



**Mogaka & 2 others v Kebati & another (Environment & Land Case
401 of 2013) [2023] KEELC 22293 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22293 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 401 OF 2013**

M SILA, J

DECEMBER 19, 2023

BETWEEN

BENARD NYAMANYA MOGAKA 1ST PLAINTIFF

ALLOYS TUMBO MOGAKA 2ND PLAINTIFF

DAVID ONSONGO MOGAKA 3RD PLAINTIFF

AND

PETER MOMANYI KEBATI 1ST DEFENDANT

LAND REGISTRAR KISII CENTRAL DISTRICT 2ND DEFENDANT

RULING

1. There are two applications before me which I directed to be heard together. The first application is that dated 21 July 2023 filed by the 1st defendant/decree holder. He seeks orders for the removal of a caution registered by the unsuccessful 1st plaintiff in the register of the land parcel Central Kitutu/Mwabundusi/347 which parcel of land is in his (1st defendant's) name. He is asking for the said prayer on the basis that this suit was determined in his favour and there is no need to keep a caution over a dispute that has already been decided. The second application is that dated 26 August 2023 but filed on 20 September 2023 by the 1st plaintiff. He is asking for an order to extend time to file a record of appeal out of time which application is purportedly based upon the provisions of section 79G of the [Civil Procedure Act](#), cap 21 Laws of Kenya. The applications are opposed by the respective respondents.
2. I will start with the 1st plaintiff's application to extend time to file a record of appeal out of time. The applicant has come to court inter alia pursuant to section 79G of the [Civil Procedure Act](#) which provides as follows :-

79G. Time for filing appeals from subordinate courts



Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

3. From the above, it will be seen that section 79G of the *Civil Procedure Act* applies to appeals to this court from subordinate courts and it does not apply to appeals from this court to the Court of Appeal. When it comes to extension of time to file appeal out of time, what is operative is The Court of Appeal Rules made under the *Appellate Jurisdiction Act*, cap 9, Laws of Kenya. Under rule 82, of the said rules, an appeal is supposed to be filed within 60 days of filing of the Notice of Appeal unless one can benefit from saving of time taken to procure the proceedings and judgment. If one wishes to have an extension of time for anything under the rules, he needs to apply under rule 4 of the Court of Appeal Rules which provides as follows :-
 4. Extension of time
The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.
4. The definition of 'court' in the context of the *Court of Appeal Rules*, unless otherwise specifically provided, means the Court of Appeal as explained in rule 2 of the said Rules. It follows that the court that has jurisdiction to allow for an extension of time to file a record of appeal out of time to the Court of Appeal, is not this court, but the Court of Appeal. The application of the 1st plaintiff seeking extension of time to file record of appeal out of time is thus in the wrong forum and I have no option but to dismiss it, which I hereby do, with costs to the 1st defendant.
5. The above disposes of the application dated 26 August 2023.
6. Let me now turn to the application dated 21 July 2023 filed by the 1st defendant. I have already mentioned that he seeks orders to remove a caution from his land parcel Central Kitutu/Mwabundusi/347. I have seen two cautions registered against the title both placed by the 1st plaintiff herein. There is one registered on 26 July 2012 and another registered on 12 September 2017 where the 1st plaintiff claims a beneficiary interest and quotes this case.
7. By way of background, the plaintiff and two others filed this case claiming that the 1st defendant's land parcel Central Kitutu/Mwabundusi/347 (the suit land) is superimposed on their land parcel Central Kitutu/Mwabundusi/833 and contended that the suit land is physically located elsewhere. I heard the case but I was not persuaded. I held that the suit land is properly located and is distinct from the land parcel Central Kitutu/Mwabundusi/833 on the ground. I thus proceeded to dismiss the case of the plaintiffs. Having dismissed the case of the plaintiffs, the plaintiffs cannot now allege to have any beneficiary interest in the suit land, as the dispute over the land has now been settled. There is therefore no basis upon which to maintain the cautions registered against the suit land.
8. In his reply, the 1st plaintiff claimed that since he has served a notice of appeal, this court is divested of jurisdiction and is functus officio. No law was cited by the 1st plaintiff to support his allegations. As far as I can see the application of the 1st defendant flows directly from the judgment of this court and this court is entitled to supervise and issue orders that emanate from its own judgment. The other



ground to oppose the application is that there is an ongoing criminal case against the 1st defendant. It means nothing that there is a criminal case against the 1st defendant in the subordinate court. This court, being the superior court, has already held that the title of the 1st defendant is a good title and that the 1st plaintiff has no interest in the suit land. Having made that decision it cannot be argued that the 1st plaintiff still has a beneficial interest in the suit land. In my opinion the opposition to the application seeking to remove the caution has no basis at all.

9. For the reasons above, I allow the application dated 21 July 2023 and order the Land Registrar to proceed and remove the cautions registered on 26 July 2012 and 12 September 2017 in the register of the land parcel Central Kitutu/Mwabundusi/347. The 1st defendant will have the costs of the application dated 21 July 2023 payable by the 1st plaintiff who is the one who chose to oppose it.
10. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 19 DAY OF DECEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

