**Khushal v Gilani**

[1974] 1 EA 370 (HCK)

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 29 May 1974

**Case Number:** 2303/1973 (89/74)

**Before:** Harris J

**Sourced by:** LawAfrica

*[1] Land – Caveat – Extension – Order must be served on registrar within* 28 *days – Registration of*

*Titles Act* (*Cap.* 281) *s.* 57 (*K.*)*.*

**Editor’s Summary**

The defendant lodged a caveat to protect the interest claimed by him in the suit. He was served with a

notice requiring removal of the caveat within 28 days and his application for its extension was heard after

the expiry of the 28 days.

The plaintiff contended that there was no jurisdiction to grant the application after the expiry of the

caveat, and the defendant contended that the application had been made within the 28 days.

**Held –** an order must be served on the registrar within 28 days.

Application dismissed.

**Cases referred to Judgment:**

(1) *Parmer v. Singh* (S.C.C.C. 259 of 1963) unreported.

(2) *Mayers v. Akira Ranch Ltd*. (No. 3), [1973] E.A. 431.

**Judgment**

**Harris J:** This is an application by chamber summons brought by the defendant for an order that a

caveat lodged by him under s. 57(1) of the Registration of Titles Act (Cap. 281) in respect of the suit

premises, which consist of a small plot of land with buildings thereon situate at Nakuru, be extended.

In the suit, which was field on 22 November 1973, the plaintiff claims possession of the premises

from the defendant who is alleged to have wrongfully seized and retained possession thereof. The

defendant in his defence claims that the plaintiff agreed to sell the premises to him and counterclaims for

specific performance.

On 5 February 1974 the defendant lodged his caveat claiming a purchaser’s interest and it appears that

on 8 April 1974 he received a notice from the registrar of titles under s. 57 (6) of the Act requiring the

withdrawal of the caveat in accordance with that sub-section within the next 28 days, that is, on or before

6 May 1974. On this day the present application was filed, supported by affidavit, seeking an order that

the caveat be extended until the finalisation of the suit.

Mr. Khanna’s main objection is based on the fact that the caveat had expired at least by 6 May with

the result that, in his submission, the court has now no jurisdiction to grant the relief sought. In support

of this last matter he relied upon the unreported decision of Miles, J. dated 3 November 1964 in *Parmer*

*v. Singh* (S.C.C.C. 259 of 1963).

S. 57(6) of the Act is in the following terms:

“Except in the case of a caveat lodged by the registrar, the caveatee may make application in writing to the

registrar to remove such caveat, and thereupon and upon payment of the prescribed fee the registrar shall give

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twenty-eight days’ notice in writing to the caveator requiring that the caveat be withdrawn, and, after the lapse

of the service of such notice at the address mentioned in the caveat, the registrar shall remove such caveat

from the register by entering a memorandum that the same is discharged, unless he has been previously served

with an order of the court extending the time as herein provided.”

In the course of his judgment Miles, J. said:

“The operative word is clearly the word ‘previously’ in subsection (6). This indicates that the registrar must

have been served with the order extending the caveat before the lapse of the twenty-eight days’ notice in

writing. It is not sufficient that the application for extension should have been filed or even the order obtained

within this period. The words, ‘after the lapse of the service of such notice’ in subsection (6) are rather

peculiar and I do not know whether there is some typographical error. I can only construe these as meaning

‘after the lapse of twenty-eight days from the date of service of such notice’. In this connection I would

observe that the notice given by the registrar specifies twenty-eight days from the date thereof.

“The requirement that the order must be served on the registrar within the period of twenty-eight days is not

unreasonable since the lodging of a caveat is a substantial interference with the rights of a proprietor, and it is

not surprising that the legislature should have subjected it to stringent conditions. A period of twenty-eight

days is not inadequate, and it is to be noted that subsection (8) enables the caveator to apply for an extension

of time either before or after receiving the notice from the registrar. In many cases a caveator will have good

reason to anticipate that steps will be taken by the caveatee to have the caveat withdrawn under subsection (5)

of section 57. Section 63 of the Interpretation and General Provisions Act does not apply because this is a

case where a contrary intention appears.”

Mr. Ndegwa for the defendant submitted that, since the notice from the registry had been received on 8

April 1974, expiring on 6 May, and since the present application had been filed on 6 May, the proposed

order if and when made should be given retrospective effect to that date. He contended that there was a

possibility that, despite the lapse of time, the registrar might not have yet removed the caveat and

therefore that the order, if now made and served expeditiously, might still be in time to save caveat.

I am satisfied that the application must fail. I agree with Mr. Khanna that the information before the

court is insufficient and I would refer the applicant to the decision of Spry, V.P. in *Mayers v. Akira*

*Ranch Ltd*. (No. 3), [1973] E.A. 431, where the desirability of a full disclosure of all relevant matters in

applications relating to caveats was pointed out. Furthermore, by virtue of O. 36 r. 3B, the application

should strictly speaking have been by originating summons under that Order and not by chamber

summons.

The principal ground upon which the application fails however is that of lack of jurisdiction for it is

clear that the registrar of titles is required by sub-s. (6) to remove the caveat immediately upon the

expiration of the statutory period of 28 days unless he had been previously served with an order of the

court extending the period of grace allowed to the caveator. At this stage it would be impossible to serve

any order now to be made within the time contemplated since this time has already expired and I cannot

entertain the possibility that the registrar has been so unaware of his duties as to omit to remove the

caveat on the due date.

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Whatever hardship might be suffered by the defendant through the loss of the protecting caveat,

however, may to some extent be ameliorated by the provisions of s. 52 of the Transfer of Property Act

1882, precluding dealings with the premises pending the determination of the suit without an order of the

court.

The application is therefore dismissed with costs but in view of the difficulty of assessing at this stage

a fair instruction fee and of avoiding duplication of fees in the matter I will not as requested direct the

taxation and payment of such costs forthwith. The costs accordingly will form part of the plaintiff’s costs

in the matter, being added to such other costs as he may be awarded.

*Order accordingly.*

For the plaintiff:

*DN Khanna* (instructed by *Khanna & Co*, Nairobi)

For the defendant:

*MK Ndegwa* (instructed by *P Bowry*, Nakuru)