



Gathirimu & another v County Land Registrar-Kiambu & another (Judicial Review 5 of 2022) [2023] KEELC 20712 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
JUDICIAL REVIEW 5 OF 2022
BM EBOSO, J
SEPTEMBER 28, 2023**

BETWEEN

DANIEL GIKONYO GATHIRIMU 1ST APPLICANT

PETER MWAURA GATHIRIMU 2ND APPLICANT

AND

COUNTY LAND REGISTRAR-KIAMBU 1ST RESPONDENT

ROSE WAIRIMU NGUNJIRI 2ND RESPONDENT

JUDGMENT

1. Through an originating notice of motion dated 14/7/2022, the applicants sought an order vacating a caution registered in the encumbrances section of the land register relating to land parcel number Dagoretti/Uthiru/553. The applicants designated Rose Wairimu Ngunjiri as an interested party in the application.
2. On 16/7/2023, the court ordered the applicants to amend the originating notice of motion and designate Rose Wairimu Ngunjiri as a substantive respondent in the suit. Further, the court directed the applicants to serve the motion on Rose Wairimu Ngunjiri through a prominent notice in either the Daily Nation or the Standard Newspaper.
3. An affidavit of service sworn by George Owino was subsequently filed, indicating that Rose Wairimu Ngunjiri was served through a notice published in the Daily Nation Edition of 17/8/2023. In addition, there was an affidavit of service filed, indicating that the Honourable Attorney General had been duly served. Indeed the Attorney General entered appearance on 28/2/2023 through Ms Ngira Lynn, Litigation Counsel.
4. The single issue falling for determination in this suit is the question as to whether the subsisting caution should be lifted. The case of the applicants is that they are the registered proprietors of the suit property.



In 1999, they learnt that Rose Wairimu Ngunjiri had caused a caution to be registered against the land register relating to the suit property on 27/2/2018 claiming the interest of a beneficiary. They had never been notified about the caution.

5. Upon learning about the caution, they lodged an application with the Land Registrar, seeking removal of the caution. Their request to the Land Registrar to conduct a hearing with a view to removing the caution went unheeded, hence the suit.
6. The 1st respondent, through the Attorney General, filed grounds of opposition dated 27/2/2023 opposing the suit on the following verbatim grounds:
 - a. The application is incurably defective, an abuse of the court process and ought to be dismissed at the first instance.
 - b. The applicant has approached this honourable court prematurely and in contravention of the doctrine of exhaustion which requires that a party exhausts all available dispute resolution mechanisms provided by the law before filing a dispute in court.
 - c. The cautioner or his legal representative has not been given an opportunity to participate in the removal of the said caution. If the caution is lifted, there will be compromise and this will further defeat the core purpose of restriction.
7. The 1st respondent did not file a replying affidavit to tender an explanation on the circumstances which necessitated the registration of the caution. The 2nd respondent did not, in any way, respond to the suit. On 15/5/2023, the 1st respondent, through Ms Ngira, indicated that he did not intend to tender submissions in the suit. At the hearing Mr Amoko, counsel for the applicants submitted that the applicants do not know why the caution was lodged. He urged the court to vacate the caution.
8. I have considered the originating notice of motion. The purpose of a caution is to preserve a land register for a short period of time to enable the cautioner move to a court of law to ventilate his claim. The cautioner is expected to move to a court of law promptly. A caution is never intended to encumber the land in perpetuity. Indeed, our superior courts have been unequivocal on this principle.
9. In the present suit, both the cautioner and the Land Registrar have been given the opportunity to tender evidence as to why the caution should not be vacated. They have not stepped forward to tender any evidence to warrant retention of the caution.
10. In the circumstances, the court finds merit in the originating notice of motion dated 14/7/2022 and amended on 16/8/2023. The same is allowed as prayed. The 2nd respondent shall bear costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28TH DAY OF SEPTEMBER 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Owino for the Applicants

Court Assistant: Osodo

