



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND

AT KAJIADO

MISC APPLICATION NO. 47 OF 2018

IN THE MATTER OF TITLE NOS. LOITOKTOK/KIMANA TIKONDO/147;

KAJIADO/ OLKARIA/31; LOITOKTOK/NGAMA/1553 AND

LOITOKTOK/KIMANA TIKONDO/1289

LEPAPA OLE MOSHONO.....APPLICANT

VERSUS

LAND REGISTRAR, KAJIADO.....1ST RESPONDENT

JOSEPH TIPAPE OLE LEAPA.....2ND RESPONDENT

RULING

What is before me for determination is a Notice of Motion dated the 14th August 2018 brought pursuant to section 73(1) of the Land Registration Act, Section 63(e) of the Civil Procedure Act; Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law. The Applicant seeks the following orders:

1. Spent.
2. Spent.
3. This Honourable Court be pleased to direct the Land Registrar, Kajiado to withdraw all cautions lodged by the 2nd Respondent over Title Nos. Loitoktok/ Olkaria/ 31; Loitoktok / Kimana Tikondo/ 147; Loitoktok/ Kimana Tikondo/ 1289 and Loitoktok/ Ngama/ 1553.
4. Costs be provided for.

The application is premised on the summarized grounds that Applicant is the registered proprietor of the aforementioned parcels of land, which the 2nd Respondent has registered a caution over, claiming beneficial interest. The cautions are not founded on a legal basis and the 1st Respondent failed to notify the Applicant about the cautions lodged over his properties. The Applicant wishes to subdivide his property and distribute among his family during his lifetime to avoid squabbles.

The application is supported by the affidavit of the Applicant LEPAPA OLE MOSHONO where he avers that the 2nd Respondent does not fit the criteria of a cautioner under the law since he claims beneficial interest. He insists the registration of the caution was irregular and illegal. Further, in order to distribute his property among his spouses and children, he requires the caution to be removed and seeks an order to that effect.

The Application is opposed by the 2nd Respondent JOSEPH TIPAPA OLE LEEPA who filed a replying affidavit where he avers that he is the son of the Applicant and lodged the cautions over the aforementioned parcels of land as he has beneficial interest over them. He insists the cautions were not irregular, illegal, unfair and or oppressive. He explains that the Applicant had three wives namely Muthoni Lepapa; Naiputa Lepapa and his late mother Mariam Lepapa who was the eldest. He claims the Applicant's third wife Naiputa Lepapa has been prevailing upon him to subdivide the land with a view to having the larger portion to be left to her benefit. He contends that the said third wife had caused the Applicant to effect subdivision of the aforementioned parcels of land on the ground and given 50% possession to the children including grandchildren of the third wife in a secretive manner without the knowledge of the 1st and 2nd wives' children. He states

that as a result there is disharmony, strife, dissension and lack of cohesion in the Applicant's family. Further, that the manner in which the Applicant proceeded to subdivide the stated parcels of land, prejudices one part of the family, while favouring another. He reiterates that he lodged cautions on the said parcels of land to protect his beneficial interests and those of other family members. Further, that removal of the cautions would prejudice them and he seeks the matter to be referred to mediation.

The applicant filed a supplementary affidavit where he reiterated his claim and denied subdividing the suit properties. He explains that they have made numerous attempts to resolve this matter amicably by seeking assistance from the Chief, Entarara Location and Kajiado Land Registrar but all the attempts have been unfruitful.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

In considering the materials presented in respect of the application herein, the only issue for determination is whether the caution registered against Title Nos. Loitoktok/ Olkaria/ 31; Loitoktok / Kimana Tikondo/ 147; Loitoktok/ Kimana Tikondo/ 1289 and Loitoktok/ Ngama/ 1553 by the 2nd Respondent should be removed. Section 71 of the Land Registration Act makes provisions on who should lodge a caution and states that it can be lodged by a person claiming the right to obtain an interest in land capable of creation by an instrument registrable under the statute. Further, a person can lodge a caution claiming entitlement to a license or by a person who has presented a bankruptcy petition against the proprietor. It is the Land Registrar who is mandated to Register a Caution. A caution can be removed as provided for under Section 73 of the Land Registration Act which stipulates thus:

‘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.’

The parameters on who should register a caution is well stated in section 71 of the Land Registration Act as stated above. In the current scenario, the 2nd Respondent who is a son to the Applicant claimed beneficial interest in registering the caution against the aforementioned parcels of land. He averred that the Applicant was not subdividing his land equally since he had been influenced by his third wife. The Applicant claims he wants the caution removed so as to divide the land among the family during his lifetime. The 2nd Respondent insists the matter should be referred to mediation while the Applicant is opposed to it. From the annexures to the supporting affidavit, it is clear the Applicant has attempted to refer the matter to mediation with the District Land Registrar and the local Chief but claims the efforts were unfruitful. I note the said letters seeking for mediation, were copied to the 2nd Respondent who has not informed court on whether he participated in the said process or not. The Applicant has relied on the following decisions: **Maria Ngangi Gwako Vs Charles Mwenzi Ngangi (2014) eKLR; Mamut Hardware Stores Limited V Chief Land Registrar, Nairobi & Another (2017) eKLR; Milka Muthoni Wagoco V County Council of Kirinyaga & 2 other (2017) eKLR and Dinara Properties Limited V Malcedian Properties Limited & Another (2018) eKLR** to buttress its arguments.

Black's Law Dictionary 10th Edition defines 'beneficial interest' as follows: 'A right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing'.

From the evidence presented before me, as well as the legal provisions cited above, I note the 2nd Respondent's claim for beneficial interest does not fall within the ambit of section 71 of the Land Registration Act. In the case of **Maria Ngangi Gwako V Charles Mwenzi Ngangi (2014) eKLR**, the Court was specific that a caution can only be lodged by a person, who claims a right to obtain an interest in land, lease or charge which is capable of creation by a registrable instrument .

In the case of **Dinara Properties Limited Vs Malcedian Properties Limited & Another (2018) eKLR**, the Court held that:.....' **The Applicant has demonstrated that it is the registered proprietor of the suit property and that the Respondents have no basis for continuing to have the caution lodged against the said title.'**

The 1st Respondent has also not filed any documents in court to confirm whether he has convened a meeting with the parties as mandated by the law to find out how the caution was registered. The 2nd Respondent is claiming beneficial interest for himself and other members of the family in respect of their father's aforementioned parcels of land. He has however not furnished court with affidavits from the other members of the family claiming beneficial interest.

The Applicant has confirmed he is the proprietor of the suit lands and insofar as the 2nd Respondent is his son, the said Respondent has not justified why the caution should subsist. The 2nd Respondent wants the matter to be referred to mediation in accordance with Article 159 (2) (d) of the Constitution which I cannot stop but am of the view that he already had ample time from August 2018 when the suit was filed to participate in the process in respect of the suit land. In the circumstances, I find the Applicant's instant application merited and will proceed to allow it.

Since this is a family matter, I will direct each party to bear its own costs.

Dated signed and delivered in open court at Kajiado this 29th day of May, 2019

CHRISTINE OCHIENG

JUDGE