

REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT ELDORET

MISCELLANEOUS CASE 2 OF 2013

JOSEPH KIBOWEN CHEMJOR.....PLAINTIFF

VS

WILLIAM C. KISERA.....DEFENDANT

(Suit for removal of a caution; suit instituted by way of miscellaneous application; applicant seeking to have a caution lodged by respondent removed; respondent raising preliminary objection that suit is incompetent; whether suit to remove caution can be instituted by way of miscellaneous application; no provision in law for such suit to be instituted by way of miscellaneous application; no provision either to institute such suit by way of originating summons; suit incompetent; preliminary objection upheld)

RULING

A. BACKGROUND

This ruling is in respect of a preliminary objection raised by the respondent. The Notice of Preliminary Objection filed on 16 February 2013 raises two grounds as follows :-

- (a) That there is no suit properly before court for determination.*
- (b) That the suit has been commenced through unprocedural means and is thus fatally defective.*

The process herein was commenced by way of a Notice of Motion dated 25 January 2013 stated to be brought under the provisions of Order 51 Rule 1, Section 73 (1) of the Land Registration Act (Act No.3), of 2012, Section 3A and 63 (e) of the Civil Procedure Act and all enabling provisions of the law. The application sought the following orders :-

- 1. That this application be certified urgent and an earlier (sic) hearing dated (sic) be allocated.*
- 2. That the caution lodged against the land parcel No. Baringo/ Kewamoi A/3241 by the respondent herein be and is hereby removed.*
- 3. That the cost of this application be provided for.*

The application is based on the grounds :-

- 1. That the applicant is the registered owner of that parcel of land known as parcel No. Baringo/Kewamoi A/ 3241 measuring 0.3 hectares or thereabouts.*
- 2. That the respondent has illegally and unlawfully lodged a caution on the said parcel of land thereby preventing the applicant transferring it to his children.*
- 3. That the caution has no merit and is intended to frustrate the applicant from dealing with his parcel of land.*
- 4. That the plaintiff requires that his land be dis-encumbered to enable him enjoy his rights under the law.*

5. *That the respondent will not suffer any prejudice if the caution is removed.*

The application is supported by the affidavit of the applicant. The affidavit is a lengthy one and I do not wish to set it out in full. It is deponed that the applicant is the registered owner of the land parcel Baringo/Kewamoi A/3241 and a copy of the title deed is annexed. He has deponed that at sometimes in 2009, he did enter into a sale agreement with the respondent for the sale of a portion of the suit land which the applicant later repudiated. Owing to this development, the respondent on 26 September 2012, placed a caution on the suit land claiming a purchaser's interest. The applicant wrote to the Land Registrar advising him that he had rescinded the agreement and asked him to remove the caution. The Land Registrar issued a 30 days notice to the respondent on 3 October 2012 informing him that he would remove the caution unless the respondent made a written objection. The respondent did make an objection on 12 November 2012 which the applicant claims to have been made out of the time frame prescribed by the Land Registrar. The applicant has deponed that he then requested the Registrar to convene a meeting for a hearing on the removal of the caution but the Registrar declined and instead referred the matter to the area Chief thereby abdicating his duties. The applicant has deponed that he does not see how the area Chief can solve a matter involving the removal of a caution which is within the purview of the Land Registrar. It is for this reason that he has now come to court for the caution to be lifted.

The respondent upon being served with the application did not make a reply to it but filed the preliminary objection noted earlier.

B. ARGUMENTS OF COUNSELS

The objection was argued before me on 18/2/ 2013 and 20/2/2013. Mr. T. Mutei, learned counsel for the respondent argued that the applicant could not commence this suit through the provisions of Order 51 Rule 1 of the Civil Procedure Rules. He argued that Order 51 presupposes the existence of a suit upon which an application may be filed. He accepted that under the provisions of Section 73 of the Land Registration Act,[\[1\]](#) the court has jurisdiction to remove a caution. However, he stated that this can only be done by the applicant filing an Originating Summons under the provisions of Order 37 of the Civil Procedure Rules, 2010 . He argued that the applicant does not have any suit before the court and that the Notice of Motion is fatally defective. He relied upon the case of *Peter Mwema Kahoro & Another vs Benson Maina Githethuki*,[\[2\]](#) to support his arguments.

Mr. M.K. Chebii, learned counsel for the applicant argued that the Notice of Motion is properly before court. He stated that the application only asks for the court to remove a caution and that there is no substantive prayer in the application to go for a hearing. He stated that Order 37 of the Civil Procedure Rules does not provide for the procedure for the removal of cautions. According to Mr. Chebii, a suit can be instituted in any manner, "even by writing of a letter". To him, the preliminary objection was raising a matter of technicality. He pointed out that the substantive law on the removal of cautions is Section 73 (1) of the Land Registration Act[\[3\]](#), but which statute does not provide for the procedure by which the court may be moved. Counsel argued that the removal of a caution is not a substantive issue to warrant one institute suit by way of Plaint or by way of Originating Summons. He argued that the court can determine the issues raised through the application.

C. CONSIDERATION BY COURT

I have considered the Preliminary Objection. The specific issue herein is whether the applicant could commence proceedings on a removal of a caution by way of a Miscellaneous Application. There is also the general question on how proceedings ought to be instituted in court.

Cautions are provided for in the Land Registration Act[\[4\]](#). Under Section 71 a caution may be lodged by a person who claims the right to obtain an interest in land capable of creation by an instrument registrable under the statute. A caution may also be lodged by a person claiming entitlement to a licence or by a person who has presented a bankruptcy petition against the proprietor. The essence of a caution is to forbid the registration of dispositions in the subject land because the cautioner is apprehensive that such registration may obliterate his interest in the land. Cautions are registered by the Land Registrar.[\[5\]](#)

Section 73 of the Land Registration Act makes provision for the removal or withdrawal of a caution. This section provides as follows :-

73. (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.

Thus cautions may be removed in three ways.

(a) By withdrawal of the same by the cautioner.

(b) By removal by order of the court.

(c) By removal by order of the Registrar.

These three ways are independent of each other such that it is not necessary for one to demonstrate that he has attempted to have the caution removed by the Land Registrar before moving the court to remove the caution. It is however always advisable to have the court arbitrate the matter as a last recourse.

It is apparent that in this matter, the respondent placed a caution in the title of the suit land claiming a purchaser's interest. The applicant's application to the Registrar to have the caution removed was not successful and therefore the applicant has now sought the intervention of court to have the caution removed.

The issue at hand is whether the applicant commenced his action appropriately by filing a Miscellaneous Application. Indeed, is there a valid suit before this court?

I need not overemphasize that it is important to note that the Rules prescribed when instituting a suit need to be followed. But what is a "suit"?

The word "suit" has several meanings. Black's Law Dictionary^[6] defines "suit" as *any proceedings by a party or parties against another in a court of law.*^[7] "suit of a civil nature" is defined to be a civil action.^[8] "A civil action" is an action brought to enforce, redress, or protect a private or civil right.^[9]

Section 2 of the Civil Procedure Act, defines "suit" as *all civil proceedings commenced in any manner prescribed.*^[10]

“prescribed” under Section 2 means *prescribed by rules*.[\[11\]](#)

“Rules” means *rules and forms made by the Rules Committee to regulate the procedure of courts*.
[\[12\]](#)

“pleadings” includes *a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant*.[\[13\]](#)

Under Section 19 of the Civil Procedure Act, *every suit shall be instituted in such manner as may be prescribed by rules*. It will be observed that Section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how proceedings may be commenced. For example the Probate & Administration Rules under the Succession Act,[\[14\]](#) prescribe how matters touching on succession of estates of deceased persons need to be instituted.

It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings.

At this level, the court is not adjudicating on any rights. Where there is a call to adjudicate on rights of parties then it must be said that there is a “civil action” and this must be commenced in the manner prescribed by the Rules. A matter touching on whether or not a caution needs to be removed is in my view a civil action which then must be commenced in the manner prescribed by the Rules. The issue whether the caution should be removed or should remain is at that moment a contentious issue that must be tried on merits.

The Land Registration Act,[\[15\]](#) does not prescribe any rules on how proceedings under the statute need to be commenced. In this event, the default statute remains the Civil Procedure Act[\[16\]](#) which prescribes the manner in which civil suits must be instituted. Order 3 Rule 1 prescribes the way in which suits should be instituted. It specifically provides that “every suit shall be instituted by presenting a plaint to the court , or in such other manner as may be prescribed.” Thus the Civil Procedure Rules contemplate that suits shall be instituted by plaint or “other such manner” .

One other such manner is Originating Summons under Order 37 of the Civil Procedure Rules, 2010. However Order 37 is not applicable to all suits but only to suits of a special nature which Order 37 specifies. Is the removal of a caution one of the specified matters ? I have carefully perused the provisions of Order 37 and I have not seen anywhere where cautions are mentioned. The precursor to the Land Registration Act[\[17\]](#) is the Registered Land Act (RLA).[\[18\]](#) Rule 8 of Order 37, which is yet to be amended to reflect the current law, provides that applications under the RLA other than under Sections 120, 128, 133, 138, 143, and 150 shall be made by originating summons. The removal of cautions under the RLA was contained in Section 133 of the statute. It will be noted that Section 133 is not one of the sections in which applications could be made by way of Originating Summons.[\[19\]](#)

Section 71 of the Land Registration Act, which is the current law, is drafted in similar terms to Section 131 of the RLA (repealed).

Section 107 of the Land Registration Act, which contains savings and transitional provisions, preserves

certain rights which were exercisable immediately prior to the commencement of the said statute. It states as follows :-

S. 107. (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

If it is apparent that the right to register a caution was exercisable before the commencement of the Land Registration Act (LRA). Such right unless the contrary is specifically provided continues to be exercisable and governed by the law that was applicable to it immediately prior to the commencement of the LRA. Since the LRA does not provide for a procedure that is contrary to the procedure provided under the RLA regime, the same procedure for the removal of cautions prevailing in the RLA regime, is the same procedure that will apply under the current law. The prior procedure did not provide for cautions to be removed by way of Miscellaneous Application or Originating Summons as we have seen above. In such instance the fall back is to commence suit by way of plaint as noted in the Civil Procedure Act.^[20] It is therefore my considered view that an action for the removal of a caution needs to be commenced by way of Plaint in which suit the plaintiff needs to prove on a balance of probabilities why the defendant has no right to place the caution on his title and why the caution placed by the defendant needs to be removed.

It is always advisable for a claimant to commence action by way of plaint unless there is a clear alternative provided by statute or the rules thereunder. Courts have had occasion to consider whether suits instituted by way of miscellaneous application are valid. Counsel for the respondent relied on the case of *Peter Mwema Kahoro & Another vs Benson Maina Githethuki*,^[21] In the said case the court (Azangalala J, as he then was) frowned upon a suit commenced by way of miscellaneous application. So too the court (Kasango J and Emukule J) in the case of *Eutyclus Muthui vs Apollo Nteere M'Abutu & 2 others*^[22]. In this case the applicant commenced a suit inter alia to compel the defendant to produce certain records relating to a land parcel. The suit was struck out as incompetent with the court relying upon the court of appeal decision in *Board of Governors Nairobi School v Jackson Ireri Geta Nairobi*^[23]. A similar decision was made in the case of *Kenya National Federation of Co-operatives vs Econet Wireless Kenya Limited & 3 Others*^[24].

I am alive to the provisions of Article 159 (2) (d) of the Constitution^[25] which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be “pleadings”, goes beyond a mere technicality. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of “suit by a letter” which Mr. Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party.

If I am to allow the current “pleadings” to stand, I do not see how this matter will be determined without prejudice being caused to the defendant. Even if no prejudice will be caused to the defendant I would rather strike out this application at this stage, which will only invite minimal cost, rather than to allow the proceedings to stand, and thereafter be at a loss on how to thereafter proceed with the matter. The former action will benefit all parties and is certainly the lesser of the two evils.

Given the reasons above, my view is that there is no suit before court capable of being determined on merits. I have little option but to strike out the miscellaneous application with costs.

It is so ordered.

DATED AND DELIVERED THIS 12 DAY OF MARCH 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

In the presence of:

Mr. R.M. Wafula advocate holding brief for M/s M.K. Chebii & Co Advocates, for the applicant.

No Appearance for M/s Tom Mutei & Co Advocates for the respondent.

[1] Land Registration Act, Act No. 3 of 2012; assented to on 27 April 2012 and came into force on 2 May 2012.

[2] *Peter Mwema Kahoro & Another vs Benson Maina Githethuki*, Nairobi Miscellaneous Application No. 86 of 2005.

[3] Supra note 1.

[4] Ibid.

[5] Ibid, Section 71.

[6] Black's Law Dictionary, Seventh Edition, p 1448.

[7] Ibid, p1448.

[8] Ibid.

[9] Ibid, p238 and p30.

[10] Civil Procedure Act, CAP 21, Laws of Kenya, Section 2.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] Law of Succession Act, CAP 160, Laws of Kenya.

[15] Supra, note 1.

[16] Civil Procedure Act, CAP 21, Laws of Kenya.

[17] Supra, note 1.

[18] Registered Land Act, CAP 300, Laws of Kenya, repealed by the Land Registration Act, Act No.3 of 2012.

[19] Supra note 16, Rule 8 of Order 37.

[20] Ibid, Order 3 Rule 1.

[21] Supra note 3.

[22] Meru High Court Miscellaneous Application No. 82 of 2007.

[23] Nairobi Court of Appeal, Civil Appeal No. 69 of 1991.

[24] Nairobi (Milimani) Miscellaneous Civil Application No. 955 of 2006.

[25] Constitution of Kenya, 2010.