



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

**Civil Case 1335 of 2004**

1. Land and Environmental Law Division

2. Subject of main suit: i) Land

ii) Removal of caution

3. Procedure:-

i) Originating summons filed

ii) Directions given 15 May 2006 Aluoch, J.

iii) Defendant served absent – hearing Order IXb

r 3 (a) Civil Procedure Rules and Order IXa r 8 Civil Procedure Rules.

3. Hearing

i) The plaintiff and defendant man and wife

ii) The two are divorced through Thika

DMCC18/96 case

iii) Prayers in Originating Summons to remove caution on land placed by defendant

iv) Court orders required to do so.

4. Finding

i) Court calls up DMCC18/96 from Thika

ii) File confirms that parties are NOT divorced

iii) Material non disclosure and

deponing of false fact

5. Held:

i) Application refused and Originating Summons dismissed

ii) The caution to remain as lodged

6. Case Law

Related cases:-

a) Esther Wanjiru Mucheru v Ibrahim Mucheru

Thika, DMCC18/96. T.W. Cherere DMII/Ag.RM

b) Esther Wanjiru Mucheru v Ibrahim Mucheru

Nairobi CA 48/97 (High court).

7. Advocate:

A.M. Nyangau for Masore Nyangau & Co. Advocates for the plaintiff

Esther Wanjiru Mucheru the defendant in person

**IBRAHIM MUCHERU WAHOTHI ..... PLAINTIFF**

**VERSUS**

**ESTHER WANJIRU MUCHERU ..... DEFENDANT**

**JUDGMENT**

I: PROCEDURE

1. The Suit herein has been brought by way of an Originating Summons that seeks prayers to remove cautions lodged against certain titles.
2. The plaintiff Ibrahim Mucheru Wahothi is the husband to Esther Wanjiru Mucheru whom he sued to have the caution against the title removed.
3. Directions under Order XXXVI r 8, 12 Civil Procedure Rules was given by this court (Aluoch J, 15 May 2006) that the hearing of the said originating summons be heard by way of affidavit evidence.
4. The defendant on being served failed to file an affidavit or attend court. The hearing proceeded under order IXb r 3 (a) Civil procedure Rules and order IXa r 8 Civil Procedure Rules.

II: Hearing

5. In his submissions the plaintiff stated through his advocate that he was married to the defendant but divorced her through a court case being SRMCC 18/96 in Thika. In 1995 the defendant lodged a caution on four of his parcels of land being Ngenda/Gatukuyu/T328, Ndarugu/Gakoe/598, Ngenda Gatukuyu/329 and Ndarugu/Gakoe 87. As the defendant has no legitimate claim on the land, the caution should be removed. The district Land Registrar would not remove the same unless the said caution is ordered to be removed by a court order.

6. I did cause the file SRMCC No.18/96 from Thika to be called up. It transpired that there are two files

SPMCCC NO.8/96 and DMCCC18/96. There were two separate files bearing the same case number. The correct file was DMCCC 18/96.

7. On perusal of this file (whose proceeding should have been annexed to the plaintiff's affidavit) it discloses that it was the defendant Esther Wanjiru Mucheru who filed for a divorce. The two had married in 1953. By 1969 their marriage began to disintegrate. By 1986 the defendant stated the plaintiff threatened to kill her. She ran away to a church where she lived for 20 days and finally left the matrimonial home. Ten years later she filed for divorce. The trial magistrate T.W Cherere ( Mrs) Ag. Resident Magistrate gave judgment in which she refused to grant a divorce and accordingly dissolved the divorce cause. She also refused to grant maintenance on the grounds that under the Kikuyu Customary Law a wife is not entitled to maintenance (The decision was made on 31 January 1997).

8. Being dissatisfied with the magistrates decisions the defendant appealed to this High Court of Kenya irobi on the 26 February 1997. The appeal was admitted to hearing (Amin J) and directions as required by law was given Ojuk J 21 October 1995. The suit was set down for hearing on the

25 November 1998. Five days prior to this date the plaintiff filed a notice of withdrawal and or discontinuation of the appeal (20 November 1998). The appeal case being CA48/97.

9. As it stands the plaintiff and defendant are still man and wife. There was no divorce granted by any court of law.

### III Affidavit

10. The plaintiff deponed to an affidavit stating:-

“That the defendant is my wife although I have divorced her in Thika SRMCC No.18 of 1996”.

11. This is a false statement deponed to on oath. The affidavit before me can therefore not be relied on the grounds that this court removed the caution. It is an affidavit that has not disclosed material fact is untrue and unreliable before this court of law.

### IV Findings/holdings

11. I hereby find that the Originating Summons cannot be relied to as it being false the said application be and is hereby dismissed. The caution is to remain as lodged.

13. The defendant having failed to attend court there will be no orders as to costs.

Dated this 11<sup>th</sup> day of July 2007 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

A.M. Nyangau for Masore Nyangau & Co. Advocates for the plaintiff-present

Esther Wanjiku Mucheru the defendant in person - absent