



**Kinyugo v Njagi (Environment and Land Appeal 5 of 2019)
[2023] KEELC 22591 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 22591 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 5 OF 2019
A KANIARU, J
JUNE 20, 2023**

BETWEEN

LAWRENCE P MUNYI KINYUGO APPELLANT

AND

IRENE WAMBETI NJAGI RESPONDENT

(Being an Appeal from the Judgment of the Honourable M. Gicheru Chief Magistrate at Embu delivered on 28th January 2019 in Civil case No 216 of 2017)

JUDGMENT

1. This appeal arose from the judgment of the lower court (M. N Gicheru, Chief Magistrate – as he then was) delivered on 28.1.2019. In the lower court, the appellant – Lawrence P. Munyi Kinyugo - was the plaintiff and had impleaded the respondent – Irene Wambeti Njagi – who was the defendant, alleging, *inter alia*, that the latter had placed a caution on his land parcel No Ngandori/ Kirigi/51 “without any colour of right” and “without any reasonable cause” (see paragraph 4 of the plaint filed in the lower court).
2. The respondent responded, *inter alia*,
“that she had all the right to caution the said suit land so as to preserve the property of the family” (see paragraph 4 of the defence filed in the lower court).
3. In the lower court, parties adopted their witness statements as evidence and the court thereafter delivered a judgment in which it dismissed the appellant’s suit. That dismissal is what triggered this appeal.
4. The appeal is premised on five (5) grounds as follows:



1. The learned Trial Magistrate erred in law and infact when he held that the caution placed by the appellant (? – should be the respondent) was lawfully registered against the appellant’s land parcel No Ngandori/ Kirigi/5145 in total disregard the evidence adduced and tendered before the court by the appellant.
2. The learned trial magistrate erred both in law and infact by finding that it was the appellant’s burden to prove that he didn’t owe the respondents family money whereas the issue whether the appellant owed any money or paid any loan was not a subject matter in the suit between the parties and no evidence was adduced by the respondent to that effect.
3. The learned trial magistrate erred both in law and in fact by misinterpreting the cause of action of the matter before him instead of determining whether the respondent had any beneficial interest against the appellant’s land parcel No Ngandori/ Kirigi/ 5145 to warrant her register a caution against the said land as per the provisions of the law.
4. The learned trial magistrate erred in law and infact when he dismissed the plaintiffs case with costs whereas the appellant had proved his case on a balance of probabilities that the caution was unlawfully acquired (*sic*) and interest known in law.
5. The learned trial magistrate erred in law and in fact by finding that the appellant owed the respondent and her family and ordering the caution to remain against the law and against the weight of evidence.
5. The appellant expects a favourable outcome of his appeal and has therefore asked the court to set the judgment aside, allow the appeal, and award him costs of both the appeal and the lower court suit.
6. The appeal was canvassed by way of written submissions. The appellant filed two sets of submissions. The first one was filed on 8.2.2024 while the other, which was largely in response to respondents submissions, was filed on 3.4.2023.
7. According to the appellant, the respondent had no “lawful cause” to place a caution on the register of his land. This is so because the respondent is not a “beneficiary” to his property. It was submitted that the trial court was wrong in taking the position that the appellant possibly owes some two acres to the respondent while the two acres were not given as one of the reasons for placement of the caution on the land register. The trial court was also faulted for relying on forged document. Further, the appellant submitted that there was no evidence made available to show that he caused the land of the respondent’s family to be auctioned allegedly because of the appellant’s failure to repay a bank loan. According to the appellant, his investigations showed that it is the respondent’s own father who sold the two acres.
8. The supplementary submissions filed by the appellant majorly focused on the issue of the alleged sale of two acres. He emphasized that it is the respondents own father and not he himself who sold the two acres and that the sale was through a private transaction and not by way of auction as intimated by the respondent. It was submitted further that the placement of the caution, which the appellant alleges to have been done in collusion with some “accomplices” was an “extortion move”, which he views as a crime punishable by law.
9. The respondent on the other hand submitted that the caution was not placed wrongly on the land register; that there was no collusion with accomplices in the placement of caution on the land register; and that the appellant did not object to what the so called accomplices presented for consideration in the lower court. It was emphasized that the appellant caused the respondent’s family land to be sold and that the appellant promised several times to compensate by transferring the cautioned land to the



family but the promise ultimately turned out to be empty because the appellant was hellbent on selling the same land to a third party. That's why the caution was lodged.

10. I have considered the appeal as filed, rival submissions, and the lower court record made available for the purposes of the appeal. This is a first appeal and the task ahead is as stated in the case of *Mbogo and Another v Shah* (1968) EA 93 where the court expressed itself thus:

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice”.

11. Also useful in this regard is the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA123 where the court observed:

“an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that the court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's, finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of the witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955) 22 EA 270)”

12. In the plaint in the lower court suit (see paragraph 4 thereof) the appellant complains that the caution was placed

“without any colour of right at all..”

and/ or

“without any reasonable cause”.

The appellant believed that this was wrong because (see paragraph 7 of the plaint) neither the respondent nor her late mother are members of his immediate family

“and therefore, both have no any legal right to my land and/ or any of my properties whatsoever”.

13. In the respondent's defence in the lower court, she pleaded, *inter alia*, that the caution was placed (see paragraph 4 of the defence)

“to preserve the property of the family”

and that (see also paragraph 8 of the same defence) the appellant had intentions

“to deprive the defendant and other family members their rights”

14. A reading of the material and written evidence relied on by the lower court in writing its judgment shows that the appellant had at some point in the past procured a bank loan using the respondents



family land as security. He defaulted in payment and a portion of the land had to be disposed of in order to repay the loan. Arising from this, there seems to have been some understanding between the appellant and the respondents family that the appellant would compensate them with some land.

15. The story goes that the appellant kept on promising to transfer the cautioned land to the respondent's family in order to compensate but he seems to have quietly reneged on the promises and even attempted to sell the land. This is what impelled the respondent and/or her late mother to register a caution.
16. In my view, when the appellant alleges that the lower court disregarded evidence when it treated as lawful the placement of caution, he is being less than honest. He was also being less than honest by pleading in the lower court that the respondent had no colour of right or reasonable cause to place the caution. The material and evidence made available show that it was not for nothing that the caution was lodged. There is a history behind the caution and the appellant cannot wish away that history.
17. In my view too, the lower court was not wrong to mention the issue of money. The lower court record talks of a loan and failure to repay that loan. The repayment was to be in monetary terms and I fail to understand why it is wrong for the lower court to mention money.
18. I have myself tried to appreciate the evidence made available to the lower court and it seems more likely than unlikely that the appellant is trying to escape some responsibility which he had promised to undertake and that is possibly why he is trying to sell the land to go and settle elsewhere.
19. Given all this, my finding is that the merits of the appeal herein have not been demonstrated and I therefore dismiss the appeal herein with costs to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 18TH DAY OF DECEMBER, 2023.

In the presence of Appellant and respondent in person.

Leadys – Court Assistant

A. KANIARU

JUDGE – EMBU ELC

18.12.2023

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 20TH DAY OF JUNE, 2023.

In the presence of Akotsi for Rose Njeru for appellant, Ms Ngige for Kathungu for respondent and Leadys – Court Assistant

ANTONY KANIARU

JUDGE- ELC, EMBU

20.6.2023

