



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**MISC CIVIL APPLICATION NO 172 OF 1992**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAND REGISTRAR, KWALE DISTRICT .....RESPONDENT**

**EXPARTE HASSAN SAID DELE & GILBERT ANALYA OMWITSA**

**JUDGMENT**

In this application the two applicants seek 2 orders as follows:

- (a) Order of *mandamus* directing the Land Registrar Kwale District to expunge from the registration records of Kwale/Mabokoni/913 Kwale/Mabokoni/1829 and Kwale/ Mabokoni/18.30 the caution file by Hamisi Saidi Mwakizondo.
- (b) That an order of *certiorari* to remove into the High Court and quash the order of the Land Registrar Kwale District made by him at Kwale on 27th May, 1992.

It is contended on behalf of the applicants that after a sale agreement between the 2 applicants the Msambweni Land Control Board granted its consent to the transaction of sale of Kwale/Mabokoni/1829. The relevant letter of consent was exhibited in these proceedings. The vendor is shown as Hassan Saidi Dele and the purchaser is named as Andalya Omwitsa Gilbert. Both are these applicants. A transfer of land was duly signed and the application for registration dated 9th of March, 1993.

It ought to be stated here that the said plot together with plot 1830 were subdivisions of plot Kwale/Mabokoni/913 against which there was a caution lodged by one Hamisi Saidi Mwakizondo. The caution forbids the registration of disposition of that parcel of land. No entries affecting this piece of land can be registered as long the caution remains in place.

So when the applicant sought to register the transfer in respect of the plot 1829 the Land Registrar rejected the application on the ground that there was the caution. It is averred in paragraph 8 of the supporting affidavit that the applicant then invoked s 133 (2) of the Registered Lands Act and sought the hearing of the caution with the view that the caution be removed.

In paragraph 9 of the same affidavit it is averred when the parties appeared before the Land Registrar for the hearing of caution, the latter (ie the Land Registrar) "refused to hear the applicants and the objector regarding the facts and circumstances pertaining to the caution. This time the Land Registrar cited a suit which is pending before this Court. According to the Land Registrar (whose ruling is annexed to the present application as "p") the hearing of the caution was tantamount to adjudicating on matters which were pending before the Court in Criminal Case No 561 of 1992 (Kwale) and RMCC No 29 of 1991. The

applicants were thus unable to get the fruits of the sale transaction. The purchaser could not be registered as the owner of the plot which he had purchased and for which the Divisional Land Control Board had given to its consent. Hence this present application seeking the orders of *certiorari* and *mandamus*.

The issue to be determined is whether the Land Registrar was justified in refusing to hear the applicant on their plea that the caution on plot 913 should be removed to pave the way for the registration of the transfer already adverted to.

In this application the Land Registrar was represented by learned state counsel Mrs Momanyi The party whose caution is the subject matter of the proceedings before the Land Registrar appeared in this application as an interested party and was represented by Mr Sagasi. He has filed a very lengthy replying affidavit of 19 paragraphs. But most of the averments are merely contentious and not at all factual as required of a classic affidavit. Basically, it seeks to show that the sale transactions between the applicants ie the sale of plot No 1829 should not have been passed by the relevant Land Control Board in as much as it is an invalid transaction. The short answer to this argument is to be found in the Land Control Act cap 302 itself which, in part IV, established the procedure or modality for challenging the decisions of the lower hierarchies of the Boards. It is certainly plain that a consent of the Land Control Board in regard to the transaction between these applicants was not challenged in the manner contemplated by the Act. It is therefore a valid consent.

But the aspect of crucial nature is whether the interested party was entitled to lodge the caution in respect to the parcel No 913 and thereby prevent the registration of one subdivision as alleged in the present application.

It is instructive to note that a person who is entitled to register a caution in respect of a given piece of land must be one who is able to assert and manifest his registrable interest in that piece of land. See s 131 of the Registered Lands Act. But it must be observed that the mere assertions or protestations cannot constitute evidence of a registrable interest. And by the same token it should be said that caution registered by a person who is not able to legally demonstrate his registrable interest in the parcel of land is defective and cannot be upheld by the Court.

The interested party in his affidavit unequivocally appreciates that a valid consent of a Land Control Board is a categorical imperative before the sale transaction becomes consummate: The purchaser cannot be registered as owner by virtue of the transfer unless the sale has been consented to by the Land Control Board. See s 6 (1) of the Land Control Act. The time within which the Board consent is obtained is also categorically prescribed. It is 6 months. See s 8 (1) of the Act. If it is not so obtained then the transaction is void and by virtue of s 22 of the Act any acts in furtherance of the sale transaction are criminal acts for which the perpetrator can attract unto himself the penalty stipulated therein.

Although the interested party claims to have purchased part or the whole of plot 913 he was never able to point to any letter of consent from the Land Control Board validating the transaction. I am sure that he would have shown it if he had one. I therefore find that he does not have any. It follows that the sale is already void. It can never be registered, and so the caution in respect of the land is anything but an act of a dog in the manger.

In the absence of the Board's letter of consent his seeking specific performance of the sale is altogether misconceived and it is a non-starter. Under s 7 of the Act the interested party can only recover the purchase price as a debt.

Upon the foregoing I hold that the caution in question was wrongly lodged and equally, it was wrongly used by the Land Registrar to reject the application for registration of a valid transfer. There is no way in which the Land Registrar's action can be legally rationalized. I hold that the Land Registrar was not at all entitled to decline to show Mr Omwitsa the alleged caution" In so doing he was preventing a party the chance to see and fathom the impediment which obstructed the registration of his transaction. A Land Registrar by the virtue of his position, ought to assist such parties rather than create unnecessary hurdles in their way as has been proven in these proceedings. I therefore deprecate his conduct as it smacks of

bias in favour of the cautioner.

Accordingly, the decision of the Land Registrar was irregularly made. It is brought up and quashed. It is ordered that the caution be removed from the Register to pave way for the registration of the legally valid transaction between the applicants.

The application is allowed. I order that applicants be paid their costs of the application by the Land Registrar.

Dated and delivered at Mombasa this 14<sup>th</sup> day of October, 1993

**I.C.C WAMBILYANGAH**

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**JUDGE**