



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL 453 OF 2002**

HANNAH NYAMBURA GIKAMU APPELLANT

VERSUS

MUCHAI KARU RESPONDENT

(An Appeal from the Order of S. B. A. Mukabwa, SRM in Githunguri

Misc. Application No. 5 of 2002 delivered on 14th August, 2002).

JUDGMENT

On 13th May, 2002, the Respondent to this Appeal filed an application in the lower court, by way of a “Notice of Motion” seeking the following Order:

“That the Caution lodged by one Hannah Nyambura Gikamu against L. R. Githunguri/Gathangari/1721 be removed forthwith. That costs of this application be in the cause”.

The Appellant objected to the application as being incompetent as it had not been commenced by way of a Plaint, and submitted that it should be struck out. By its Ruling dated 14th August, 2002 the lower court upheld the Notice of Motion application as being competently before her, and granted the Orders sought. Aggrieved by that decision, the Appellant has appealed to this Court on the following four grounds:

“1. The Magistrate erred in law and fact in not dismissing the application as it was defective in law as the proceedings to remove the caution Registered on 21/11/89 on Githunguri Gathangari/1721 should have been initiated by plaint under Order IV rule 1 of the Civil Procedure Rules and not by Notice of Motion.

2. The Magistrate erred in law and fact in ordering the removal of the caution on L. R. Githunguri/Gathangari/1721 despite the fact that the appellant had a judgment in her favour in Kiambu RM land case on 21/80 over L. R. Githunguri/Gathangari/1218 from which L. R. Githunguri/Gathangari/1721 was a subdivision.

3. The Magistrate erred in ordering the removal of the caution while it protected the appellants husbands purchasers interest on L. R. Githunguri/Gathangari/1721 and the caution was valid under Section 131 of the Registered Land Act Chapter 300 Laws of Kenya.

4. The Magistrate erred in ordering the Appellant to pay costs of the application”.

Although there are four grounds to this appeal, Mr Kinuthia, Counsel for the Appellant, argued only ground 1, as that, in his own words, was the most important ground. The Court did not have the benefit of

the Respondent's submissions, as the Counsel was absent, although duly served.

The issue before this court is whether an application to remove a Caution on the suit land could be commenced by way of a Notice of Motion application. As Mr Kinuthia argued, Order 4 Rule 1 of the Civil Procedure Rules requires that:

“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed”.

The “other manner” prescribed in Order 36 Rule 1 is the Originating Summons which may be taken out in respect of matters stipulated in that Rule. Order 36 Rule 3F stipulates as follows:

“Order 36 Rule 3F. An application under the Registered Land Act other than under sections 120, 128, 133, 138, 143 and 150 thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made by summons in chambers in that suit”.

The above rule specifically excludes the use of Originating Summons for applications under Section 133 of the Registered Land Act, which is the Section under which the Respondent filed his application for the removal of the Caution.

Section 133 of the Registered Land Act having been expressly excluded from the use of Originating Summons, the only other way that application could have been made was by way of a Plaint. It could not have been made by way of Notice of Motion. The learned Magistrate fell in error when he relied on Order 50 Rule 1 which applies to interlocutory applications where a suit is already before the Court.

Accordingly, I find that the Notice of Motion application dated 10th May, 2002 filed in the lower court on 13th May, 2002 was incompetently before the court. This appeal is allowed, and the application is struck out, and the Orders made set aside. The Appellant shall have the costs, both of this appeal, and in the court below.

Dated and delivered at Nairobi this 27th day of July, 2005.

ALNASHIR VISRAM

JUDGE