



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 478 OF 2017

PETER KAHUHO MUCHAI.....PLAINTIFF

VS

FRANCIS MUCHAI KAHUHO.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant on 13/10/2017 seeking orders as follows ;-

a. The caution lodged by the Defendant on 29th August 2017 over the Plaintiff's property being ITHANGA/NGELELIA BLOCK 1/303 be and is hereby removed.

b. Cost of suit.

2. The Defendant was served but failed to enter appearance nor file a defence prompting the Plaintiff to seek and obtain interlocutory judgement against the Defendant and list the matter for formal proof. The Defendant's case is therefore undefended.

3. At the formal proof hearing the Plaintiff testified that he is the registered proprietor of the suit land. He attached a copy of official search as well as the copy of title of the suit land registered in his name. The Plaintiff averred that neither he nor the defendant reside on the suit land. That he bought the defendant a piece of land that he resides with his family.

4. Section 71 (1) of the Land Registered Act Cap No. 3 of 2012 states as follows;-

“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) is entitled to a licence; or

(c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, 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”.

Section 73 states as follows;

“(1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.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

(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

(6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation”.

I have seen the caution allegedly lodged by the Defendant and is described as beneficial interest. It is not one of those covered under section 71 (1) above. A beneficial interest is incapable of creating a right protected by section 71(1).

5. It is trite law that when a caution is objected by a proprietor of the land the onus is upon the cautioner to justify the lodging of the caution. The Defendant having failed to enter appearance and file defence notwithstanding service, is clear to the Court that the Defendant failed to discharge that duty.

6. In the absence of evidence to the contrary the Plaintiff's claim succeeds and the Court grants his prayers.

7. Parties being related, each party to meet their own costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF MARCH 2018.

J G KEMEI

JUDGE