thereof, Pitalis Nyalele Opiyo who is also deceased sometime in the year 1975 and that his family moved into the said portion of the suit property in the year 1980 and have occupied the same to date. The respondent contended that his occupation of the suit property has been peaceful, open and uninterrupted. The respondent contended that the 1<sup>st</sup> applicant who also purchased a portion of the suit property took advantage of his late father's ignorance and caused the entire parcel of land to be registered in his sole name including the portion bought by the respondent's father which the respondent occupies to date.
5. The respondent contended that in view of his open, peaceful and uninterrupted occupation of the said portion of the suit property measuring 3 acre for a period of over 30 years, he has acquired rights over the same through prescription which are adverse to the 1<sup>st</sup> applicant's title. The respondent contended further that his rights aforesaid constitute overriding interest recognized under section 28 (h) of the Land Registration Act 2012 to which the 1<sup>st</sup> applicant's title is subject. The respondent denied that the caution that he lodged on the title of the suit property was fraudulent. The respondent contended that he was of the mistaken belief that the 1<sup>st</sup> applicant was dead and that the caution was lodged to protect his overriding interest aforesaid upon realization that the 1<sup>st</sup> applicant has fraudulently caused himself to be registered as the sole proprietor of the suit property including the 3 acres that was sold to his late father and which he has occupied since 1980.
6. The respondent contended further that there would be no proper justification for the removal the caution that he has registered against the title of the suit property because the respective interests of the parties herein in the suit property have not been determined conclusively by the court. The respondent contended that the applicants' application has been brought in bad faith. The respondent contended further that he has filed an application by way of Originating Summons against applicants for a declaration that he has acquired proprietary interest on a portion of the suit property measuring 3 acres by adverse possession seeking which application is yet to be determined. The respondent contended that the application herein is premature and that he is

bound to suffer great prejudice if the same allowed since the applicants would be at liberty to alienate and/or dispose of the suit property thereby resulting in his eviction from his home of more than 30 years. The respondent contended further that the application is contrary to the decision of the Land Registrar Migori who had advised the parties to proceed to court for the determination of their interests in the suit property before the caution can be removed.

7. When the application came before me on 14<sup>th</sup> May 2014, Miss Marinda, appeared for the applicants while Miss. Kusa appeared for the respondent. In her submission, Miss. Marinda reiterated the contents of the 1<sup>st</sup> applicant's affidavit filed herein in support of the applicants' application. Counsel maintained that the respondent had lodged a caution against the title of the suit property wrongfully and fraudulently on false allegation that the registered proprietor of the suit property is deceased a fact that is not true. Counsel argued that a caution registered wrongfully cannot be allowed to subsist and urged the court to allow the applicants' application.
8. Miss Kusa learned counsel for the respondent submitted that the disputed caution was lodged by the respondent against the title of the suit property to safeguard his interest in the suit property and not on the ground that the 1<sup>st</sup> applicant was dead as alleged. Counsel submitted that the respondent lodged the said caution against the title of the suit property because he had been informed that the 1<sup>st</sup> applicant was deceased. Counsel submitted further that the Land Registrar had jurisdiction to determine the applicants' application for the lifting of the said caution. Counsel submitted that the said Land Registrar acted within his powers when he referred the parties to this court to have their interests in the suit property determined. Miss. Kusa submitted that the respondent has an interest in the suit property and if the caution is lifted, the applicants are likely to dispose of the suit property thereby subjecting the respondent to serious prejudice. Counsel submitted that the rights of the parties to the suit property should be determined first in the Originating Summons filed by the respondent before the caution is lifted. Counsel urged the court to dismiss the applicants' application.
9. I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the respondent in opposition thereto. Finally, I have considered the oral submissions that were made before me by the learned counsels of the parties. What I need to determine in the application before me is whether the caution said to have been registered against the title of the suit property on 19<sup>th</sup> March, 2012 was fraudulent and wrongful. For me to be able to determine the issue, I have to peruse the said caution so as to ascertain whether or not it was so lodged and the reasons for the lodging thereof. Under section 71(1) of the Land Registration Act, 2012, the only persons allowed to lodge a caution against a title to land are those claiming a right to obtain interest in land, lease or charge capable of creation by an instrument registrable under the said Act, those entitled to a licence over the land and those who have lodged a bankruptcy petition against the registered owner of land, lease or charge. I have not had the benefit perusing a copy of the caution that was lodged by the respondent against the title of the suit property.
10. The court has not even been supplied with a copy of a certificate of official search on the title of the suit property from which the court would have been able to confirm that the caution was in fact lodged and the right if any that was sought to be protected therewith. In the absence of a copy of the caution or a certificate of official search, I am unable to determine whether the caution complained of was lodged lawfully or not. The applicants have contended that the caution was registered on the ground that the 1<sup>st</sup> applicant was deceased. This contention has been denied by the respondent. The respondent has contended that he registered the caution to protect his prescriptive right over the suit property a portion of which he claims to have acquired by adverse possession. In the absence of the caution and certificate of official search aforesaid, I am unable to determine where the truth lies. In the circumstances, the applicants have failed to prove that the said caution was lodged wrongfully. The onus of proving that the said caution was wrongful was upon the applicants.
11. It is the applicants who had a duty to place before the court a copy of the caution complained of or a certificate of official search on the title of the suit property from which the court would have ascertained the existence of the said caution and the grounds upon which it was lodged. The applicants' application in its current form is bereft of any merit. Before disposing of the application, I would wish to state that a right to acquire title to land through adverse possession is

not protectable by a caution under section 71(1) of the Land Registration Act, 2012 aforesaid. If the respondent's caution was registered to protect such interest then the same was wrongful. Again, the death of a registered owner of land does not justify the registration of a caution against the title of such land. In my view, if the registrar was informed of the then alleged death of the 1<sup>st</sup> applicant and he was satisfied that the property may be dealt with fraudulently or improperly prior to the appointment of legal representative of the 1<sup>st</sup> applicant, what he could have done was to register a restriction on the title of the suit property pursuant to the provisions of section 76(1) of the Land Registration Act, 2012.

12. It follows therefore that if the caution complained of was registered because of the then alleged death of the 1<sup>st</sup> applicant which in fact turned out to be untrue, the same was wrongful. Due to the foregoing, I would not have hesitated to lift the said caution, if I had evidence before me that it was either lodged to protect the respondent's alleged prescriptive rights over the suit property or on account of the fact that the registered owner of the suit property was deceased. I would have advised the respondent to go and seek an order of injunction or inhibition in the Originating Summons application that he has lodged against the applicants. The respondent cannot expect the caution that he lodged against the title of the suit property in the year 2012 to last until the Originating Summons that he filed this year against the applicants is heard and determined. I am in agreement with the holding in the case of **Ahmed Ibrahim Suleiman and another v Noor Khamisi Surur [2013] eKLR** where it was stated that ;

**“The essence of registering a caution or a caveat is to act as a stop gap measure to enable the cautioner or caveatee to initiate action to establish his or her interest.”**

13. For the reasons that I have given earlier in this ruling however, the applicants' application dated 25<sup>th</sup> June, 2013 must fail. The same is accordingly dismissed with costs to the respondent.

**Delivered, signed and dated at KISII this 14<sup>th</sup> of November, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Abobo h/b for G. S Okoth                      for the applicants

Mr. Ochwang'i    for the respondent

Mr. Mobisa    Court Clerk

**S. OKONG'O**

**JUDGE**