



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT THIKA**  
**THIKA LAW COURTS**  
**ELC MISC CASE NO.71 OF 2017**

**DINARA PROPERTIES LIMITED.....APPLICANT**

**-VERSUS-**

**MALCEDIAN PROPERTIES LIMITED.....1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, THIKA.....2<sup>ND</sup> RESPONDENT**

**RULING**

Coming up for determination is the Applicant's *Notice of Motion* application dated **12<sup>th</sup> October 2017**, brought under various provisions of law and more so Section 73(1) of the Land Registration Act, No.3 of 2012 and Section 3A of the Civil Procedure Act. The Applicant has sought for an order that:-

- 1) That the caution lodged against the parcel of land Thika Municipality Block 14/96, by the 1<sup>st</sup> Respondent and registered by the 2<sup>nd</sup> Respondent be and hereby removed.***
- 2) That the costs of this application be provided for.***

The application is premised upon the following grounds:-

- a) That the Applicant is the legally registered owner of the parcel of land known as Thika Municipality Block 14/96.***
- b) That the 1<sup>st</sup> Respondent herein has illegally, wrongfully and unlawfully lodged a caution on the said parcel of land without any viable claim or basis.***
- c) That the Applicant is in the process of erecting and completing development of residential apartments and selling the said apartments to interested purchasers.***
- d) That due to the illegal, wrongful and unlawful caution by the 1<sup>st</sup> Respondent, the Applicant has been unable to obtain consents related to the parcel from the Lands Registry at Thika.***
- e) That the 1<sup>st</sup> Respondent has refused, failed and/or neglected to remove the caution despite being requested to do so.***

**f) That despite being requested to remove the caution, the 2<sup>nd</sup> Respondent has neglected, refused, failed and/or ignored to remove the caution.**

**g) That the Applicant is apprehensive that since it cannot proceed with obtaining the necessary consents from the Lands Registry at Thika, the legal purchasers of the said development may terminate the sale contracts resulting into enormous losses for the Applicant herein.**

**h) That it is in the best interest of justice that this application is allowed.**

The application is further supported by the *Affidavit* of **Andrew Kamau Muhiu**, the Applicant herein who reiterated the contents of the grounds in support of the application and also stated that he is the lawfully registered owner of the land parcel known as **Thika Municipality Block 14/96**, wherein he is in the process of erecting and completing developments of **250 apartments for sale**. He further averred that the 1<sup>st</sup> Respondent placed **caution** on the suit property in **August 2017**, claiming to have **purchaser's interest**, but the 1<sup>st</sup> Respondent had failed to pay the agreed purchase price as stated in the **two Sale Agreements** dated **2<sup>nd</sup> June 2015**. Therefore, it was his contention that as per his advocates advise,

the **two Sale Agreements** are **null** and **void** for lack of consideration as the Respondent failed to pay any of the deposit towards the purchase price. The Applicant further deposed that despite writing a **demand letter** to her to remove the said caution, the Respondent has wilfully failed, ignored neglected and/or refused to withdraw the same to the detriment of the Applicant. The Applicant contended that due to the caution, it has been unable to obtain various consents from the **Thika Lands Registry** in regard to its development on the suit property thereby causing all transactions with the purchasers to come to a halt.

Further, he alleged that he has requested the 2<sup>nd</sup> Respondent to remove the unlawful and illegal caution placed on the suit property but the 2<sup>nd</sup> Respondent has **wilfully refused, failed, ignored** and/or **neglected** to have the said caution removed. He further contended that the caution by the Respondent is **ill-informed, baseless**, and **malicious** and only meant to hoodwork and deceive the Registrar that it has a claim leading to untold inconvenience to the Applicant.

It was his further contention that if the 1<sup>st</sup> Respondent had any interest if any, then it was only entitled to caution only the apartments claimed upon and not the entire suit property. Therefore, the Applicant contended that it was only fair and just that the caution on the suit property be removed and that it should be allowed to enjoy the benefit and use of its property without illegal and undue encumbrances. Further that

the Applicant will suffer irreparable harm and damage if the instant application is disallowed.

The Respondents did not file any responses to the instant application despite service of the same as is evident from the *Affidavit of Service* of **Mercy K. Mberia, Advocate**.

The Court directed the Applicant to canvass the application by way of **written submissions** which was done on **16<sup>th</sup> January 2018**. The Applicant relied on various decided cases among them the case of **Kenya Breweries Ltd...Vs...Kiambu General Transport Agency Ltd, Civil App. No.9 of 2000(2000) 2EA 398**, where the Court of Appeal held that:-

***“If the agreement is mere nudum pactum, it would give no cause of action for breach, particularly if its effect was to give a voluntary indulgence to the other party to the agreement”.***

Further, the Applicant relied on the case of **Muchanga Investment Ltd....Vs....Safari Unlimited (Africa) Ltd. & 2 Others(2009) eKLR (Civil Appeal NO.25 of 2002)**, where the Court held that:-

***“.....it should have been clear to the court that a Caveator cannot just claim a purchaser's interest unsupported by a sale agreement. In Boyes..Vs..Gathure 1969 EALR 385, the predecessor of this Court held:- ‘The nature of the registrable interest claimed was not disclosed***

***by the caveat and it should have been rejected by the Registrar'. By analogy and on the basis of the unchallenged documentary evidence, the court should have summarily done the same in the circumstances..."***

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 ***Notice of Motion*** and the annexures thereto and it makes the following findings:-

The Applicant herein has sought for removal of caution lodged against the suit land herein ***Thika Municipality Block 14/96***, which was lodged by the 1<sup>st</sup> Respondent on ***8<sup>th</sup> July 2017***, as is evident from ***annexture AKM-2***. The 1<sup>st</sup> Respondent claimed purchaser's interest. It is evident from ***annexture AKM-4***, which is a ***Certificate of Official Search*** issued on ***1<sup>st</sup> September 2017***, that indeed on ***8<sup>th</sup> July 2017***, the 1<sup>st</sup> Respondent did lodge a caution 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 1<sup>st</sup> Respondent in its application claimed to have purchaser's interest. However, the said Caveator did not attach any evidence to show that it was a purchaser of the suit property.

The Applicant has alleged that indeed the 1<sup>st</sup> Respondent entered into ***two Sale Agreements*** for purchase of ***two apartments***, which were among the other ***250 apartments*** that Applicant had developed for sale on the suit property. However, the 1<sup>st</sup> Respondent did not deposit any purchase price and has not paid any money as purchase price. Therefore the said ***Sale Agreements*** are ***null*** and ***void*** and cannot be enforced for lack of consideration.

The 1<sup>st</sup> Respondent did not respond to the application herein and therefore the Applicant's allegations remain uncontroverted or unchallenged. If indeed the 1<sup>st</sup> Respondent has not paid any monies as consideration for the purchase of the two apartments as alluded by the Applicant, then the Sale Agreements are not enforceable and she cannot claim to have any interest over the said apartments.

The Court would be guided by the findings in the case of ***Kenya Breweries Ltd....Vs....Kiambu General Transport Agencies (supra)*** where the Court of Appeal held that ***'if the agreement is mere nudum pactum, it would have no cause of action for breach.....'***

Further, the 1<sup>st</sup> Respondent had a duty to justify the lodging of the said caution. In its application for lodging of caution, the 1<sup>st</sup> Respondent did not attach any evidence of purchase of any property from the Applicant or in particular the suit property. Further, the 1<sup>st</sup> Respondent did not appear in court to defend or justify its action of lodging the caution. The Court will further be 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”.***

The Respondents herein did not appear in court to justify why the caution lodged by the 1<sup>st</sup> Respondent should remain in place.

This application is brought vide **Section 73(1)** of the **Land Registration Act**, which 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 but the proprietor of the suit property has done so vide this application. The cautioner has not raised any objection on why the caution should not be removed. The Court had earlier found that the 1<sup>st</sup> Respondent who is the cautioner had no basis for lodging the said caution. The Applicant has demonstrated that it is the registered proprietor of the suit property and that the Respondents have no basis for continuing to have the caution lodged against the said title.

Therefore in the absence of 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 ***Notice of Motion*** dated ***12<sup>th</sup> October 2017*** ***is merited and the same is allowed entirely in terms of prayer No.2 with costs being in the cause.***

It is so ordered.

**Dated, Signed and Delivered at Thika this 18<sup>th</sup> day of May 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Kamura for Applicant

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

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

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

Court – Ruling read in open court in the presence of Mr. Kamura for the Applicant and absence of the Respondents.

**L. GACHERU**

**JUDGE**

**18/5/2018**