



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC.MISC.38 OF 2017
IN THE MATTER OF WITHDRAWAL OF CAUTION
MARY NJERI MWAURA.....APPLICANT

RULING

The Applicant herein filed this *Miscellaneous Application* dated **13th June 2017**, and sought for the following orders:-

- 1) That this Honourable Court be pleased to grant orders directing the Land Registrar Kiambu to withdraw a Restriction and/or Caution against LR.No.Limuru/Bibirioni/T.443.***
- 2) That costs of this application be provided for.***

The application is based on the *Affidavit* of *Mary Njeri Mwaura* and on the following grounds:-

- a) That there exists a Restriction and/or Caution against LR.No.Limuru/Bibirioni/T.443, placed by Kenya Flour Mills (1975) Limited and which Company is not in existence todate.***
- b) That the caution had been placed against a loan facility which was later paid before the Company closed down its business.***
- c) That it is evident that cautioner is no longer an existing Company as per the Registrar of Companies records.***

In her Supporting Affidavit, the Applicant averred that she is the administratrix of the estate of *Mwaura Muiruri*, who was the registered owner of **LR.No.Limuru/Bibirioni/T.443**. Further that in the **year 1993**,

the suit property **LR.No.Limuru/Bibirioni/T.443**, was used as security for a loan facility by her late husband. She also averred that upon payment of the said loan facility, the deceased never followed up the issue of withdrawal of the caution till his demise. She further contended that when she went to the Lands office at Kiambu to have the said caution removed, she was advised to secure orders directed to **Kenya Flour Mills (1975) Ltd**, to remove or withdraw the existing restriction on the suit property. She also alleged that she cannot trace their offices and she was informed by the Registrar of Companies that the said Company is no longer in existence as no returns have ever been made for **over 20 years**. She urged the Court to allow her application.

The application was served on the District Land Registrar Kiambu, but he did not enter any appearance nor file response to the application. The **Director of Kenya Flour Mills (1975) Ltd, Parshoram Natha**

Patel was also served through registered post as is evident from the payment receipts dated **12th October 2017**, but there was no response too from the said Flour Mills.

The Applicant filed written submissions on **1st November 2017**, and urged the Court to allow her application.

This application is anchored under Section 63(c) and (e) of the Civil Procedure Act and the relevant Section is 63(e) which provides that:-

“In order to prevent the ends of justice from being defeated, the Court may if it is so prescribed;- make such other interlocutory orders as may appear to the court to be just and convenient”.

The application is also brought under Section 3A of the Civil Procedure Act which grants the court inherent power to make such orders as may be necessary for the ends of justice to be met or to prevent abuse of the process of court.

The Applicant has sought for orders against the Land Registrar Kiambu. She did not enjoin the said Land Registrar, Kiambu as a Respondent herein. However, the application herein is a Misc. Application which was served on the said Land Registrar Kiambu as is evident from the Affidavit of Service filed in court on **17th October 2017**.

Order 1 Rule 9 provides that:-

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it”.

The application herein is in regard to the right of the Applicant who cannot deal with the suit property due to the existence of the caution placed on the suit property in the **year 1982** in favour of **Kenya Flour Mills Ltd (1975)**. It is evident from the letter dated **12th September 2014**, that the said company has not been in existence since the **year 1994**. The Director of the said company was served with the instant Misc. Application but he failed to respond to it. The application is therefore not opposed by the benefactor of the said caution.

Section 73(1) of the Land Registration Act provides that:-

“A caution may be withdrawn by the cautioner or removed by order of the court or subject to sub-section 2 by order of the Registrar”.

The Applicant has alleged that her husband **Mwaura Muiruri** repaid the loan facility but did not apply for removal of the caution until his demise. The said cautioner did not appear in court to dispute the said allegation. If the loan facility was paid, the cautioner – **Kenya Flour Mills (1975) Ltd** did not also apply to remove the said caution.

The Applicant who is the administratrix of the estate of **Mwaura Muiruri** as is evident from the certificate of confirmation of grant dated **18th June 2009**, has come to court seeking for removal of the said caution. The said caution has been in place from the **year 1982**. That is such a long period and the loan facility was for **Kshs.15,000/=**. This Court has no doubt that the said amount was fully paid and that is why the benefactor of the caution or charge never realized the security.

As provided by Section 73(1) of the Land Registration Act 2012, the Court has discretion to remove any caution placed on the suit property. The Court finds that as behoved by Sections 3A and 63(e) of the Civil Procedure Act, the Court has powers to make necessary orders for end of justice to be met. By ordering the removal of the caution/restriction herein, the Court will be issuing the said necessary orders which will ensure that the end of justice is met.

For the above reasons, the Court finds that the *Misc. Application* dated *13th June 2017*, is *merited and the same is allowed entirely in terms of prayer No.1 with costs being in the cause.*

It is so ordered.

Dated, Signed and Delivered at Thika this **20th** day of *December 2017*.

L. GACHERU

JUDGE

In the presence of

No appearance for the Applicant

Lucy - Court clerk.

L. GACHERU

JUDGE

20/12/2017

Court – Ruling read in open court in the absence of the Applicant though date taken in her presence.

L. GACHERU

JUDGE

20/12/2017