



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

MISCELLANEOUS APPLICATION NO. 12 OF 2018

IN THE MATTER OF TITLE NUMBER NYERI MUNICIPALITY BLOCK II/88

AND

IN THE MATTER OF NYERI ELC NO. 125 OF 2016 (Formerly NYERI HCCC NO. 224 OF 1992)

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

MWANGI RUKWARO.....1ST APPLICANT

JOSECK MWANGI MACHARIA.....2ND APPLICANTS

-VERSUS-

LAND REGISTRAR, NYERI.....RESPONDENT

RULING

1. Mwangi Rukwaro and Joseck Mwangi Macharia hereinafter referred to as “the applicants” brought the application dated 4th September, 2018 and filed on 5th September 2018 praying for orders that:-

(i)The caution lodged on land parcel number Nyeri Municipality/Block II/88 by Sheikh Mahmoud Mwanzi on 3rd April, 1995 be removed;

(ii) The restriction restricting dealings in land parcel number Nyeri Municipality/Block II/88 lodged on 13th July 2001 be lifted.

(iii) The orders issued herein be served upon the Land Registrar, Nyeri for compliance.

(iv) Cost of the application be provided.

2. The application is premised on the grounds that there is a caution and restriction filed by Mahmoud Shak Mwanzi alias Sheik Mahmoud Mwanzi (cautioner); that the cautioner is deceased; that the suit against the cautioner to wit **Nyeri ELC No.125 of 2016 (Formerly Nyeri HCCC No.224 of 1992)** abated following the death of the cautioner without being replaced as by law required.

3. It is the applicant’s case that the cautioner having died and there being no other claim on behalf of the cautioner, the caution ought to be removed as its purpose is spent.

4. Through the affidavit sworn in support of the application, an account of the circumstances leading to lodging of the caution is given and pointed out that a suit was filed *inter alia* seeking to permanently restrain the cautioner from interfering with the suit property; that an order of maintenance of *status quo* was issued pending the hearing and determination of the suit; that the suit abated by operation of law following the death of the cautioner without being substituted and that abatement of the suit was confirmed vide a ruling and order issued in **Nyeri ELC No.125 of 2016 (formerly Nyeri HCCC No.224 of 1992)**.

5. The order issued in the above cited suit is said to have been served on the Land Registrar, Nyeri with a view of removing or lifting the encumbrances and freeing the suit property who failed to remove the order rendering filing of this application necessary.

6. Explaining that continued existence of the encumbrances is prejudicial to them yet no prejudice will be occasioned on anybody if the caution/restriction is removed, the applicants urge the court to grant them the orders sought.

7. In support of the averments contained in the affidavit sworn in support of the application the applicants have annexed the following documents:-

(i) Certificate of lease showing that the applicants and others are the registered proprietors of the suit property;

(ii) The order issued in **Nyeri HCCC No.224 of 1992** for maintenance of *status quo* until the suit is heard and finalized.

(iii) Certificate of official search dated 30th July, 2018 showing that the suit property is encumbered by a caution in favour of the deceased person herein registered on 3rd April, 1995 and through a restriction filed on 13th July 2001 restricting dealings with the suit property until **Nyeri HCC No.224 of 1992** is finalized.

(iv) The ruling delivered on **22nd November, 2016 in Nyeri Elc No. 125 of 2016 (Formerly 224 of 1992)** *inter alia* declaring that the suit against the cautioner abated (ceased to exist) following the demise of the cautioner without being substituted as by law required.

(v) Order issued pursuant to the ruling referred to in (vi) above.

8. In reply and opposition to the application, the District Land Registrar Nyeri, Susan Mwanzawa, filed a replying affidavit through which she *inter alia* denies the applicants' allegation that an application for removal of the caution/restriction herein was made to them and that they failed to remove it.

9. Explaining that the office of the Land Registrar continues to maintain the caution because no application has been made by the applicants for consideration by the office of the Land Registrar as required under **Section 73(2) and (3)** of the Land registration Act, 2012 the Land Registrar maintains that she has not refused to remove the caution or lift the restriction.

10. Terming the application premature, a waste of judicial time and an abuse of the court process, the Land Registrar contends that the applicants had not exhausted the statutory avenues available to them before filing this application and urges the court to dismiss the application with costs to the respondents.

11. In a rejoinder, the applicants filed a further affidavit, sworn on **9th November, 2018**, through which they maintain that the court order referred to in paragraph 8(v) above was served on the respondent and that they continue to be prejudiced by the existence of the encumbrance yet no valid reason exists for its continued Registration. Arguing that the court has discretion to order removal of caution over a property in the interest of justice, the applicants urge the court to grant them the orders sought.

12. When the application came up for hearing parties relied on the filed pleadings.

Analysis and determination

13. As can be discerned from the documents annexed in support of the application herein, this court vide the order issued on **6th July, 2017 in Nyeri ELC 125 of 2016** declined to grant the applicants orders similar to the ones sought in this application on the ground that the suit against the respondent no longer existed and that the respondent was not a party to the application.

14. Whilst the applicants' claim that the order cited above was served on the respondent with a view of lifting the caution and/or restriction on the grounds that the suit against the cautioner had abated, there is no evidence that the letter annexed to the applicants' further affidavit was ever served on the respondent to warrant a finding that the contention by the respondent that her office never received either the order or an application for removal of the caution/restriction has been sufficiently controverted. Be that it may, It is noteworthy that besides determining that the suit against the defendant had abated, the court did not determine that the cautioner's interest in the suit property had ceased to warrant that order being used to remove the caution or the restriction. In essence, therefore, the order relied on could only be used as proof that the case preferred against the defendant in respect of the suit property had ceased to exist. It could however, not be used as proof that the circumstances that had led to lodging of the caution had ceased to exist.

15. The suit that abated was not by the deceased but by the plaintiffs. The effect of abatement of the suit was that the issues raised in that suit were not determined on their merits. To conclude that the issues raised in the suit were determined by operation of law is, in my view, a miscomprehension of the law.

16. A determination as to whether or not any person stands to suffer any prejudice if the caution filed against the title held by the applicants can only be made if the process of removing a caution as contemplated in law is followed. That is to say, there is need for the applicants to apply to the Registrar for removal of the caution. In that application, the applicants would give the reasons for seeking removal of the caution. The Registrar would then, write to the cautioner to show cause why the caution should not be removed. In that regard see **Sections 73 and 78** of the Land Registration Act, 2012 which in the relevant parts provides as follows:-

“73. (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.

(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

(3) If the cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

(4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for payment of costs.

“78(1) The Registrar may, at any time and on an application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.

(2) upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or otherwise order as it deems fit, and may make an order as to costs.”

17. As pointed out herein above, there is no evidence of any order issued by the court requiring the respondent to remove the caution and restriction hereto. The order relied on by the applicants shows that the court declined to issue the orders sought on the ground that the cautioner was not a party to it and that the application was premised on a none existent suit.

18. There is no evidence that the applicants made the application contemplated in **Sections 73 and 78** of the Land Registration Act cited above.

19. Whilst this court has power to order for removal of the caution/restriction herein, it cannot do that through a process where the cautioner or his legal representative has not been given an opportunity to participate. In the special circumstances of this case, I am of the considered view that the applicants should invoke the process provided in **Section 73(2) (3) (4)** of the Land Registration Act, 2012 as it is only through that process that it may be determined that there is no person with an interest in maintenance of the caution.

20. The upshot of the foregoing is that the applicants have not made up a case for being granted the orders sought. Consequently, the application is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court at Nyeri this 25th day of March, 2019.

L N WAITHAKA

JUDGE

Coram:

N/A for the applicant

Mr. Nderitu for the respondent

Court assistant – Kimeli