



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC NO. 45 OF 2019**

**IN THE MATTER OF: SECTIONS 57(5) &64 OF THE LAND REGISTRATION OF TITLES ACT, CAP 281 LAWSOF  
KENYA(NOW REPEALED)**

**AND**

**IN THE MATTER OF: ARTICLE 40 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ORDER 37 RULE 5 OF THE CIVIL PROCEDURE RULES 2010**

**MAGDALENE WAMBUI MBUGUA MUHIA.....1<sup>ST</sup> APPLICANT**

**MICHEAL WANYOIKE KUNGU.....2<sup>ND</sup> APPLICANT**

**STEPHEN MWAURA MWIHIA.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**CHARLES KING KIGWE.....1<sup>ST</sup> RESPONDENT**

**JOSEPH KANGTHE CHEGE.....2<sup>ND</sup> RESONDENT/CAVEATOR**

**TIMOTHY KIGURU GACHERU.....3<sup>RD</sup> RESPONDENT/CAVEATOR**

**REGISTRAR OF TITLES, NAIROBI CENTRAL REGISTRY.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

By an **Originating Summons** dated **4<sup>th</sup> March 2019**, the Applicant herein filed this suit against the Respondents for determination of questions that;

- 1. Whether the Applicants are entitled to be registered as the proprietors of land Reference No.10823/2267 (Original number 10823/11/26) for the reason that they acquired title to the said property by way of purchasers for value from the registered owner Charles King Kigwe, the 1<sup>st</sup> Respondent herein.**
- 2. Whether the Applicants are entitled to be registered as the proprietors of land Reference No.10823/2267(Original Number 10823/11/26) currently registered in the name of Charles King Kigwe, the 1<sup>st</sup> Respondent herein**
- 3. Whether the caveats lodged against Land Reference No. 10823/22667 (Original Number 10823/11/26) by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was done illegally and unlawfully.**
- 4. Whether the 4<sup>th</sup> Respondent ought to cause all necessary conveyance instruments to be executed and/ or registered against Land reference no.10823/2267 (original Number 1082/11/26) so as to ensure that land reference no. 10823/2267**

**(original Number 1082/11/26) is transferred in the names of the Applicants.**

**5. Should a permanent injunction issue against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents restraining them by themselves, their servants, legal representative agents or howsoever from trespassing, encroaching, constructing or in any other manner interfering with all that land described as Land Reference No. 10823/2267(Original Number 10823/11/26) as L.R No.145845.**

**6. Are the Applicants entitled to Damages for breach of contract?**

**7. Who should bear the costs of this suit.**

In their **Supporting Affidavit** the Applicants averred that on **11<sup>th</sup> August 2016**, they entered into sale agreement to purchase the suit property for a consideration of **Kshs.35 million** and on **25<sup>th</sup> January 2017**, their Advocates paid the balance of purchase price upon which they received the completion documents and a transfer instrument was then duly executed by the Applicants and the 1<sup>st</sup> Respondent. However upon presentation at the Lands titles Registry on the **22<sup>nd</sup> of June 2017**, it was rejected because two caveats were registered on **22<sup>nd</sup> June 2017** against the property claiming purchasers interest by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents .Further that their Advocates wrote to the 1<sup>st</sup> Respondent's Advocates and notified them of the existence of the caveat and they contacted the seller over the existence of the Caveats.

It was their contention that they received correspondences between the 1<sup>st</sup> and 4<sup>th</sup> Respondents touching on the removal of the caveat and an Application by the 1<sup>st</sup> Respondent for the removal of the Caveat. Further that their attempts to have the Caveats lifted have been rejected by the 4<sup>th</sup> Respondent.

That despite having the Caveats registered for over two years, the 4<sup>th</sup> Respondent has failed to take any action and though the 4<sup>th</sup> Respondent is tasked with conducting a hearing before placing the caveat, there is no evidence that the procedure was followed and in the circumstances herein, the said actions are illegal. That the 1<sup>st</sup> Respondent has been lacksture in ensuring that he has fulfilled his obligation despite the Applicants fulfilling their obligations under the Contract. Further the Applicants averred that the continued existence of the Caveats is prejudicial to them as they cannot register transfers against the suit property. Further that upon them being registered as owners the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents should be restrained in any manner from disrupting the Applicants' quiet enjoyment of the suit property.

In response the 1<sup>st</sup> Respondent filed a Replying Affidavit and averred that he has made several attempts to have the **Caveats** removed and made personal visits to the Ministry of Lands, but they have been futile. That it is the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents who are out to frustrate them and despite promises by the 4<sup>th</sup> Respondent that he would invite the parties for a hearing no steps have been made. That he terminated the sale agreement subject of the Caveat when the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to pay the balance of the purchase price and the termination was communicated to Respondents and their lawyers acknowledged the termination. He averred that despite efforts to have him refund the 2<sup>nd</sup> and 3<sup>rd</sup> respondents deposit less the 10% deposit, they have refused to remove the caution which they placed without any justifiable cause.

Despite being duly served, the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not participate in the proceedings.

The Court directed the parties to canvass the Originating Summons by way of written submissions. The Applicants through the **Law Firm of S. M. Muhia & Company Advocates** filed their submissions on **the 7<sup>th</sup> of June 2019**, and relied on **Section 71 to 75 of the Land Act** and submitted that in deciding whether a caution ought to be removed, the Court should consider whether the Cautioner has a substantial point in his favour. However from the evidence produced by the 1<sup>st</sup> Respondent the same is in the negative as the sale agreement was terminated.

The 1<sup>st</sup> Respondent through the **Law Firm of Makhandia and Makhandia Advocates** filed his submissions on the **19<sup>th</sup> of June 2019**, and submitted that they supported the removal of the caution as he does not have any interest in the suit property and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were in breach of the sale agreement

The Court has now carefully considered the written submissions, the quoted authorities and the relevant provisions of law. The Court has also considered the instant **Originating Summons** and the annexures thereto and it makes the following findings:-

The Applicants herein have sought for various orders which have not been controverted by the Respondents. They have further sought for the removal of caveats, lodged against the suit land herein **LR No.10823/**

**2267(Original Number 10823/11/26)**, which was lodged by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on **22<sup>nd</sup> June 2017**, as is evident from **annexture AKM-2**. The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents claimed purchasers' interest. It is evident from **annexture MWMM 5**, which is a **Certificate of Official Search** issued on **5<sup>th</sup> July 2017**, that indeed on **22<sup>nd</sup> June 2017**, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent did lodge caveats on the suit property claiming purchaser's interest. The lodging of caution on any property is governed by **Section 71(1)** of the **Land Registration Act**, which provides:-

**“A person who;-**

**a) Claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;**

b) ...

c) ...

**may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.”**

Therefore, from the above provision of law, a person who lodges caution over any property is one who claims right whether contractual or otherwise. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the search claimed to have purchaser's interest. However, the 1<sup>st</sup> Respondent who is the registered owner of the suit property has acknowledged that though there was a sale agreement between him and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, he later terminated the said sale agreement as the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents failed to pay up the balance of the purchase price. This Court has seen the letter dated **26<sup>th</sup> July 2017** from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Advocates acknowledging the termination of the agreement and for that reason, the Sale agreement became **null and void** and cannot be enforced since that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had not fulfilled their obligations under it.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not respond to the application herein and therefore the Applicants and the 1<sup>st</sup> Respondent's allegations remain uncontroverted or unchallenged. If indeed the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents sale agreement dated **10<sup>th</sup> August 2015** and **11<sup>th</sup> August 2015** were terminated, then the Sale Agreements are not enforceable and they cannot claim to have any interest over the suit property.

See the case of **Kenya Breweries Ltd...Vs...Kiambu General Transport Agencies Ltd Civil Appeal No. 9 of 2000 (2000)** 2EA where

the Court of Appeal held that;

**“if the agreement is mere nudum pactum, it would have no cause of action for breach.....’**

Though the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent had a duty to justify the lodging of the said caveats and the 4<sup>th</sup> Respondent also had a duty to inform the registered proprietor of the lodging of the caveats beforehand, he failed to do so. The 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents did not appear in court to defend or justify their action of lodging the caveats in issue. The Court is persuaded by the findings in the case of **Maria Nganga Gwako...Vs... Charles Mwenzi Nganga, Civil Appeal No.287 of 2012 (2014) eKLR**, where the Court held that:-

**“When a caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place.....**

**In the absence of any reasonable cause shown by the Respondent as to why the said caution should not be removed, the application for the removal of the same must succeed”.**

**Section 73(1)** of the **Land Registration Act**, states as follows:-

**“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”.**

The cautioner has not applied to remove the Caution. However the Applicants who claim purchasers interest have done so and the said application is supported by the 1<sup>st</sup> Respondent who is the registered owner of the suit property. The cautioners have not raised any objection on why the caution should not be removed.

The Court had earlier found that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who are the cautioners had no basis for lodging the said caution. The Applicants have demonstrated that they have interest over the suit property and the 1<sup>st</sup> Respondent the registered proprietor of the suit property has also supported the removal of the caution. The Court finds that the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents have no basis for continuing to have the caution lodged against the said title.

Without any objection from the Respondents and without any reasonable cause being shown as to why the caution should remain in place, the Court finds that the Applicant's **Originating summons** dated **4<sup>th</sup> March 2019** is **merited** and the same is allowed. **Consequently, the Court finds that the Applicants questions no.1,2,3,4,5 & 7 are answered in the affirmative and they are entitled to them.**

However, with regard to the issue of costs and Damages for breach of contract, the Court find that the 1<sup>st</sup> Respondent has shown through evidence tendered that he made attempts to have the Caveats removed and therefore it would be difficult to fault him. However the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents led to the filing of this suit and therefore they are liable. The Applicants are the successful litigants and are entitled to costs which should be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein.

It is so ordered.

**Dated, Signed and Delivered at Thika this **29<sup>th</sup>** day of **November 2019**.**

**L. GACHERU**

**JUDGE**

**29/11/2019**

In the presence of

M/S Mwangi for Applicants

No appearance for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> Respondent

No appearance for 3<sup>rd</sup> Respondent

No appearance for 4<sup>th</sup> Respondent

Lucy - Court Assistant.

**L. GACHERU**

**JUDGE**

**29/11/2019**