



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 28 OF 2012 (O.S)**

**IN THE MATTER OF REGISTRATION OF TITLES ACR, CAP 281**

**AND**

**IN THE MATTER OF REMOVAL OF CAVEAT OVER LAND REFERENCE NUMBER  
2544/SECTION 1/MAINLAND NORTH**

**PRIME BANK LIMITED.....APPLICANT**

**VERSUS**

**JANE GAKII MARETE.....RESPONDENT/CAVEATOR**

**THE REGISTRAR OF TITLES.....INTERESTED PARTY**

**JUDGMENT**

1. For determination is the originating motion dated 6<sup>th</sup> February 2012 seeking the following orders;

**a) This Honourable Court be pleased to find that caveat no.15351/6 registered on 14<sup>th</sup> October 1998 is wrongful;**

**b) This Honourable Court be pleased to issue an Order that caveat No. 15351/6 registered on 14<sup>th</sup> October 1998 be and is hereby removed;**

**c) Pursuant to (a) and (b) above, this Honourable Court be pleased to issue a declaration that the Applicant is entitled to realize its security being its registered charge over Land Reference No. 2544/SECTION 1/MAINLAND; and**

**d) Costs of this Application be provided for**

2. The application is premised on the grounds listed on the face of it and on the affidavit sworn by Mohammed Mungai. In brief, the applicant deposes that on 23. 4. 1996 it registered a charge over Land Registration no.2544/Section 1/MN for a loan of **Kshs 550, 000** it advanced to Ahmed Abdalla Mwidau. The said Mwidau defaulted and the applicant sued for recovery of the money in suit no HCC 233 of 2007. Subsequent to the registration of the charge, the 1<sup>st</sup> Respondent caused to be registered a Caveat on 19<sup>th</sup> March 1998 on the same title.

3. That on 10<sup>th</sup> August 2011, the applicant herein applied to the registrar (2<sup>nd</sup> Respondent) to remove the Caveat but the same was not removed. It has therefore filed this application asking the court to order the

1<sup>st</sup> Respondent to show cause why the Caveat should not be removed to enable them realise the security.

4. The motion is opposed by 1<sup>st</sup> Respondent vide her replying affidavit sworn on 24<sup>th</sup> day June 2013. She deposed that on 4<sup>th</sup> June 1998 they executed a sale agreement between Mr. Ahmed Abdalla Mwidau & herself regarding the suit plot. That clause 12 of their agreement required Mr. Mwidau to repay the loan on completion of the purchase price and retrieve the title. The 1<sup>st</sup> Respondent deposes that she paid the full price but has not been issued with the completion documents. Further she asked the vendor (Mr Mwidau) to discharge the title which he has not done to date and that any letter she wrote to the vendor would be copied to the applicant.

5. The 1<sup>st</sup> Respondent deposed that she placed the Caveat to protect her interest and her action is in conformity with the provisions of section 57 of the Registration of Titles Act. Further that she has extensively developed the suit premises and the present application has been brought in bad faith and is meant to cause prejudice to her as she stands to suffer irreparable loss.

6. Both advocates filed written submissions. The applicant began by narrating the facts as brought out in its pleadings. That the chargee is entitled to priority over the caveat as stated in section 28 of the Registration of Titles Act (repealed) and was therefore irregularly lodged and should be removed. That the alleged prejudice suffered by the 1<sup>st</sup> Respondent is of her own making having had notice of the applicant's interest in the land. Lastly that clause 12 of the sale agreement provides a remedy for the 1<sup>st</sup> Respondent.

7. The 1<sup>st</sup> Respondent also filed a supplementary affidavit in which she deposed that the O.S herein is incurable defective as the appropriate approach should have been by way of judicial review. Secondly that the O.S. offends the provisions of order 37 of the Civil Procedure Rules. Lastly that the applicant being a holder of a decree in HCC 233 of 2007 has waived its remedy of statutory power of sale over the subject property.

8. The 1<sup>st</sup> Respondent in her submissions also narrated the contents of the pleadings and she urged that the motion be struck out with costs. The applicant replied to this submission on the basis of the procedural objections raised. The applicant submit that section 57 (5) & (6) of the Registration of Titles Act (repealed) gave the court power to remove a caveat. And section 64 empowered the court to direct the registrar to remove such a caveat. That those sections do not provide for the application to be by way of judicial review. Secondly that order 37 rule 5 of the Civil Procedure Rules provides that the application shall be brought by summons.

9. The applicant admitted that although the heading of the motion cited that the application was brought under order 37 rule 7 (1) & (2) instead of order 37 rule 5. That this anomaly is curable by the provisions of article 159 (2) (d) of the Constitution. In support of this line of submission, they referred to the case of **Crown Paints (Kenya) Limited vs Dry Associates limited (2015) eKLR** where the court held *that quoting the wrong provisions of the law is a procedural technicality that the courts overlook for the sake of substantive justice*. The applicant also cited the case of **Nancy Nyamira & Another vs Archer Diamond Morgan limited (2012) eKLR** where the trial judge took a similar position.

10. I will first commence with determining the issue of whether this originating motion is incompetent and therefore should be struck out. The 1<sup>st</sup> Respondent deposed that an O.S seeking to remove a caveat so as to have a property sold is not provided for under order 37 of the Civil Procedure Rules. The applicant in response said this is untrue and referred this court to the provisions of order 37 rule 5 which provides as quoted below;

**“An application under section 116 of the Government Lands Act or Section 57 of the Registration of Titles Act shall be made by originating Summons unless there is a pending suit involving the same land when the application may be made by summons in that suit.”**

11. The present motion was described to have been brought under section 57 (5) and 64 of Cap 285 and

Section 3 & 3A of Cap 21 and **order 37 rule 7 (1) & (2) of the Civil Procedure Rules**. The anomaly being quoting Rule 7 instead of Rule 5 which deals with caveats. Is this anomaly fatal to the application? According to the 1<sup>st</sup> Respondent's advocate in his oral submissions he stated that order 37 deals with adverse possession. While it is true that order 37 rule 7 deals with adverse possession, rule 5 allows a party who wishes to remove a caveat under section 57 of Cap 281 to come to court by way of an originating Summons. It is therefore not true to submit that order 37 deals only with issues of adverse possession.

12. Did quoting the wrong rule therefore make the application fatally defective? I shall adopt the finding of my learned brother Justice C. Kariuki in the case of *Crown Paints Supra* that this is a procedural technicality that the court should overlook. The 1<sup>st</sup> Respondent is well aware of the applicant's claim as brought out in the summons. Therefore quoting a wrong rule by itself does not occasion her any injustice as she knew what defence to adopt to attack the claim. Consequently, it is my finding that the defect as pointed out by the 1<sup>st</sup> Respondent is curable under the provisions of article 159 2 (d) of the Constitution

13. Does the application have any merit? It is not in dispute that the charge was registered on 9<sup>th</sup> April 1996 while the caveat was registered on 14<sup>th</sup> October 1998, two years later. From the 1<sup>st</sup> Respondent's affidavit, it appears she was aware of the charge before entering the sale transaction with Mr Mwidau. I say so because in paragraph 4 of her affidavit, she said that they included in clause 12 of the sale agreement that Mr. Mwidau (the vendor) was to offset the loan as soon as the purchase price was paid in full. Clause 12 of that agreement reads thus;

**“That the title deed is now at the bank where it was lodged as a security and the vendor has to retrieve the same on completion of payment of the purchase price immediately in default of which the vendor shall pay and or forfeit the sum of Kshs.1 million as liquidated sum.”**

14. The 1<sup>st</sup> Respondent's remedy by virtue of her agreement lie on her being paid Kshs1,000,000 and not by registering a caveat on the title as she now deposes. The vendor was joined as an interested party on application of the 1<sup>st</sup> respondent and given time to file document to oppose the application. He never filed any within the timelines provided. The loan is still outstanding to date. The doctrine of equity **“of the first in time prevails”** supports the applicant's case. Further the law on charges gives a chargee priority to realise the security over any other debt. For this reason I find no basis why the caveat should not be removed as the caveator (1<sup>st</sup> Respondent) has her remedy provided for in the sale agreement.

15. Lastly the 1<sup>st</sup> Respondent stated that the applicant lost its right to exercise its statutory power of sale by virtue of the decree obtained in HCC 233 of 2007. No basis was laid to support this averment. Even if that were so, the applicant still has the liberty to sell the immovable property (the suit land) in execution of the said decree. Similarly the 1<sup>st</sup> Respondent said the application was statute barred. Again no basis was laid for this. In addition the 1<sup>st</sup> Respondent's agreement was executed on 4<sup>th</sup> June 1998; approximately 16 years has gone by without her bringing a claim against the vendor or the applicant. She may be the one in the precarious position of her claim being caught with statute of limitations as regards when suits based on contract may be filed.

16. In conclusion, I am satisfied there is merit in the originating summons dated 6<sup>th</sup> February 2012 and hereby do allow it in terms of prayer (a), (b) and (c). Each party shall bear their respective costs of the summons

**Dated and Delivered at Mombasa this 24<sup>th</sup> Day of JANUARY 2017**

**A. OMOLLO**

**JUDGE**