



REPUBLIC OF KENYA



KENYA LAW
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**Karanja v Karanja (Environment & Land Case 19 of 2019)
[2022] KEELC 2787 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 19 OF 2019**

LN GACHERU, J

JUNE 30, 2022

BETWEEN

PETRO MWANGI KARANJA PLAINTIFF

AND

JAMES KIRAGO KARANJA DEFENDANT

RULING

- 1 The Applicant vide a Notice of Motion Application dated 5th March 2020, sought for order that;
 - a. Spent
 - b. That the Caution on parcel number LOC. 18/Githima/1217, claiming purchaser's interests placed by the Plaintiff be withdrawn.
 - c. That costs of the Application be provided for.
2. The application is premised on the ground set out on the face of it and the Supporting Affidavit of James Kirago Karanja (the Applicant) sworn on 5th March 2020. It the Applicant's disposition that the Plaintiff/ Respondent filed the instant suit seeking orders to transfer 0.25 acres out of the suit land more specifically being land parcel Number Loc. 18/Githima/1217, claiming that he had purchased the said portion from Mary Waithira Karanja. That this Court delivered Judgment dismissing the Plaintiff's case and therefore the entire suit land was left to the Defendant/Applicant. That based on the Judgement of this Court, he now seeks that the caution placed on the suit land by the Plaintiff/ Respondent be withdrawn.
- 3 The Application is opposed. On the one hand the Plaintiff/Respondent filed a grounds of Opposition dated 14th May 2020 and opposed the instant application on grounds that;
 - a. The Application as filed is vexatious, frivolous and an abuse of the due process of Court.



- b. Having dismissed the Plaintiff's case against the Defendant on 19th December 2019, and there being no Counterclaim by the Defendant against the Plaintiff for removal of caution on land parcel number Loc. 18/Githima/1217, the Court is now functus officio in as far as this matter is concerned.
 - c. The Judgment dated December 19, 2019, only dismissed the Plaintiffs case against the Defendant with costs and this Court has no basis on which it can grant the Orders for removal of caution as the same was not in issue in the dismissed suit.
 - d. The Defendant is trying to reopen the case by way of backdoor.
4. On the other hand the Plaintiff/Respondent filed a Replying Affidavit sworn by J.N. Kirubi, Advocate, on 14th May 2020. It was Counsel's disposition that the instant application was vexatious, frivolous and an abuse of due process as the alleged caution was not an issue in the main suit herein. That the Defendant/Applicant had filed a Defence, but did not file a Counterclaim against the Plaintiff/Respondent for removal of caution on land parcel number Loc. 18/Githima/1217. That this Court delivered its Judgment on 19th December 2019, dismissing the Plaintiff's Case with costs. That the instant suit having been dismissed, and there being no Counter claim by the Defendant/Applicant against the Plaintiff/Respondent regarding the caution, this Court became functus officio. That this Court did not make any orders in its Judgment touching on the caution on the suit land and as such the Defendant/Applicant cannot move Court in the same cause for removal of caution. That in the absence of a Counterclaim by the Defendant/Applicant for removal of caution, the Defendant can only file a suit in Court in order to obtain the relief sought. That the Defendant is trying to use back door means to obtain a substantial relief for removal of caution.
 5. The Application was canvassed by way of written submissions. The Defendant/Applicant filed his written submissions dated 25th March, 2022 through the Law Firm of Karuga Wandia & Co Advocates. He reiterated his averments in the Application and Supporting Affidavit thereto and urged this Court to allow the instant application as prayed. Similarly, the Plaintiff/Respondent filed his written submissions dated 21st April 2022 on the same day through the Law Firm of Kirubi, Mwangi Ben & Co Advocates.
 6. The Court has considered the pleadings in general, the rival written submissions and the relevant provisions of law and finds that the main issue for determination is whether the Application dated 5th March 2020, is merited.
 7. Before delving into the merit of the Application, it is important to lay a background of it. The Plaintiff filed the instant suit against the Defendant via a Plaint dated 6th June 2019 seeking the following orders;
 - a. Transfer of 0.25 acres out of land parcel No Loc18/Githima/1217, (suit land) as per the judgement in Murang'a HCCC Succession cause No 460 of 2014.
 - b. Costs of the suit.
 8. It was the Plaintiff's case that he purchased 0.25 acres out of the suit land from the late Mary Waithira Karanja, the then registered owner of the suit land and that the said Mary Waithira Karanja died on 30th July 2006, before transferring the land to him. The Defendant denied the Plaintiff's claim and asserted that the Plaintiff had not proved his claim on the portion of 0.25 acres and that in any event the decision of the Land Disputes Tribunal was ultra vires its jurisdiction hence null/void.
 9. The Court upon hearing the parties delivered its Judgment on 19th December 2019, dismissing the Plaintiff's case with costs to the Defendant. The Court in delivering its judgment stated as follows,



16. In exercise of my jurisdiction conferred upon this Court under Art 162(2) (b) of *the Constitution* read together with Section 13 of the *Environment and Land Court Act* and upon considering the evidence tendered on submissions of the parties the Court has come to the conclusion that the Plaintiff has failed to prove his claim in 0.25 acres in LOC 18/ Githima/1217.
17. In the upshot the Plaintiff's suit is dismissed with costs to the Defendant"
10. It is this judgment that necessitated the filing of the instant application. It appears that the Plaintiff/ Respondent herein had placed a caution over the suit land to preserve his interests if any pending determination of the suit. It is this caution that the Defendant/Applicant herein, being the successful party in the suit, seeks to withdraw.
11. Section 2 of the *Land Registration Act* defines a caution to include a notice in the form of a register to the effect that no action of a specified nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave the notice.

Section 71 (1) of the *Land Registered Act* Cap No. 3 of 2012 states as follows; -

A person who—

- (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
- (b) is entitled to a licence; or
- (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge".

Section 73 of the aforementioned Act states as follows;

- (1) A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar.
- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
- (5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any



dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

- (6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under Section 74 shall not be affected by the cancellation”.

12. It is the Applicant’s contention that the Caution should be withdrawn to enable him enjoy the fruits of his judgement by transferring and registering the suit land in his name. This Court notes that at the time the caution was placed, the Plaintiff had no registrable interest in the suit land as described in Section 71 of the [Land Registration Act](#) above mentioned. The Plaintiff however had an alleged interest over the suit land which he sought to protect. The said interest of the Plaintiff/Respondent on the suit was however extinguished when this Court delivered Judgment in favor of the Defendant/Applicant.

13. Therefore, after this Court delivered its judgment, the caution placed over the suit land serves no purpose and can only be referred to as wrongful caution. The [Land Registration Act](#) in Section 75 provides for wrongful cautions and states to wit as follows;

Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person.”

14. Further, in the case [Milkab Muthoni Wagoco...Vs...County Council of Kirinyaga & 2 Others](#) [2017] eKLR, the Court held inter alia that:

Further, a caution can only be lodged and maintained on a parcel of land by a party who can demonstrate a right or interest in the land, lease or charge. The 1st Respondent has not advanced any interest in the suit property or any reason why the caution lodged thereon should remain on the register. I would therefore make a finding that the 1st and 2nd Respondents have violated the Petitioner’s rights under [Article 47 of the Constitution](#) and further order the removal of the caution lodged on the suit property.”

15. Under Section 73 (1) of the [Land Registration Act](#), a caution may be removed by the cautioner or by the Registrar or by the Court. This Court therefore has the jurisdiction to grant the orders sought in the Application.

16. The right to own and acquire property in Kenya is premised on Article 40 of [the Constitution](#) of Kenya, 2010. The said Article provides as follows;

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

- (a) of any description; and
- (b) in any part of Kenya.”

17. Further, the rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#), 2012. Section 24(a) provides:

“24. Subject to this Act



- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

18. Section 25(1) provides that such a registered owner’s rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act.
19. It is trite that a caution placed over land forbids the registration of dispositions of any nature over the subject land and no action in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave the notice. It is evident from the record herein that the Defendant/Applicant was the successful party in the judgment and therefore he is the rightful owner of the suit land. It follows therefore that the Defendant/Applicant herein cannot enjoy the fruits of his judgment with the caution placed by the Plaintiff/Respondent in place.
20. The Plaintiff/Respondent has no protectable interest in the suit land after judgment was delivered against him. Further no evidence has been led before this Court to the effect that the Plaintiff/Respondent lodged an appeal after the impugned judgment. The Plaintiff/Respondent contends that this Court is functus official and cannot pronounce itself on the instant application because the issue of caution was not raised in main suit. This Court is however of a different view and it finds and holds that the instant application is rightly before it as its purpose is to give effect to the Judgment of this Court delivered on 19/12/2019.
21. This Court is persuaded by the findings in the case of *Maria Nganga Gwako...Vs... Charles Mwenzi Nganga*, Civil Appeal No.287 of 2012 (2014) eKLR, where the Court held that:-
- When a caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place.....
22. In the absence of any reasonable cause shown by the Respondent as to why the said caution should not be removed, the application for the removal of the same must succeed”.
23. The cautioner has not applied to remove the Caution. However, the Defendants/Applicants who is the legal owners of the suit land pursuant to the Judgment of this Court delivered on 19th December 2019, have done so. The cautioner has raised an objection to the instant Application, but not raised any objection on why the caution should not be removed.
24. The Court had earlier found that the Plaintiff/Respondent who is also the cautioner had no basis for maintaining the said caution. The Defendant/Applicant has demonstrated that they have a registrable interest over the suit property and therefore the said caution should be withdrawn.
25. This Court finds that the Plaintiff/Respondent has no basis for continuing to have the caution lodged against the suit land. Without any reasonable cause being shown as to why the caution should remain in place, the Court finds that the Applicant’s Notice of Motion Application dated 5th March 2020 is merited and the same is allowed as prayed. The Defendant/Applicant being the successful party shall have costs of the App.lication

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 30TH DAY OF JUNE, 2022.

L. GACHERU



JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

Mr Kirubi for the Plaintiff/Respondent

Respondent/Objector/Applicant – Absent

L. GACHERU

JUDGE

30/6/2022

