



**Agata v Land Registrar Narok & another (Environment and Land Miscellaneous Application E001 of 2023) [2024] KEELC 3905 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3905 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2023  
CG MBOGO, J  
APRIL 30, 2024**

**IN THE MATTER OF: AN APPLICATION BY CRISPIN NYAMWAYA AGATA (THE APPLICANT) FOR AN ORDER DIRECTED AT THE LAND REGISTRAR, NAROK AND IN THE MATTER OF: THE APPLICATION OF SECTIONS 71, 72, 73, 74, 75, 86, 101 & 107 OF THE LAND REGISTRATION ACT, 2012. AND IN THE MATTER OF: AN APPLICATION BY CRISPIN NYAMWAYA AGATA CHALLENGING A CAUTION REGISTERED BY BEATRICE NASERIAN TOMPO ON 19TH JANUARY, 2023 ON HIS PARCEL OF LAND TITLE NO. CISMARA/OLELESHWA/169**

**BETWEEN**

**CHRISPIN NYAMWAYA AGATA ..... APPLICANT**

**AND**

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

**BEATRICE NASERIAN TOMPO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant filed an amended case statement dated 22<sup>nd</sup> November, 2023, pursuant to Section 86 (1) of the [Land Registration Act](#) seeking the court's opinion on following questions: -
  1. Whether Beatrice Naserian Tompo meets the qualification of a cautioner as per Section 71 of the [Land Registration Act](#), 2012. If she is entitled to claim any right to obtain an interest in that parcel of land, title no. CisMara/Oleleshwa/169.
  2. Whether Beatrice Naserian Tompo who lodged and maintained a caution dated 19<sup>th</sup> January 2023 wrongfully and without reasonable cause is liable for the action of damages for the application as per Section 75 of the [Land Registration Act](#), 2012.



3. Whether the Land Registrar has neglected his powers/duty to remove a caution as instructed in a letter dated 27<sup>th</sup> April 2023.
  4. Is Crsipin Nyamwaya Agata, the applicant herein, entitled to an order of this Honourable court directing and/or compelling the Land Registrar, Narok to remove the caution on the title no. CisMara/Oleleshwa/169.
  5. By whom are the costs of this application payable?
2. The case statement was supported by the amended affidavit of the applicant sworn on even date. The applicant deposed that he is the registered proprietor of CisMara/Oleleshwa/169 which he bought in the year 2007 while employed by the Kenya Revenue Authority. He deposed that while seeking a loan to develop the land, he realized that the 2<sup>nd</sup> respondent had placed a restriction on the property on 22<sup>nd</sup> December, 2010 through the assistant chief, Narok Central and he sought removal of the caution on 27<sup>th</sup> April, 2022. That in the absence of an objection, the caution was removed on 5<sup>th</sup> May, 2022.
  3. The applicant deposed that he sought and obtained consent to subdivide the property and that he was in the process of getting separate titles deed numbers, when he realized that a caution has been placed on the land. He went on to depose that he conducted a search on 8<sup>th</sup> March, 2023 which revealed that the caution was placed on 19<sup>th</sup> January, 2023 by the 2<sup>nd</sup> respondent citing spousal interest.
  4. The applicant deposed that in a letter dated 27<sup>th</sup> April, 2023 which he wrote to the 1<sup>st</sup> respondent, he sought removal of the caution and the 1<sup>st</sup> respondent scheduled a meeting which was to be held on 25<sup>th</sup> May, 2023 which also included the 2<sup>nd</sup> respondent. He deposed that a visit to the 1<sup>st</sup> respondent's office on 27<sup>th</sup> June, 2023, was not fruitful and it did not achieve any objective. He maintained that the impasse is causing him pecuniary embarrassment as he cannot meet his needs.
  5. The amended case statement was opposed by the replying affidavit of the 2<sup>nd</sup> respondent sworn on 5<sup>th</sup> December, 2023 and filed in court on 10<sup>th</sup> January, 2024. The 2<sup>nd</sup> respondent deposed that together with the applicant, they are husband and wife having celebrated their customary marriage in the year 1999. The second respondent deposed that they lived together from the year 1999 to the year 2007. According to her, they both contributed to the purchase of the suit property which amounts was paid in instalments. She went on to depose that they agreed that the suit property would be a common asset.
  6. The 2<sup>nd</sup> respondent further deposed that the applicant was never present during the whole transaction (purchase of the suit property) and to her surprise, the applicant went behind her back with the help of her uncle to have the suit property registered in his name. The 2<sup>nd</sup> respondent further deposed that she placed a caution in the year 2010 and that she later placed the caution that is the subject of the matter before this court. She further deposed that the applicant has not demonstrated the exhaustion of remedies provided under the law for removal of cautions and that the evidence presented is scanty in nature and does not relate to removal of caution, but relates to obtaining the documents used by the 1<sup>st</sup> respondent to register the caution.
  7. The 2<sup>nd</sup> respondent further deposed that she has no other recourse in law but to have the caution maintained until the matrimonial cause she intends to file is concluded. She deposed that her registration of the caution is justified as there is an actual threat to sell the property which she contributed to its purchase.
  8. The applicant filed a supplementary affidavit sworn on 24<sup>th</sup> January, 2024 in response thereto. While denying the averments raised by the 2<sup>nd</sup> respondent and reiterating the averments contained in his supporting affidavit, the applicant deposed that he was in a christian marriage with Joy Mideva that



was solemnized on 30<sup>th</sup> May, 1998 and he lacked capacity to conduct another marriage. He deposed that the 2<sup>nd</sup> respondent has failed to prove spousal interest with regard to the caution and neither has he been furnished with any documentation to support the registration of the caution. In conclusion, the applicant deposed that he has exhausted the mechanism for the removal of a caution as provided under Sections 73 and 78 (1) of the [Land Registration Act](#) by making the necessary application before the 1<sup>st</sup> respondent.

9. The case statement was canvassed by way of written submissions. On the 8<sup>th</sup> February, 2024 the applicant filed his written statement dated 6<sup>th</sup> February, 2024 where he raised two issues for determination as follows: -
  1. Whether the 2<sup>nd</sup> respondent is entitled to claim any right to obtain an interest in the suit property.
  2. Whether the applicant has exhausted the statutory avenues available to him before moving to court.
10. On the first issue, the applicant submitted that having celebrated a christian marriage on 30<sup>th</sup> May, 1998 with Joy Mideva, he had no capacity to contract another marriage in 1999 with the 2<sup>nd</sup> respondent and the alleged spousal interest in the suit property cannot stand and she is therefore, not entitled to claim any right or to obtain an interest in the suit property. The applicant relied on the provisions of Section 71 (1) of the [Land Registration Act](#), Section 8 of the [Marriage Act](#) and the case of SMM alias GSM alias SSM versus CAKM alias CAKM [2017] eKLR.
11. On the second issue, the applicant submitted that pursuant to Section 72 (1) of the [Land Registration Act](#), there is no evidence that the requisite notice as required by the Act was issued to him as the registered proprietor of the land. He submitted that there is no indication that the procedure prescribed by law was followed by the 1<sup>st</sup> respondent in registering the caution against the suit property. He also submitted that he has exhausted the available avenues for the removal of the caution before filing the instant application. Reliance was placed in the cases of Republic versus Land Registrar, Laikipia County: Exparte, Peterson Nguchu Kaburi [2021] eKLR and Republic versus Chief Lands Registrar; Exparte, Mary Wamaitha Kaitany [2021] eKLR.
12. The applicant further submitted that Section 73 (1) of the [Land Registration Act](#) empowers the court to remove a caution. He submitted in addition, this court enjoys original jurisdiction over matters involving land which emanates from Article 162 of [the Constitution](#). He further submitted that Section 72 (1) of the Act directs that the Land Registrar ought to give a written notice of caution to the proprietor whose land, lease or charge will be affected by the caution. He went on to submit that this case, there is no evidence that the requisite notice as required by the [Land Registration Act](#) was issued to the applicant as the registered proprietor of the suit property.
13. On the 7<sup>th</sup> March, 2024 the 2<sup>nd</sup> respondent filed her written submissions dated 6<sup>th</sup> March, 2024 where she raised three issues for determination as follows: -
  - a. Whether the 2<sup>nd</sup> respondent has demonstrated an interest in that parcel of land, title no. Cis Mara/Oleleshwa/169 capable of having the caution complained of registered and maintained. If not, is the applicant entitled to damages for the 2<sup>nd</sup> respondent's application as per Section 75 of the [Land Registration Act](#), 2012.
  - b. Whether the applicant has exhausted the mechanisms provided in Section 73 of the [Land Registration Act](#), 2012.
  - c. Who shall bear the costs of this application.



14. On the first issue, the 2<sup>nd</sup> respondent submitted that she meets the qualification as outlined in Section 71 of the [Land Registration Act](#) even though the same is a non-issue since the caution was already registered. She went on to submit that it is only the 1<sup>st</sup> respondent who had power to assess whether there was merit in the 2<sup>nd</sup> respondent's application to have a caution registered over the suit property. She submitted that the suit property is a common asset and the caution registered by the 2<sup>nd</sup> respondent was to serve as a shield aimed at protecting her interest in the suit property as the applicant had made it clear of his intention to subdivide and sell the same.
15. The 2<sup>nd</sup> respondent further submitted that there is imminent threat that the applicant will part with the ownership of the suit property in a bid to defeat the 2<sup>nd</sup> respondent's interest and as such, registering and maintaining the caution over the suit property was necessary. The 2<sup>nd</sup> respondent submitted that despite being the registered owner of the suit property, she maintains that the same is matrimonial property and she contributed to the purchase of the same.
16. She submitted that she has an interest in the suit property which is currently protected by the caution held in place and removing the same will prejudice her. It was also submitted that the caution as registered is not against the rules of natural justice and does not in any way violate the applicant's constitutional right to property.
17. On the second issue, the 2<sup>nd</sup> respondent submitted that the applicant has not invoked the procedure under Section 73 which requires that an application for removal of caution be made to the 1<sup>st</sup> respondent. She submitted that the applicant is yet to invoke the process of removing a caution as contemplated in the law and in the absence of such, the jurisdiction of this court cannot be invoked.
18. The 2<sup>nd</sup> respondent submitted that the applicant had failed to attach a form LRA 70 as proof of the application and as such the procedure under Section 73 of the [Land Registration Act](#) was not exhausted. Reliance was placed on the case of Anna Chesaina Kenduiywa versus Narok County Land Registrar [2022] eKLR and Joseph Kibowen Chemjor versus William C Kisera [2013] eKLR.
19. On the third issue, the 2<sup>nd</sup> respondent submitted that the case statement before this court is premature, incompetent, barred in law and should be dismissed with costs.
20. On 12<sup>th</sup> March, 2024, the 1<sup>st</sup> interested party filed its written submissions dated 8<sup>th</sup> March, 2024 where he raised two issues for determination as follows: -
  1. Whether the 2<sup>nd</sup> respondent had an interest in the property as to entitle her to lodge a caution on the suit property.
  2. Whether the applicant has exhausted other remedies.
21. On the first issue, the 1<sup>st</sup> respondent submitted that the 2<sup>nd</sup> respondent has demonstrated her interest in the suit property as it forms matrimonial property that was purchased during the subsistence of the marriage contracted under Maasai customary law in 1999. The 1<sup>st</sup> respondent placed reliance on the provisions of Section 93 of the [Land Registration Act](#) and Section 12 of the [Matrimonial Property Act](#). She further submitted that she is not an idle by stander in this application as she has beneficial interest in the suit property which gave her a right and an interest for her to lodge the caution.
22. On the second issue, the 1<sup>st</sup> respondent submitted that the applicant has not exhausted the available remedies provided under Section 73 (2) of the [Land Registration Act](#). The 1<sup>st</sup> respondent relied on the case of the Speaker of the National Assembly versus James Njenga Karume [1992] eKLR.



23. I have considered the case statement, the replies thereof and the written submissions filed as well as the authorities cited. In my view, the issue for determination is whether the case statement has merit.
24. Section 71 of the *Land Registration Act* provides that:
- (1) 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) is entitled to a licence; or
    - (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, 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.
  - (2) A caution may either—
    - (a) forbid the registration of dispositions and the making of entries; or
    - (b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution.
  - (3) A caution shall be in the prescribed form, and the registrar may require the cautioner to support the caution by a statutory declaration.
  - (4) The registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under this Act.
  - (5) Subject to this section, the caution shall be registered in the appropriate register.”
25. While Section 72 of the *Land Registration Act* stipulates that:
- “(1) The Registrar shall give notice, in writing, of a caution to the proprietor whose land, lease or charge is affected by the caution. (2) A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court.”
26. Further, Section 73 of the *Land Registration Act* states thus: -
- (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.”
27. The applicant in this matter contended that he is the registered owner of the suit property and that being desirous to dispose the same to meet his needs, he realized that a caution had been placed by



the 2<sup>nd</sup> respondent. It was his contention that he sought for removal of the same by writing to the 1<sup>st</sup> respondent through his advocates on record which did not yield much fruit. He also contended that the meeting that was convened by the 1<sup>st</sup> respondent and in the presence of the 2<sup>nd</sup> respondent did not bear fruit.

28. On the other hand, the 2<sup>nd</sup> respondent argued that she placed caution on the suit property citing spousal interest. According to her, the suit property is matrimonial which was acquired during the subsistence of their marriage, and which she contributed towards its purchase. She further argued that whereas the suit property was registered in the name of the applicant, it was done so behind her back with the help of her uncle.
29. From the affidavits and the documentary evidence, it is immaterial at this stage to determine whether the caution was lodged formally or through due process. My concern is on the removal and whether the applicant exhausted the remedies available under Section 78. In the case of Mwangi Rukwaro & Another versus Land Registrar Nandi [2019] eKLR, the court expressed itself as follows

“There is no evidence that the Applicant made the applications contemplated in section 73 and 78 of the *Land Registration Act* cited above.

19. Whilst this court has power to order removal of the caution/restrictions herein it cannot do that through a process where the cautioner or his legal representative has not been given an opportunity to participate. In the special circumstances of this case, I am of the considered view that the Applicants should invoke the process in section 73(3)(4) of the *Land Registration Act*. As it is the only through that process that it may be determined that there is no person with an interest in maintenance of the caution.”(with emphasis)

30. Arising from the above, this court is of the view that the applicant has not exhausted the mechanisms available to enable the intervention of this court. As such the case statement dated 22<sup>nd</sup> November, 2023 lacks merit. It is hereby dismissed. Each party to bear its own costs. Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 30<sup>TH</sup> DAY OF APRIL, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**30/04/2024.**

**In the presence of: -**

Mr. Meyoki Pere – C. A

