



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION**

**MISCELLANEOUS APPLICATION NO. 22 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES 2010 LAWS OF KENYA**

**AND**

**IN THE MATTER OF LEAVE FOR THE ORDERS OF MANDAMUS PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES AND SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE LAND REGISTRAR KAJIADO LAND REGISTRY.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**EX PARTE APPLICANT: .....MARIA NTINYAYIAN LIESEYO**

**JUDGEMENT**

The application before court is a notice of motion dated 23rd May, 2017 by the ex parte Applicant brought pursuant to order 53 rule 1 & 2 of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act and Section 73 (1) & (2) of the Land Registration Act and all the other enabling provisions of the law. It seeks for the following:

- a) An order of MANDAMUS compelling the 1st and 2nd Respondents to remove and/or lift a caution pursuant to the provision of Section 73(1)(2)(3) &(4) of the Land Registration Act of 2012 registered against all that parcel of land known as Land Reference No. KAJIADO/KITENGELA/38015 and KAJIADO/KITENGELA/38016.
- b) That the costs of this application be provided for
- c) That such further and other relief that this Honourable Court may deem just and fit to grant.

The application is based upon the grounds set out in the Statutory Statement of facts filed on the 13th

March, 2017 which in summary is that the ex parte Applicant is the absolute and legally registered owner to all that parcel of land known as Land Reference Number KAJIADO/KITENGELA/38015 and 38016 (suit lands) respectively vide a court order. On 21st December, 2016 the ex parte Applicant visited the Kajiado Land Registry for purposes of conducting a search and found out a caution had been lodged against the suit lands by one SOLOMON TOBIKO. The ex parte applicant was awarded the parcels of land through proceedings which the cautioner SOLOMON TOBIKO was involved but he never appealed.

The application is supported by the affidavit of MARIA NTINYAYIAN LIESEYO where she deposes that on 21st December, 2016 she visited the District Land Registry at Kajiado for purposes of conducting a search on the suit lands and found that there existed a caution lodged by the 1st Respondent on the said parcels of land. She states that sometime in 2011 she filed a land disputes tribunal case no. Kajiado North TC 267/7/011 against one SOLOMON TOBIKO that involved the issue of occupation the suit land, which was heard and determined in her favour and no appeal was preferred against it. She avers that the award from the tribunal was adopted by the Principal Magistrate Court at Kajiado vide Land Disputes Tribunal Case no. 32 of 2012 after which the suit parcels of land were transferred to her name. She claims she has written a letter dated 10th January, 2017 through her advocates on record to the District Land Registrar Kajiado to have the caution lifted and or removed but he has failed to act upon it. She affirms that the Respondents have no legal basis or any justifiable claim against the suit lands and the Caution has no legal basis or interest on the same too. Further that the cautioner has obstructed her from undertaking any development planning on the suit lands and his claim of beneficial interest is malicious, baseless and wrongful since he received his fair share. She seeks the Court intervention to have the caution removed.

### **Applicant's Submission**

Counsel for the Ex-Parte Applicant reiterated the contents of the Motion, the Statement and the affidavits, and submitted that the dispute arose between the Ex- Parte Applicant and a family member called Solomon Tobiko with the matter being heard and determined vide the Kajiado Land Disputes Tribunal (case no.267/7/011) where they decided that it is Solomon Tobiko who had obtained title deeds belonging to the Ex-parte Applicant during demarcation. He relied on the proceedings and findings from the Tribunal which were annexed as 'NMN 3'.

He submitted that the Tribunal's Award was adopted vide the Kajiado Principal Magistrate's Court Case No. 32 of 2012 with a Decree issued on 24th July, 2012 in which it was ordered that the two parcels of land revert to the Applicant and the Executive Officer to sign on behalf of the Objector. The Objector failed to lodge an appeal and only lodged a caution in 2014. He reiterated that the Caution is in bad taste and should be removed.

I note from the affidavit of service dated the 10th July, 2017, the 1st and 2nd respondents were duly served on 22nd June, 2017 and 29th June, 2017 respectively but failed to enter appearance nor file a response to the proceedings herein. The application hence proceeded unopposed.

### **Analysis and Determination**

Leave to institute Judicial Review proceedings was granted on 24th April, 2017 hence application here is property before court

The Ex- parte Applicant submitted that she got the two suit parcels of land vide a decree of the court dated the 24th July, 2012 which has not been appealed against. Further that one Solomon Tobiko who was a family member has registered a caution on the suit lands from 2014 and despite requesting the 1st Respondent vide her advocate's letter dated 10th January, 2017, to remove the said Caution, he has failed to do so and this is affecting her developing them.

In the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** held that -

*"It is important to remember that "mandamus" is neither a writ of course nor a writ of right,*

***but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."***

*In relying on this case and since there is no evidence in the contrary to controvert the ex parte Applicant's Claim, I find that the order of mandamus as against the Respondents who are Public Officer is a necessary remedy to enable the ex parte Applicant enjoy her benefits over the suit lands. In the circumstances and taking into account the foregoing I make the following order:*

d) An order of MANDAMUS be and is hereby issued against the 1st and 2nd Respondents compelling them to remove and/or lift a caution registered by one SOLOMON TOBIKO in 2014 against all that parcel of land known as Land Reference No. KAJIADO/KITENGELA /38015 and KAJIADO/KITENGELA/38016 respectively. The *ex parte* applicant will also have the costs of this application.

**Dated signed and delivered in open court at Kajiado this 18th day of October, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**