



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E176 OF 2021 (OS)**

**IN THE MATTER OF SECTION 57(5) AND 64 OF THE LAND REGISTRATION OF**

**TITLES ACT CAP 281 OF THE LAWS OF KENYA (NOW REPEALED)**

**AND**

**IN THE MATTER OF ARTICLES 40 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ORDER 37 RULES OF THE CIVIL**

**PROCEDURE RULES 2010 AND ALL THE ENABLING PROVISIONS**

**SAMMY NG'ANG'A NGATIRI S.S.....PLAINTIFF/APPLICANT**

**VERSUS**

**GEORGE NGATIRI MBUGUA.....1<sup>ST</sup> RESPONDENT/CAVEATOR**

**THE REGISTRAR OF TITLES KIAMBU.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF SURVEY KIAMBU.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Applicant, Sammy Nga'ng'a Ngatiri filed this originating summons dated 18<sup>th</sup> May 2021 under sections 57(5) and 64 of the Registration of Titles Act Cap 281 of the Laws of Kenya (now repealed), Article 40 of the Constitution of Kenya and Order 37 rule 5 of the Civil Procedure Rules 2010.

2. The Originating Summon sought the following questions for determination against the Respondents;

i. WHETHER the caveat lodged against L.R No.Lari/Kirenga/3157 by the caveator and the registrar was done illegally and unlawfully.

- ii. If the answer to one above is affirmative WHETHER the plaintiff is entitled to damages (as per the scheduled annexed).
- iii. WHETHER the Director of Survey, Kiambu erred in issuing DEEP PLAN declaring the access road leading to my property as a public road when in fact it is a private road.
- iv. WHETHER my sons or daughters can lodge a caveat on Lari/Kirenga/3157 which is a gift from my parent, and not a land I have bought for the family or any other while they are grown up and with their respective jobs and are not breadwinners of my family.
- v. WHETHER the registrar of land titles Kiambu erred by lodging the caveat without informing the owners and not inviting the parties for a hearing despite my letters he acknowledged on 19.11.2020 annexed herein.
- vi. WHETHER the second respondent should be ordered to remove the caveat forthwith for his failure to follow the right procedures.
- vii. WHETHER the 3<sup>rd</sup> respondent should be ordered to rectify the deed plan and remove the road forthwith and also rectify the deed plan on Lari/Kirenga/3157 by curving out a portion of land 40\*80 from my parcel to accommodate the matrimonial house which have stood there from time immemorial or adequate compensation be paid for the house and other developments therein.
- viii. WHETHER an administrator can act on behalf of a deceased person without having taken out the confirmed letters of administration to be a personal representative for the deceased person.
- ix. Any other relief the honourable court may deem necessary to address the cause of justice.
- x. WHO should bear the cost of this application"

3. The Originating Summons was supported by the Applicant's affidavit sworn on 18<sup>th</sup> May 2021. The case of the Applicant was that he was the registered owner of one of L.R No. Lari/Kirenga/3157 which was one of the properties that the 1<sup>st</sup> Respondent had registered a caveat against the same. Despite his requests to the 1<sup>st</sup> Respondent, the caveat had not been removed and the pendency of the same was detrimental to his interests on the property.

4. In response, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 24<sup>th</sup> September 2021 and averred that he registered the caveat in respect to several parcels of family land which included, L.R No. Lari/Kirenga 3157, 3154, 3155, 3156 all hived from their ancestral land.

5. The 1<sup>st</sup> Respondent contended that the registration of the caveat was informed pursuant to a family meeting held on 17<sup>th</sup> October 2019. Pursuant to the said meeting an agreement was reached with the following terms: -

**Particulars of agreement on 17<sup>th</sup> October 2019**

- i. It was agreed that a graveyard shall be hived off from all the properties and parcel of land known as Lari/Kirenga/3154, 3155, 3156, 3157;**
- ii. As it stands we have over five (5) graves of our loved ones buried in the proposed grave yard;**
- iii. The proposed graveyard is to measure 0.0447 to be exercised from the aforementioned properties for the benefit of all beneficiary of the Estate of the late Grace Wanjiku (deceased)**
- iv. A public road to be closed and be converted to private use.**
- v. All parcels of land to be accessed from the private road and all expenses to be incurred jointly.**

**vi. The activities discussed to be carried out as soon as possible.**

6. It was the 1<sup>st</sup> Respondent further contention, that pursuant to the said agreement, a surveyor by the name M/S Landsway Geoconslut was engaged to undertake the following; -

**Particulars of the survey**

**i. All parties have to transfer to each other parcels L.R No. Lari Lari/Kirenga, 3154, 3155, 3156, 3157 and all those pieces to read the four (4) names**

**ii. All parcels of land shall be amalgamated to allow hiving of the graveyard.**

**iii. The remainder of parcel of land shall be re-subdivided and parties to receive their individual titles.**

7. The 1<sup>st</sup> Respondent further stated that the Applicant intends to sell the land without giving part of the graveyard in blatant disregard to the rights and wishes of the other beneficiaries. He further added that he has an equal right, together with his siblings and the Applicant to the Estate of the late Joseph Mbugua Gatwiri.

8. Despite being duly served, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file any response nor did they participate in the proceedings.

9. When the matter came up for directions on 19<sup>th</sup> October 2021, the Court directed the parties to canvass the Originating Summons by way of written submissions. The Applicant and the 1<sup>st</sup> Respondent filed their respective submissions. The Applicant's submissions were filed on 7<sup>th</sup> October 2021 while the 1<sup>st</sup> Respondent filed his submission through the firm of **M/S Githui and Partners Advocates** on 1<sup>st</sup> November 2021.

10. The Applicant's submission replicated what was stated in his supporting affidavit. He submitted that the 1<sup>st</sup> Respondent got the grant of letters of administration for the late Joseph Mbugua Ngatiri who had at no time raised the issue of a family graveyard during his lifetime and further that the caveat was lodged to frustrate his sale agreement in respect to L.R No. Lari/Kirenga/3157.

11. According to the Applicant, the caveat was lodged just three weeks after his sale agreement. The caveat was lodged on 28<sup>th</sup> September 2020 while the sale agreement had been entered into on 20<sup>th</sup> August 2020.

12. It was also submitted that the documents referred to by 1<sup>st</sup> Respondent were fraudulent. The Applicant further submitted that the caveator did not follow the due process when lodging the caveat, he lacked the locus standi to put the caveat and further to deal with the estate of the deceased Grace Wanjiku. He urged the Court to allow his application and grant him the reliefs sought.

13. In his submission, the 1<sup>st</sup> Respondent outlined two issues for determination by the court. The first one, on whether he had the locus to lodge the caveat and secondly whether a court could rewrite the agreement/contract of the parties.

14. It was submitted that pursuant to **Section 57 (5) of the Registration of Titles Act** he had a locus to raise a caveat by the fact of having an interest to the land.

15. On the second issue, he submitted that the court should not rewrite the agreement of the parties that was held on the 17<sup>th</sup> October 2019 and that the Applicant was estopped from denying and going against the terms of the said agreement.

16. He further urged the Court to dismiss the Originating Summons for having been initiated as an afterthought and being an abuse of the Court process and he referred to the cases of **Eliud Timothy Mwamunga v Kamau Njendu[2002] eKLR and Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited [2013] eKLR**.

17. The Court has now carefully considered the written submissions, the quoted authorities and the relevant provisions of law. The Court has also considered the instant Originating Summons and the annexures thereto and it makes the following findings; -

18. The issue for determination is whether the Applicant is entitled to the reliefs sought. I note that the Registration of Titles Act Cap 281 was repealed in May 2012 by virtue of **Section 109 of the Land Registration Act 2012**. Even though the 1<sup>st</sup> Respondent objected to the same urging the court to find the application defective, it is the view of the Court that quoting the repealed law by itself does not render the Originating Summons defective since the tenor and purport of the application is understood by the Court and the parties. The defect is curable under the provisions of **Article 159(2)(d) of the Constitution**. The starting point is to look at the law regarding caveats in the current legislation regime. **Section 71(1)** of the *Land Registration Act*, which provides: -

“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) ...

c) ...

**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.**”

19. **Section 2 of the Land Registration Act** defines caution to include a caveat. It states;

"caution" includes —

(a) **a notice in the form of a register to the effect that no action of a specified nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave the notice; or**

(b) **a caveat. (emphasis added)**

20. It is clear, from the reading of this **Section 71(1)** that in order for one to lodge a caveat, one must demonstrate that he or she has a right or a registrable interest in that particular piece of land. The question therefore that arises is whether the 1<sup>st</sup> Respondent has demonstrated that he had sufficient interest in the suit property to be entitled to the continued existence of the caveat registered thereon. In the case of *Muchanga Investments Ltd -vs-Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No.25 of 2002 Bosire J (as he then was)* held that:-

“**On the basis of the provisions of section 57 of the Registered Titles Act, it is clear that a caveat may be registered only pursuant to a contractual relationship or otherwise. However, it is expressly provided that the interest being claimed must be such as is registrable under the Act.**”

21. In the Case of *Boyes v Gathure (1969) EA 385* the Court of Appeal held that:-

“**a caveat is intended to serve a twofold purpose: on the one hand, it is intended to give the caveator temporary protection, and on the other, it is intended to give notice of the nature of the claim to the person whose estate in the land is affected and to the world at large.**”

22. The Applicant herein has sought for various orders. He has further sought for the removal of caveats, lodged against the suit land herein *L.R No. Lari Lari/Kirenga, 3154, 3155, 3156, 3157*.

23. **Section 72 of the Land Registration Act** refers to the registrar giving notice to the registered proprietor. In the instant case, the Applicant has submitted that no notice was given to him in respect to the caveat being lodged neither was he given an opportunity to be heard before the same was registered.

24. The Applicant through **Muhoho Gichimu & Co. Advocates** vide a letter dated 26<sup>th</sup> October 2020 wrote to the 1<sup>st</sup> Respondent expressing their displeasure and complaints in respect to the action of lodging the caveats in the suit properties. In the said letter, the 1<sup>st</sup> Respondent was given seven (7) days to remove the caveat failure of which legal action would ensue. Upon receipt of the said letter, the 1<sup>st</sup> Respondent neither responded nor took any action towards removal of the caveat.

25. It is evident from Applicant's documents that L.R No. Lari/Kirenga 3157 is registered in his name, the title having been issued on 14<sup>th</sup> February 2006. It is also evident that on 28<sup>th</sup> September 2020, the 1<sup>st</sup> Respondent did lodge a caveat on the suit property claiming beneficiary's interest.

26. Be that as it may, I note that the said Caveat was registered on 28<sup>th</sup> September 2020. Over one year has lapsed since then. The Agreement that was referred to by the 1<sup>st</sup> Respondent and annexed to his Replying Affidavit as annexures '**GNM2**' had a **clause 6** which stipulated as follows;

1. ....

2. ....

3. ....

**6. 'The activities discussed to be carried out as soon as possible' [emphasis added]**

This period of time must have afforded the 1<sup>st</sup> Respondent the time he needed to address whatever concerns or issues he had in respect to the said property if any.

27. A caveat should only serve as a temporary measure and should not be used to limit or deprive the Applicant of right to the property in eternity. The Court of Appeal echoed that principle in the case of *Boyes –Vs- Gathure (1969) (Supra)*.

28. While the 1<sup>st</sup> Respondent relied on the terms of the family agreement of 17<sup>th</sup> October 2019, there was no evidence adduced to confirm whether the said terms were implemented. The same having been specified to be implemented as soon as possible. Neither was the Court shown any evidence confirming that the intended survey had been undertaken to its completion. No survey report was produced. As such the 1<sup>st</sup> Respondent cannot rely on the terms of the family agreement as a basis for the continuance of the caveat.

29. The continued existence of the caveat registered in *L.R No. Lari Lari/Kirenga/3157* for over one year has adversely affected the Applicant. The 1<sup>st</sup> Respondent did not indicate how long they intended to keep the Caveat on the property.

30. The Authority referred to by the 1<sup>st</sup> Respondent namely: - *Eliud Timothy Mwamunga v Kamau Njendu[2002] eKLR* shows that the land in question did not belong to the Applicant unlike the instant case where the Applicant is the proprietor. The court is therefore not persuaded by the same.

31. The protection of the right over property afforded by **Article 40 of the Constitution** is to be enjoyed by the proprietor except where the property is found to have been unlawfully acquired.

32. The Chief Land Registrar did not present any response to the Originating summons and without reasonable cause being shown by the 1<sup>st</sup> Respondent as to why the caveat should continue to remain in place, the Court is satisfied that the Applicant has proved his case to the required standard of proof. I find no basis why the caveat should not be removed.

33. The Applicant's Originating summons dated 18<sup>th</sup> May 2021 partially succeeds. Consequently, the Court finds that the Applicant's questions No.1 and 6 are answered in the affirmative and he is entitled to them.

34. However, with regard to the issue of damages and other questions, the Court finds that there was no cogent evidence that was laid to prove the same and as such the same cannot be granted.

35. On the issue of costs, the actions of the 1<sup>st</sup> Respondent led to the filing of this suit and therefore he is liable. The Applicant is entitled to costs which should be met by the 1<sup>st</sup> Respondent.

36. In the end, the Court makes the following disposal orders:

**i. The Chief Land Registrar is hereby ordered to lift the caveat lodged by George Ngatiri registered on 28<sup>th</sup> September 2020 against Land Reference No. Lari/Kirenga/ 3157.**

**ii. The 1<sup>st</sup> Respondent shall bear the costs of this suit.**

37. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Mr. Sammy Ng'ang'a Ngatiri the Plaintiff/Applicant acting in person.**

**Mr. Kori h/b for Mr. Githui for the 1<sup>st</sup> Respondent.**

**N/A for the 2<sup>nd</sup> Respondent.**

**N/A for the 3<sup>rd</sup> Respondent.**

**Court Assistant; Caroline Nafuna.**



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