



REPUBLIC OF KENYA



Kimathi v Land Registrar Nyandarua & 2 others (Environment & Land Miscellaneous Case E005 of 2023) [2023] KEELC 17426 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND MISCELLANEOUS CASE E005 OF 2023**

YM ANGIMA, J

MAY 18, 2023

BETWEEN

MARY WAKARIDI KIMATHI APPLICANT

AND

LAND REGISTRAR NYANDARUA 1ST RESPONDENT

ROSE WANJIRU GITHINJI 2ND RESPONDENT

CHRISPINE NGUNJIRI GITHINJI 3RD RESPONDENT

RULING

1. Vide an *ex parte* chamber summons dated 20.03.2023 brought under the provisions of Section 8(2)(3) & (4) of the *Law Reform Act*, Cap. 26 Laws of Kenya; Order 53 Rule (1) of the *Civil Procedure Rules*, Section 1A, 1B and 3B of the *Civil Procedure Act*; Article 159(2)(d) of the *Constitution* of Kenya, 2010, and all other enabling provisions of the law the applicant sought leave of court to apply for judicial review orders of *certiorari* and *mandamus* against the 1st respondent as a result of a caution the 1st respondent had registered against the suit property on the application of the 2nd & 3rd respondents.
2. The application was based upon the applicant's statutory statement dated 20.03.2023 and the verifying affidavit of even date and the exhibits thereto. The applicant stated that she was the administrator of the estate of the late David Kimathi Waigera (the deceased) who was the registered proprietor of Title No Nyandarua/Ol Kalou South/220 (the suit property). She further stated that she was the beneficial owner of the suit property by virtue of the certificate of confirmation of grant issued by the High Court in Nyeri High Court Succession Cause No 1018/2011 by which she was to hold the same on her own behalf and in trust for the children of the deceased.
3. It was the applicant's case that despite confirmation of grant, she was unable to obtain registration of the suit property or to fully utilize it due to a subsisting caution which was illegally and unprocedurally registered at the instance of the 2nd and 3rd respondents. The applicant further contended that the 2nd



and 3rd respondents had not demonstrated a legitimate interest in the suit property and that, in any event, the caution was registered without the 1st respondent according her a chance of being heard.

4. The court has considered the applicant's application for leave together with her written submissions. The court is of the opinion that the main question for determination is whether the applicant has made out a case for the grant of leave to apply for the two judicial review orders stated in the application.
5. In the case of *Republic v County Government of Kwale and another Ex Parte Kondo and others* [1998] 1 KLR (E&L) which was cited by the applicant the test for granting such leave was described by Nyamu J.A. as follows:

“Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always is has to be exercised judicially. Has the applicant satisfied these principles?...”

6. Section 71 of the *Land Registration Act*, 2012 on registration of cautions stipulates as follows:

- “(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 made an application for a bankruptcy order against the proprietor of any registered 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.”

7. On the other hand, Section 73 of the said Act on removal of cautions stipulates as follows:

“Withdrawal and removal of caution.

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."
8. The court has considered the material on record in this matter. Although the applicant did not avail a copy of the land register and a copy of the caution which was lodged by the 2nd and 3rd respondents, she provided a copy of a certificate of official search which indicated that the 2nd respondent was claiming a beneficiary interest on account of a pending suit being Nyeri HCCC No 82 of 2003 (O.S.). The 3rd respondent was said to be claiming a beneficiary interest but no further details were noted in the certificate of official search. The applicant ought to have provided copies of the land register and the impugned cautions to facilitate a better assessment since a caution is usually accompanied by a statutory declaration and supporting documents.
 9. The court has further noted that the applicant has not provided any information on the status or fate of Nyeri HCCC No 82 of 2003 (O.S.) which was said to be pending at the time of registration of the caution. The court is thus unable to tell whether that suit is pending or concluded. Such insufficiency of information can only work against the applicant's application for leave to apply for judicial review.
 10. An examination of the material on record, without going into depth, indicates that prima facie, the 1st respondent had a legal basis for registration of the caution as stipulated under Section 71 of the [Land Registration Act](#). It is also apparent from the material on record that the applicant had an opportunity under Section 73 of the said Act to apply for removal of the caution and to demonstrate before the 1st respondent that the 2nd and 3rd respondents had no legally recognizable interest in the suit property. The applicant has not exhibited even a single letter to the 1st respondent seeking removal of the caution which would have triggered the resolution mechanism stipulated under Section 73 of the Act.
 11. The court is thus far from satisfied on the basis of the material on record that the applicant has demonstrated an arguable case worthy of further investigation in a substantive application for judicial review. The applicant is, however, at liberty to initiate a normal civil action for removal of the caution for alleged violation of her proprietary rights.



12. The upshot of the foregoing is that the court finds no merit in the applicant's chamber summons dated 20.03.2023 for leave to apply for judicial review orders. Consequently, the applicant's chamber summons dated 20.03.2023 is hereby dismissed with no order as to costs.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 18TH DAY OF MAY, 2023.

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Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Oira for the ex parte Applicant

N/A for the Respondents

C/A - Carol

