



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 84 OF 2015**

**FABIANUS WANYAMA..... 1<sup>ST</sup> APPLICANT**

**BEATRICE AYUNGA OJIAMBO..... 2<sup>ND</sup> APPLICANT**

**= VERSUS =**

**BONFACE ONYANGO OKHAYO..... RESPONDENT**

**R U L I N G**

1. The Defendants/Applicants filed the notice of motion application dated 22/9/2020 against the Plaintiff/Respondent under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and sections 73(1) and 78(2) of the Land Registration Act. The orders sought are;

- 1) This Honourable Court be pleased to remove and/or lift the Restriction restricting dealings in Land Parcel No. SAMIA/BUTABONA/1626.**
- 2) This Honourable Court be pleased to remove the Caution lodged on Land Parcel No. SAMIA/BUTABONA/1625.**
- 3) The Orders issued herein be served upon the Registrar of Lands, Busia for compliance.**
- 4) Costs of this application be provided for.**

2. The application is premised on the grounds listed on the face of it *inter alia*;

- 1. That there is a Restriction and a Caution registered by the Respondent on L.R No. SAMIA/BUTABONA/1626 and L.R No. SAMIA/BUTABONA/1625 respectively, the suit lands in the matter.*
- 2. That the Restriction and Caution were registered on the basis of this suit, pending its hearing and determination.*
- 3. That the suit has since been dismissed based on Judgment rendered by this Honourable Court on 7<sup>th</sup> May 2019.*
- 4. That the continued existence of the Restriction and the Caution on these parcels of land is an infringement on the Applicant's proprietary rights.*

3. The 1<sup>st</sup> Applicant deposed that the court on 7<sup>th</sup> May 2019 dismissed the Respondent's suit. That the Applicants now have no intention of proceeding with the case Busia CMCC No. 468 of 2014 which was filed against the Respondent. The Applicants deposed that the Respondent had on 29/8/2016 placed a restriction on the suit title on the basis of the pendency of this suit and its determination. That since the suit has been dismissed, the restriction ought to be removed.

4. The Respondent filed a replying affidavit on 16<sup>th</sup> October 2020 opposing the application. He deposed that he lodged the Cautions on title numbers Samia/Butabona/1625 and 1626 awaiting final determination of both this case and CMCC 468 of 2014; with the later suit still pending. That nothing has been annexed to this application to prove that case No. 468 of 2014 no longer exists or that it was stayed. Consequently, the cautions cannot be removed. He urged the court to dismiss this application with costs.

5. The parties chose to argue the application by filing of written submissions. Only the Applicants' submissions are on record. The applicants opened their submissions by rehashing the facts contained in their pleadings and on record. Counsel for the Applicants proceeded to paraphrase on the subject matter in dispute in BSA CMCC 468 of 2014 and the particulars of fraud pleaded. The Applicants concluded their submissions by relying on the provisions of section 73(1) and 78 of the Land Registration Act, 2012 which allows for removal of the restrictions. They urged the Court to allow their application.

6. The Applicants moved the court pursuant to the judgement rendered on 7<sup>th</sup> May 2019. In the plaint for which the judge delivered himself the prayers sought was for; **“An order of injunction restraining the Defendants jointly and severally, their agents and those claiming under them from chasing away, beating up the plaintiff’s his family, workers quests and visitors or in any way interfering with the plaintiff’s occupation and use of his land being SAMIA/BUTABONA/1626”**.

7. The Applicants have confirmed that the Restrictions/Cautions were placed on 29<sup>th</sup> August 2016 during the pendency of this suit. I have looked at the copy of certificate of official search showing registration of the caution and note that the same was not made pursuant to any court order. Secondly, the statement of defence filed by the Applicants was not amended to include a counter-claim for the removal of the restrictions at the conclusion of the trial. In my opinion, the court is *functus officio* and cannot make any substantive orders which were not in issue during the trial. The manner of applying for removal of a Caution is clearly provided for in section 73(2) & (3) and section 78(1).

8. The Respondent also raised the issue of pendency of CMCC 468 of 2014 which relates to same parties and same subject matter. I have perused the record and although the file for Busia CMCC No. 468 of 2014 was put inside this file, there was no order transferring it to this court or consolidating it. Therefore, any intention/action of the Applicants in that case can only be expressed/made before the relevant court. It is irrelevant for the Applicants to submit that they do not intend to prosecute the lower court case as no order can be made in that file based on submissions filed on a different matter.

9. The Applicants submitted that the Cautions placed on the suit titles ought to be removed since the matter in issue here is similar to the matter in issue in CMCC 468 of 2014 and the judgement delivered herein had a bearing in case No. 468 of 2014. The 1<sup>st</sup> Applicant here was the plaintiff in No. 468 of 2014. He has not explained why he filed the present application before having the previous case closed. Having failed to so do makes this present application premature since the purpose of the restriction was to preserve the Respondent’s interests in the suit parcels pending determination of this suit and BSA CMCC 468 of 2014.

10. In conclusion, I find that orders sought can only be granted subject to the withdrawal or determination of Busia CMCC 468 of 2014. Since BSA CMCC 468 of 2014 is deemed as still pending, I opine that this application is premature and hereby strike it out with no order on costs.

**Dated, signed & delivered at BUSIA this 16<sup>th</sup> day of Dec., 2020.**

**A. OMOLLO**

**JUDGE**