



Mwaniki v Gichohi & another (Environment and Land Miscellaneous Application E002 of 2023) [2023] KEELC 20870 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2023
JO OLOLA, J
OCTOBER 19, 2023**

BETWEEN

KIONDO MWANIKI APPLICANT

AND

PATRICK GICHURU GICHOHI 1ST RESPONDENT

LAND REGISTRAR, NYERI 2ND RESPONDENT

RULING

1. By the Notice of Motion dated and filed herein on February 2, 2023, Kiondo Mwaniki (the Applicant) prays for an order directing the 2nd Respondent to remove and/or lift the caution registered against the parcel of land known as L.R No. Naromoru Block 2/Muriru/979 on March 12, 2013 at the behest of the 1st Respondent.
2. The application is supported by an Affidavit sworn by the Applicant wherein he avers as follows at Paragraphs 2 to 8 thereof:
 - “2. That the Applicant herein is the registered owner of Land Parcel L.R No. Naromoru Block 2/Muriru/979. (A copy of Title deed issued on 22nd September 1987 is annexed hereto marked “KM 1”);
 3. That the 1st Respondent herein, Patrick Gichuru Gichohi, the cautioner claimed to have purchased the property from Winfred Wangu Wanjiku;
 4. That while the criminal suit against Winfred Wangu Wanjiku was pending the said Patrick Gichuru Gichohi, lodged a caution/restriction over the suit property, first claiming interest as the beneficiary (Purchaser), restricting any dealings until the case (CMCR 848 of 2013) is concluded. (A copy of caution sheet lodged on March 12, 2012 is annexed hereto marked “KM 2”);



5. That the honourable court delivered Judgment on May 30, 2019 whereby the accused Winfred Wangu Wanjiru was convicted for obtaining the land in issue fraudulently. (A copy of the Judgment delivered on March 30, 2019 is annexed hereto marked “KM 3”);
 6. That the caution and restriction are registered against the property by Patrick Gichuki Gichohi;
 7. That to-date, the Registrar has failed to act on the same, thus the need to file the current application to obtain specific orders; and
 8. That I as the registered owner together (with) our dependants continue to be prejudiced by the existence of the encumbrances.”
3. Patrick Gichuru Gichohi (the 1st respondent) is opposed to the application. By his replying affidavit sworn on February 24, 2023, the 1st Respondent asserts that he was sold the suit property by one Winfred Wangu Wanjiku and that prior to the sale he had done due diligence and established that the said vendor was the registered owner thereof.
 4. The 1st Respondent avers that he lodged the caution to protect his interest in the land after the applicant herein lodged a criminal complaint against the said Winfred Wangu Wanjiku. The vendor though convicted in the lower court was later acquitted of all the charges after filing an Appeal to the High Court.
 5. The 1st respondent further avers that the suit property had changed hands and a transfer was done in favour of the said Winfred Wangu Wanjiku and the applicant no longer had any interest thereon.
 6. I have carefully perused both the application and the response thereto. I have similarly perused the submissions placed before me by the disputants herein.
 7. By the application before the court, the applicant urges the court to be pleased to issue an order directing the 2nd respondent to remove and/or lift the caution registered against the parcel of land known as Naromoru Block 2/Mururu/979. According to the Applicant, the said caution was registered at the behest of the 1st respondent on March 12, 2013.
 8. It is the Applicant’s case that he is the registered proprietor of the suit property having been so registered on September 22, 1987. It was further his case that following a suit lodged against one Winfred Wangu Wanjiku, the 1st respondent herein had lodged the caution pending the hearing and determination of the criminal charges facing the said Winfred.
 9. The applicant told the court that following judgment delivered by the court on March 30, 2019, Winfred was convicted for fraud but despite knowledge of the Judgment, the Land Registrar Nyeri (the 2nd respondent) had declined and/or failed to remove the caution on his land to his detriment.
 10. As it did emerge from the response by the 1st respondent, Winfred had appealed her conviction and sentence to the High Court. In a decision rendered on October 22, 2020 in Nyeri High Court Criminal Appeal No. 34 of 2019 her conviction was quashed and the sentence set aside. In allowing the Appeal, the Honourable Lady Justice T. W. Cherere found as follows at Paragraphs 24 and 25 of the Judgment:-
 - “ 24. From the defence by the appellant, she appears to me to have been a victim of a well calculated con game perpetrated by the Land Registration Officers at Nyeri office, one John Kiondo Mwaniki and some persons



who purported to be working in the office of P.M. Kahiga Advocate. In the absence of evidence that the Appellant was aware of the con game being played on her, the fact that she benefitted from its perpetration was no good cause to find her guilty;

25. And having been lawfully issued with a title deed L.R No. Naromoru/Block 2 (Muriru)/797, the appellant had a legitimate expectation that she could dispose it as she wished and cannot be criminally held liable for selling it to PW3 for more than she had purchased it.”
11. Both the applicant and the 1st respondent have latched on those two statements to justify their various positions. While the applicant contends that the court found that the title was fraudulently issued to the said John Kiondo Mwaniki and that he could not purport to transfer the same to Winfred, it was the 1st respondent’s contention that the decision had absolved Winfred of all charges of forgery and the applicant could not therefore claim to be the rightful owner of the suit property.
12. I was not persuaded by the positions taken by the disputants herein. It was apparent from a perusal of the decision by the High Court that the Court had not delved into the issue of who was the rightful owners of the suit property.
14. Such a determination can equally not be made in the Miscellaneous Application herein as filed by the Applicant. I say so because all the applicant prays for is a removal of the caution lodged by the 1st respondent on the suit property on March 12, 2013.
15. From a perusal of the proceedings in the lower court and the High Court Judgment aforesaid, it was apparent that the Applicant’s name was removed from the register of the title on 15th May, 2012 when the name thereon was amended to read John Kiondo Mwaniki. Subsequently and on the purport that the said John Kiondo Mwaniki had sold the land to Winfred Wangui Wanjiku, a new title deed was issued for the suit property in the name of Winfred on July 3, 2012.
16. Testifying in the Criminal Case lodged against Winfred, the Applicant’s son Waweru Kimondo Mwaniki (PW2) confirmed the position. It was his case that termites had destroyed their title deed and that when he applied for a replacement, he discovered that the land had changed hands from the name of his father to that of John Kimondo Mwaniki before it was transferred to Winfred’s name.
17. That lends credence to the 1st respondent’s contention that as at the time he lodged the caution, the land was not in the applicant’s name anymore and the applicant is not being entirely truthful in insisting that there is a caution registered on his parcel of land.
18. From the material placed before me, it was apparent that the title presently in the register is not in the Applicant’s name and that he needs to re-establish his ownership thereto through a proper legal process before seeking to have any encumbrances registered thereon removed.
19. In the premises, I do find the present application before me misconceived and without merit.
20. I strike out the same with costs which I hereby assess at Kshs.35,000/- to be paid to the 1st Respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 19TH DAY OF OCTOBER, 2023.

In the presence of:

Mrs Nderitu for the Applicants



Ms Wambui Mwai for the 1st Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

