



**Kamau v Njoroge & 2 others (Environment & Land Case
82 of 2018) [2025] KEELC 1081 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1081 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 82 OF 2018**

CK NZILI, J

MARCH 5, 2025

BETWEEN

MARGIN MACHARIA KAMAU PLAINTIFF

AND

PETERSON NJOROGE 1ST DEFENDANT

DISTRICT LAND REGISTRAR KITALE 2ND DEFENDANT

HON ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The plaintiff approached the court through a plaint dated 16/8/2018. He seeks an order directing and or compelling the Land Registrar, who is the 2nd defendant, to remove a caution and or restriction placed on the title deed for LR No. Kitale Municipality Block 2/Tuwan/2756 by the 1st defendant, on 5/6/2015.
2. At the trial, the plaintiff relied on witness statements dated 14/8/2018 and 5/2/2018 as his evidence-in-chief. It was his testimony that he bought and was registered as the owner of the suit land as per the copies of the title deed, stamp duty declaration assessment and pay-in slip, sale agreement dated 4/4/2008, and official search certificate dated 4/7/2017, produced as P. Exhibit No. 1, 2, 3 and 4 respectively.
3. PW1 said that there was no lawful or justifiable reason that the defendants maliciously placed a caution on his title on 5/6/2015, which the 2nd and 3rd defendants have refused to lift or withdraw, subjecting him to untold loss, damages, and mental anguish; hence, the prayers sought. The plaintiff produced a copy of a statutory declaration sworn on 19/2/2016, a notice of intention to remove, the caution from the 2nd defendant dated 11/11/2015, notice to the 1st defendant, and copies of letters from his advocates dated 15/7/2016 and 15/4/2017 as P. Exhibit Nos. 5-9, respectively.



4. In cross-examination, PW1 told the court that at the time he bought the land, no one who in occupation of the land, least of all the 1st defendant, who was allegedly claiming that he had bought the land previously. PW1 said that the title deed had an acreage tallying with the position of the plot on the ground. Further, PW1 told the court that he discovered the caution while he was trying to seek a loan facility using the title deed. PW1 told the court that he came to know the 1st defendant after making inquiries at the land's office, over who had lodged the caution. PW1 said that he bought the land from one Philip Atila. PW1 blamed the 2nd and 3rd defendants for registering a caution on his land and refusing to lift it, yet the 1st defendant had no share on his land.
5. Philip Atila testified as PW2. He relied on a witness statement dated 3/8/2023 as his evidence-in-chief. He confirmed selling the land to PW1, which he had initially acquired from Tuwan Farm in 1970. PW2 said that the 2nd defendant did not summon him to their offices after the caution was lodged; otherwise, before he sold the land, he was not personally living or utilizing the land.
6. The 1st defendant opposed the suit through a statement of defense and counterclaim dated 18/9/2018. It was averred that the plaintiff fraudulently registered the land, yet it was to be jointly registered in the four names of persons who had acquired it; otherwise, the plaintiff was not a sole proprietor of the land. The 1st defendant averred that he lodged the caution since he had an interest in the said property. He termed the whole process of acquisition and registration in the name of the plaintiff as fraudulent.
7. By way of a counterclaim, the 1st defendant averred that he obtained the land alongside Joseph Kimeto, Philip Atila Okwayo, Martin Macharia Kamau, and Peterson Njoroge Ichangai, whose rights he never relinquished to the plaintiff. He prayed for the cancellation of the title held by the plaintiff, and the same be registered under the names of the plaintiff and himself.
8. In his defense, the 1st defendant relied on a witness statement dated 18/9/2018. He told the court that the plaintiff was his neighbor. DW1 said that he bought 30ft by 67ft of the suit land from Lucy Nyambura on 3/10/1987, who was a member of Tuwan Farm, paid the total purchase price, and while away, he allowed the plaintiff to use the land. He said that because of the size of the plot, the title deed was supposed to contain the names of four people, but the plaintiff illegally registered it under his name, yet he knew that fact. DW1 said that he was entitled to register the caution until his interests on the land were determined and the names rectified. DW1 relied on an agreement for sale dated 3/10/1987, caution lodged on 2/6/1987, a letter dated 5/6/2015, a letter dated 15/12/2017, a certificate of official search dated 2/6/2015 and a map and list of membership of Tuwan Farm as D. Exhibit No. 1, 2,3, 4, 5 MFI-D(6) and MFI-D(7) respectively.
9. In cross-examination, DW1 told the court that he lodged the caution after he discovered that the plaintiff had obtained a title deed in 2015, for a land he had bought from Lucy Nyambura in 1987. DW1 told the court that he had never lived on the land; otherwise, four people were entitled to a share of the same after they were put together. DW1 said that although he attended the objection proceedings, the dispute was not resolved, for the plot to be severed into individual shares. DW1 said that when he bought the land, a sister-in-law was the one utilizing the land on his behalf before the land was surveyed. DW1 said that parties were directed to move to court after the objection proceedings since the land belonged to four people as per the letter dated 5/6/2015 from Tuwan Farm showing the area list.
10. The 2nd and 3rd defendants opposed the suit by a statement of defense dated 14/6/2023. It was averred that after the suit land was registered in the name of the plaintiff, he was issued with a title deed on 27/7/2011 and that it was within their mandate to register the 1st defendant caution on 5/6/2015 after he demonstrated his interest in the land and after a letter was written by the Director of Tuwan Farm,



- indicating there was a dispute. The 2nd and 3rd defendants averred that they were competent to register the caution until the dispute was finalized to the benefit of all the interested parties.
11. The 2nd and 3rd defendants averred that they acted bonafide within their statutory and constitutional powers. The statement by the 2nd and 3rd defendants was not accompanied by any witness statement save for a list of documents dated 14/6/2023, which were not produced at the hearing.
 12. At the close of the hearing, parties were directed to file written submissions by 21/2/2025. The 1st defendant relied on written submissions dated 10/2/2025. The 1st defendant submitted that the caution was lawfully lodged to protect his share as per the area list showing that he was entitled to 0.021Ha out of 0.0556Ha, in which the plaintiff's share is only 0.0142Ha. The 1st defendant submitted that the title deed held by the plaintiff has more acreage, the person who sold him the land was not a shareholder, his documents are false, the area list produced has errors, the title deed was fraudulently obtained, he acquired his land lawfully in 1987 and that the plaintiff has failed to prove his claim to the required standards.
 13. The 2nd and 3rd defendants submitted that it was not in dispute that the plaintiff was transferred the land by the first registered owner, Tuwan Farm Ltd, on 27/7/2011 as per the green card filed alongside the statement of defense. The 2nd and 3rd defendants submitted that the caution was registered under Sections 71(1) and 76(1) of the *Land Registration Act* upon application by the 1st defendant. The 2nd and 3rd defendants submitted that the plaintiff never applied for the removal of the caution to the Land Registrar as the first port of call; thus, the Land Registrar maintained the caution.
 14. Relying on Sections 73(1) and (2) and 78 of the *Land Registration Act*, the 2nd and 3rd defendants submitted that the Land Registrar ought to be moved first to remove the caution. Reliance was placed on *Mwangi Rukwaro & Another -vs- Land Registrar Nyeri* [2019] eKLR, that the Land Registrar could not unilaterally withdraw the caution. The 2nd and 3rd defendants submitted that the plaintiff has no cause of action against them.
 15. The issues calling for my determination are:
 1. If the plaintiff exhausted the mechanism for removal of the caution before moving the court.
 2. If the 1st defendant had an interest in lodging the caution.
 3. If the 1st defendant has pleaded and proved that the plaintiff fraudulently obtained a title deed for the land jointly owned.
 4. If the counterclaim is valid.
 5. If the caution should be sustained.
 6. What is the order of costs?
 16. It is trite that parties are bound by their pleadings, and issues for the court's determination arise from the pleadings. The claim by the plaintiff is for removal of a caution placed on his title registered by the 1st defendant on 5/6/2015, claiming a beneficial interest.
 17. In his defense and counterclaim dated 18/9/2018, the 1st defendant did not specify when the four persons acquired the land jointly and the nature and particulars of their respective shares. He did not also plead when the fraud occurred and the measures that he took other than lodging the caution in 2015.



18. Regarding the counterclaim, it has no titular heading. Equally, the date of the acquisition of the joint interest and from whom it was acquired was not pleaded.
19. Similarly, the 1st defendant failed to plead any particulars of illegality, fraud, misrepresentation, and or issuance of a title deed to the plaintiff in an unprocedural or corrupt manner in line with Order 2 Rule 10 of Civil Procedure Rules.
20. It is a trite law that fraud or illegality must be specifically pleaded and proved. Courts of law do not infer illegality or fraud. The burden of proof is on he who alleges. It has to be proved on a balance higher than in ordinary suits. See *Arthi Highway Developers Ltd -vs- West End Butchery* [2015] KECA 816 [KLR] and *Virjay Morjaria -vs- Nansingh Darbar* [2000] eKLR.
21. In this suit, the 1st defendant failed to give particulars of the date on which he discovered the fraud. Fraud has a limitation period. The suit land was first registered in the name of the plaintiff on 27/7/2011. A title deed was issued on the same day to the plaintiff by Tuwan Farm Ltd. Fraud consists of deceitful practice or willful acts with the intention to deprive another of his right or cause him injury.
22. The 1st defendant used the alleged fraudulent transfer and registration of title to place, register, and maintain a caution on the title, based on a sale agreement, which he produced as D. Exhibit No. '1'. Equally, the 1st defendant relied on letters dated 5/6/2015 and 5/12/0217 as D. Exhibit No. '3' and '4'.
23. The legal effect of caution is to prohibit any transactions on a title held by the registered owner. There is no evidence if the 2nd and 3rd defendants involved the plaintiff or made an inquiry before registering the caution.
24. The primary purpose of pleadings is to communicate the complaints that a party is bringing before court, as held in *Mohamed Fugicha -vs- Methodist Church of Kenya* C.A No. 22 of 2015. The onus was on the 1st defendant to bring on board the Tuwan Farm Ltd to sustain his claim that he had a beneficial interest in the land alongside three other persons, which, unfortunately, the initial owner transferred the same to the plaintiff in 2011, without their participation. The statutory duty was on the 2nd and 3rd defendants to satisfy themselves that the 1st defendant had a genuine claim on the land before the caution was registered and sustained.
25. The 2nd and 3rd defendants have submitted that the first port of call was the 2nd defendant before the suit was filed. The 2nd and 3rd defendants' defenses did not raise the issue of non-exhaustion of the internal dispute mechanism under the law. Both the plaintiff and the 1st defendant have, however, told the court that there were objections proceedings which did not resolve the dispute and they were duly informed by the 2nd defendant to move to court. The 2nd defendant did not refute those facts or supply the court with copies of the proceedings it undertook to resolve the issue of whether four persons owned the suit land.
26. A party may not be permitted to deviate from its pleadings. See *Raila Odinga & Others -vs- IEBC & Others* [2017] eKLR. Written submissions cannot replace pleadings or amount to evidence. See *Daniel Toroitich Arap Moi -vs- Stephen Mwangi Murithi & Another* (2014) eKLR. Exhibits had been produced to show that the 1st defendant and the plaintiff appeared before the 2nd defendant for proceedings on whether or not to lift the caution. The 2nd defendant cannot, therefore, blow hot and cold at the same time. Part V11 of the [Land Registration Act](#) governs the procedure to lift a caution. The court has powers to hear and determine the legality and regularity of lodging, registering and sustaining a caution.



27. In *Mugambi -vs- Mugambi* ELC Misc. Appl. No. E003 of 2023 [2024] KEELC 445 [KLR] (31st January 2024) (Ruling), the court said that an absolute owner of land under Article 40 of *the Constitution* of Kenya as read together with Sections 24, 25, 26 and 28 of the *Land Registration Act*, is entitled to all his rights to land and that there must be justification why such rights should be impeded or curtailed for an indefinite period.
28. In *David Macharia Kinyuru -vs- District Land Registrar Naivasha & Another* (2017) KEELC 2474 eKLR, the court held that if a Land Registrar has to restrict a title register before the ownership of the land is determined, the restriction should be limited to allow a reasonable time for the person claiming the land to lodge his case in court. From 2015 to 2018, the 1st defendant did nothing to lodge his claim or seek for Tuwan Farm Ltd and his co-owners of the land to have the ownership dispute determined. He instead waited until 2018 to lodge a belated counterclaim based on fraud, almost over 3 years following the discovery of the alleged fraud. The 1st defendant before this court failed to call any director of Tuwan Farm Ltd and the co-owners to verify his interests in the suit land and also prove fraud against the plaintiff.
29. The plaintiff has produced a paper trial on how he obtained his title in a legal, procedural, regular and formal manner. He, therefore, discharged his burden of proof by establishing all the facts through documents as required of him under Sections 107 - 112 of the *Evidence Act*. The defendants were unable to challenge or impeach all those documents leading to the transfer, registration, and ownership from the former first registered owner, Tuwan Farm Ltd.
30. A mere letter from a director of Tuwan Farm Ltd, which was not supported by credible and tangible evidence, cannot be used to impeach the title held by the plaintiff and justify the indefinite sustainability of the caution. The upshot is that I find the plaintiff has proved his claim to the required standards,
31. An order is hereby granted directing and/or compelling the Land Registrar Kitale, to withdraw the caution and restriction placed by the 1st defendant on LR No. Kitale/Municipality Block 2/ Tuwan/2756 within 30 days from the date hereof. The defense and counterclaim by the 1st defendant lacks merit, substance and is unsustainable.
32. Costs to the plaintiff.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 5TH DAY OF MARCH 2025.

In the presence of:

Court Assistant - Chemutai

Jerubet for Ingosi for 2nd and 3rd Defendants present

1st Defendant absent

Plaintiff present in person

Represented by Majanga Advocate

HON. C.K. NZILI

JUDGE, ELC KITALE.

