



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2863 of 1993**

**HANNAH WAIRIMU**

**NAOMI WANJIRU**

**MARTHA GATHONI**

**RAHAB WANJIKU**

**DANIEL KINUTHIA**

**REUBEN KARANJA.....PLAINTIFFS**

**VERSUS**

**MOSES KINUTHIA GACHOKA..... 1<sup>ST</sup> DEFENDANT**

**MARGARET NJANJO ALFRED..... 2<sup>ND</sup> DEFENDANT**

**RULING**

By chamber summons dated 22.10.07 the plaintiffs applied for the following orders:-

1. That the caution lodged by George Kinuthia on 08.02.93 against the title to the suit premises, L.R. No. Dagoretti/Thogoto/T.394 be removed forthwith and the title documents to the premises be released to the plaintiffs unconditionally.
2. That the costs of this application be provided for.

The grounds upon which the application is based are:-

- i. The caution has been overtaken by the event of the orders given in this suit on the 22.08.03.
- ii. The caution is a hindrance to the implementation of the orders given by this court.
- iii. The caution is no longer maintainable as the cautioner (sic) claim has not been established.
- iv. Such further grounds and reasons as set out in the annexed affidavit of Hannah Wairimu.

The application is supported by the affidavit of Hannah Wairimu (plaintiff No.1) sworn on 22.10.07.

At the hearing of the application on 24.01.08, the plaintiffs/applicants were represented by learned counsel, Mr S. King'ara. Learned counsel, Mrs M.W. Muhuhu appeared for defendant/respondent.

Plaintiffs'/applicants' counsel informed the court that the suit against the 2<sup>nd</sup> defendant, Margaret Njanjo Alfred was withdrawn, leaving Moses Kinuthia Gachoka as the sole defendant. The said counsel proceeded to tell the court that the suit subject matter of the present application was determined by Aluoch, J (as she then was) on 22.08.03; that the Judge decided that the suit premises belong to the plaintiffs; and that the defendant's counter – claim was dismissed. Counsel referred to Certificate of Official Search dated 19.09.07 and pointed at a caution lodged on 08.02.93 by George Kinuthia against Title No. Dagoretti/Thogoto/T.394 claiming to be a beneficiary. Counsel said that George Kinuthia is a brother of defendant, Moses Kinuthia Gachoka; that both Moses Kinuthia Gachoka and cautioner George Kinuthia are dead; and that they died after the suit was determined. In plaintiffs'/applicants' counsel's view, the interests of the two brothers was the same, i.e. they said their late father was the owner of the suit premises, so they claimed beneficial interest in the suit property. Counsel reiterated that the court dismissed defendant Moses Kinuthia Gachoka's counter-claim. It was plaintiff's/applicant's counsel's contention that cautioner George Kinuthia's claim was based on the same facts and circumstances as those of Moses Kinuthia Gachoka whose counter-claim was dismissed.

Plaintiff's/applicant's counsel submitted that cautioner George Kinuthia's claim is unsustainable and that retention of the caution lodged by him against the suit premises is also not sustainable. Counsel said he had explained this vide his letters of 03.08.07 and 06.08.07 to the Kiambu Land Registrar and requested him to release the title to the suit property and remove any caution lodged against the title to no avail. Counsel urged this court to order removal of the caution.

Regarding defendant's grounds of objection, plaintiff's/applicant's counsel said the sole defendant, Moses Kinuthia Gachoka is deceased and that an application for substitution of the defendant was dismissed on 08.03.07 for being brought out of time. In view of the fact that the suit against 2<sup>nd</sup> defendant, Margaret Njanjo Alfred had been withdrawn, plaintiff's/applicant's counsel said there is no defendant to oppose the present application. It was plaintiff's/applicant's counsel's contention that counsel on record for the late defendant Moses Kinuthia Gachoka is now in the position of being counsel for a non-existent defendant and that the said counsel has no capacity to raise the issue of the cautioner not being a party to these proceedings. Plaintiff's/applicant's counsel said cautioner George Kinuthia is deceased and that there is no dispute over the matter. Counsel submitted that once a cautioner dies, the caution also dies and does not survive him. Counsel added that if a legal representative of the cautioner intends to have the life of the caution extended, such representative should seek a court order to that effect and that in default, the caution expires with the demise of the cautioner. He referred in this regard to sections 131, 132 and 133 of the Registered Land Act, Cap.300. In plaintiff's/applicant's counsel's view, the aforesaid sections presume that the cautioner is alive, which counsel had earlier on said the cautioner is not.

Plaintiff's/applicant's counsel urged the court to grant the orders sought in the chamber summons dated 22.10.07.

On the other hand, defendant's/respondent's counsel opposed the application. She said the cautioner, George Kinuthia is not a party to this suit; that the caution was placed in 1993 but the cautioner has not been joined as a party to the proceedings. Defendant's/respondent's counsel pointed out that no proof of death of cautioner George Kinuthia had been furnished to court and that no service of the present application on the cautioner or his representative had been demonstrated. In defendant's/respondent's counsel's view, the court has no discretion to issue orders against a stranger.

On the issue of Kiambu Land Registrar withholding the title to the suit land, defendant's/respondent's counsel said she had no knowledge of the said withholding or the reasons therefor. Counsel also said no proof was availed that the letters of 03.08.07 and 06.08.07 to the Kiambu Land Registrar were received by the said Registrar.

As regards the question whether defendant's/respondent's counsel has capacity to object to the

application now under consideration, defendant's/respondent's counsel pointed out that it is the plaintiff/applicant through his counsel who served her with the application and that the plaintiff/applicant must be aware that there are representatives of the defendants still interested in the subject matter of the application. Defendant's/respondent's counsel confirmed being still on record for the defendant, but not for the cautioner George Kinuthia, who is not a party to the suit.

Defendant's/respondent's counsel urged that the application be dismissed with costs.

In reply, plaintiffs'/applicants' counsel submitted that in absence of a replying affidavit on behalf of the respondents, their counsel can only confine herself to matters of law, not of fact; and that since there is no replying affidavit from the respondents, issues of fact alluded to by defendant's/respondent's counsel should be disregarded.

Plaintiffs'/applicants' counsel reiterated that since defendant Moses Kinuthia Gachoka is dead while defendant Margaret Njanjo Alfred had the case against her withdrawn, there is no one to oppose the application and that the court should allow the application.

I have given due consideration to the application plus arguments for and against the said application.

The court record establishes that the caution being challenged was lodged against the title to the suit land by one George Kinuthia on 08.02.93 and that the cautioner claimed to lodge the caution as beneficiary of the suit land. The plaint in this case was filed on 14.06.93, i.e. later than the lodging of the caution. The chamber summons application under consideration seeks an order of the court to remove the caution. The cautioner, George Kinuthia against whose caution the order is sought has not been enjoined as a party. The court does not know why there has been no joinder of cautioner George Kinuthia to these proceedings. No evidence has been tendered of service or attempted service of the application upon George Kinuthia or, if dead, upon his representative. I note that the cautioner, George Kinuthia purported to lodge the caution as beneficiary. The court does not have evidence of how his beneficial interest arose. If he is dead, the court does not know whether anybody survived him who might lay claim as successor to George Kinuthia's purported beneficial interest. The present application is essentially urging the court to condemn cautioner George Kinuthia unheard. That violates the rules of natural justice and this court will not condone such violation. The application seeks orders against a stranger.

The upshot is that this court finds the chamber summons application dated 22.10.07 incompetent and the same is hereby struck out. This seems as delicate family matter. I make no orders as to costs.

Orders accordingly.

**Delivered at Nairobi this 5<sup>th</sup> day of March, 2008.**

**B.P. KUBO**

**JUDGE**