



Muriongo & another (Suing as Personal Representatives of the Estate of Zakaria Kweyu) v Omondi (Environment & Land Case 224 of 2014) [2023] KEELC 21594 (KLR) (15 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 224 OF 2014
DO OHUNGO, J
NOVEMBER 15, 2023**

BETWEEN

CHARLES MURIONGO 1ST PLAINTIFF

ANTHONY MURIONGO 2ND PLAINTIFF

**SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ZAKARIA
KWEYU**

AND

FRANCIS OMONDI DEFENDANT

RULING

1. The plaintiffs commenced proceedings in this matter through Originating Summons dated 14th February 2008, which they filed in the High Court as HCCC Number 34 of 2008 (OS). The matter was later transferred to this court.
2. The plaintiffs averred in the OS that they had acquired title to the parcel of land known as S. Wanga/Lureko/695 (suit property) by adverse possession. Upon hearing the matter, this court (N A Matheka, J) delivered judgment on 7th May 2019. The court found that the plaintiffs had failed to establish their case and consequently dismissed it with costs.
3. Subsequently, the defendant filed Notice of Motion dated 15th February 2023, which is the subject of this ruling. The following orders are sought in the application:
 - a. That the Honourable Court be pleased to remove the caution lodged on 22.09.2009 as entry no. 6 and court order lodged on 09.10.2009 as entry no. 7 on the register.
 - b. That costs of this application be borne by the Plaintiffs/Respondents.



- c. Such other orders as the court deems fit and just to grant.
4. The application is supported by an affidavit sworn by the defendant. He deposed that he carried out a search on 6th August 2019 and was surprised to find that the plaintiffs had placed a caution as entry number 6 and registered a court order as entry number 7 in the register. He annexed a copy of a certificate of search and added that he had subdivided the suit property to his beneficiaries but was yet to process titles owing to the said encumbrances. That the plaintiffs had not filed any appeal against the judgment.
 5. The plaintiffs opposed the application through a replying affidavit sworn by the first plaintiff. He deposed that they had filed Court of Appeal Civil Application Number 1 of 2020 seeking leave to file a Notice of Appeal against the judgment out of time and that although ruling on the application was reserved for 29th January 2021, it was not delivered since the Court of Appeal found that the defendant was not served with the application. He added that the Court of Appeal is yet to fix a new hearing date for the application and that the prayer for removal of caution is premature as the defendant is yet to exhaust the statutory procedure for removal of cautions.
 6. The defendant/applicant filed written submissions on 15th September 2023 while the plaintiffs/respondents relied entirely on the replying affidavit.
 7. I have considered the application, the affidavits, and the submissions. The sole issue for determination is whether the orders sought should issue.
 8. From the material on record, it is apparent that that a caution was registered against the suit property as entry number 6 on 22nd September 2009 by Anthony Mulama Muriongo who was claiming a beneficiary interest. The said Anthony Mulama Muriongo must be the second plaintiff herein. The caution was not registered pursuant to any order of this court. Consequently, its removal must be subject to the procedure under Section 73 of the Land Registration Act as opposed to an application in this suit.
 9. The material on record further reveals that an order issued in this suit while it was still HCCC Number 34 of 2008 (OS) was registered against the suit property as entry number 7 on 9th October 2009. The entry states that the order restrained dealings “until the suit is heard.” The applicant did not offer any details as to the date the order was made. Nevertheless, a perusal of the record reveals that pursuant to a ruling delivered in this matter on 25th June 2009, an injunction was issued restraining the defendant from interfering with the plaintiffs’ use and occupation of the suit property pending hearing and determination of the OS. I believe that is the order that was registered on 9th October 2009 as entry number 7.
 10. The OS was determined on 7th May 2019, upon delivery of the judgment. Whereas the plaintiffs have stated that that they filed an application in the Court of Appeal seeking leave to file a Notice of Appeal against the judgment out of time, there is nothing to show whether the application has been determined. As long as the application remains undetermined, and long as there is no valid Notice of Appeal filed against the judgment, there is no valid appeal. The plaintiffs may wish to expedite their application in the Court of Appeal and maybe get some conservatory orders from the said court once they have a valid appeal.
 11. In view of the foregoing, I find merit in the portion of the application that refers to the order that was registered against the suit property as entry number 7 on 9th October 2009.
 12. In the result, I make the following orders:



- a. Entry number 7 dated 9th October 2009 in the register of the parcel of land known as S. Wanga/Lureko/695 pursuant to which a court order was registered be removed from the register.
- b. The defendant shall have costs of Notice of Motion dated 15th February 2023.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF NOVEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Nyikuli holding brief for Ms Ikhumba for the Plaintiffs

Mr K Mukavale holding brief for Mr Okeyo for the Defendant

Court Assistant: E. Juma

