



Festo v Gidagwa & 2 others (Environment & Land Case 34 (E030) of 2021) [2024] KEELC 568 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 34 (E030) OF 2021
FO NYAGAKA, J
FEBRUARY 8, 2024**

BETWEEN

MARKO ODEMO FESTO PLAINTIFF

AND

EMMANUEL GIDAGWA 1ST DEFENDANT

MARGARET NAFULA 2ND DEFENDANT

COUNTY LAND REGISTRAR, TRANS NZOIA COUNTY 3RD DEFENDANT

JUDGMENT

1. The Plaintiff sued the Defendants vide a Complaint dated 08/04/2021 and filed on 24/05/2021. He sought the following reliefs:
 - a. A declaration that the registration of the caution on land parcel known as Trans Nzoia/Cherangani/373 is unlawful and a nullity;
 - b. General damages for wrongful registration of the caution;
 - c. An order compelling the Defendant (sic) to surrender the title to the Plaintiff;
 - d. An order compelling the 3rd Defendant to revoke and lift the caution over the suit parcel of land registered by the 1st Defendant;
 - e. Costs and interest.
2. In response, the 1st and 2nd Defendants entered appearance on 29/07/2021. They also filed their joint Statement of Defence dated 28/08/2021. They denied all the averments set out in the Complaint and prayed that the suit be dismissed with costs. The 3rd Defendant also filed its Statement of Defence dated 25/08/2021 on 03/09/2021. It similarly denied any form of liability praying that the suit be dismissed with costs.



3. The Plaintiff thereafter filed a Reply to Defence dated 05/07/2021 on 22/09/2021 in respect to the 1st and 2nd Defendant's Defence and another dated 07/10/2021 and filed on 18/11/2021 responding to the 3rd Defendant's Defence. He joined issue with the Defences and reiterated the averments in his Plaintiff.

The Plaintiff's Case

4. The Plaintiff, PW1 adopted his witness statement dated 08/04/2021 and filed on 24/05/2021 to explain that he was the registered proprietor of all that parcel of land namely Trans Nzoia/Cherangani/373 measuring approximately 0.809 Ha (2 acres) on 16/06/1997 whose copy of the title deed he produced and it was marked as P.Exhibit 2 and the green card marked as P.Exhibit 6. His evidence was that he inherited the said land from his father.
5. The Plaintiff continued that the 1st Defendant was his son while he married the 2nd Defendant in 1983. However, the 2nd Defendant was his estranged wife and had since separated. That he moved out of the suit land in 1993 leaving his wife and children.
6. He stated further that sometime in 2014, the 1st Defendant requested the Plaintiff to surrender the title under the pretext that the same would be utilized towards settling his school fees. It was during this time that the 2nd Defendant confiscated the title to the suit land and has since been in possession of it contrary to Section 24 and 26 (1) of the [Land Registration Act](#) No. 3 of 2012.
7. The Plaintiff lamented that the 1st Defendant, without any color of right, unlawfully and illegally registered a caution over the said parcel of land claiming beneficial rights. That in fact, he was not notified of the such registration by dint of Section 72 of the [Land Registration Act](#). This discovery was only made when he conducted a search on the suit land on 27/02/2020. The search certificate was produced and marked as P.Exhibit 1.
8. Following the Defendants actions, the Plaintiff reported the matter to the area chief. Parties were summoned to appear before him but the 2nd Defendant failed to attend as evidence by a letter dated 10/07/2019 marked as P.Exhibit 5. Thereafter, the Plaintiff was referred to the Deputy County Commissioner's office where the 2nd Defendant was asked to return the title to the Plaintiff. He produced the summons dated 25/07/2019 and marked as P.Exhibit 7.
9. Upon making further inquiries from the 3rd Defendant as to the caution, the Plaintiff contended that the 3rd Defendant summoned the 2nd Defendant twice but defied those summons. He produced the notice for hearing on application to remove caution scheduling a hearing on 07/02/2020, as P.Exhibit 4 and a second notice of intention to remove caution dated 07/11/2019 as P.Exhibit 3.
10. Following the absence of the 1st Defendant during the caution hearing on 07/02/2020, the caution, as per the notice was removed. However, it was later reinstated on 12/01/2020 as the notices for caution hearing were not served.
11. In view of the above, the Plaintiff urged this Court to grant the reliefs sought. On cross examination, the Plaintiff denied that he took purchasers and surveyors to the suit land with intent to sell the land. He further denied that the chief stated that 2nd Defendant was entitled to a portion of the suit land. He also denied that his late father caused the 2nd Defendant misery. Furthermore, he recalled that he obtained the 1st Defendant's school fees from the proceeds of the suit land in the form of lease. He admitted that he sold the Bonde Market plot but added that it was done in the knowledge of the family. Additionally, he confirmed that his mobile number was 0728842492 and it was the same one placed against the caution. He intended to distribute the parcel of land to his children hence the suit



12. When clarifications were made by the court, the Plaintiff informed that if the family agreed to refund the costs of the suit incurred, he would quid pro quo not challenge the caution until an agreement is arrived at as to distribution of the land.

The Defendants' Case

13. The 1st Defendant, DW1 adopted his witness statement dated 28/06/2021 and filed on 29/06/2021 to state that in 2018, his father the Plaintiff whose birth certificate dated 23/03/2012 he produced and was marked as 1D.Exhibit 1 invited surveyors and unknown persons to the suit land with the intention of disposing it off. DW1 was not present during this exercise.
14. He accused the Plaintiff of attempting to sell the land on several occasions. In fact, the Plaintiff sold a portion of the land to mama Happy for a sum of Kshs. 140,000.00 thereby prompting a dispute before the chief. This led the 1st Defendant to register a caution with intent to safeguard the interests of himself, his mother and his five (5) siblings.
15. DW1 averred that if the property was allowed to be sold, they would all be rendered homeless. That the property was inherited from his grandfather FESTO EVUNZA as family land and was currently registered in the name of the Plaintiff. According to DW1, his grandfather specifically asked them not to sell it.
16. DW1 continued that the Plaintiff deserted them in 1993 to live with his other family. That the Plaintiff clandestinely sold another piece of land in Bonde Market. He thus ought not to be allowed to sell the suit land.
17. In closing, DW1 stated that the Plaintiff was not truthful when he stated that he wanted to subdivide the suit parcel of land for distribution to his children. This is because they had never sat as a family to discuss the said issue. He relied on a proposed subdivision of plot No. 209 who copy of title he produced and was marked as 1D.Exhibit 2 in support of his evidence. He urged this court to dismiss the Plaintiff's suit with costs.
18. During cross examination, DW1 reported that the Plaintiff should not be allowed to sell the parcel of land. In his view, much as he could not inherit the property as the Plaintiff was still alive, the Plaintiff ought to consult his family before disposal of the suit land. Finally, the Plaintiff did not build a toilet.
19. DW2 the 2nd Defendant adopted her undated witness statement filed on 29/06/2021. Her evidence was that she married the Plaintiff in 1981 and have since been blessed with six (6) children. During the pendency of their union, her father in-law, FESTO EVUNZA, gifted and transferred the suit land in the Plaintiff's name. He however handed over the title deed to the 2nd Defendant for safe keeping as he did not trust the Plaintiff.
20. In 1993, the 2nd Defendant was pregnant with the 1st Defendant when the Plaintiff deserted the matrimonial home. He proceeded to marry another wife.
21. DW2 maintained that she had been in possession of the title deed properly. She lived on the suit land where she made considerable developments. That sometime in 2021, the Plaintiff started nagging her to surrender the title document to him. She was apprehensive that had she complied, it would be sold and she be rendered homeless together with her children. It was for those reasons that she urged this court to dismiss the suit with costs.
22. The 3rd Defendant called DW3 NAOMI ROP, Land Registrar Trans Nzoia County and custodian of all land transactions as its witness. Explaining the history of transactions in respect to the suit land as recorded in the green card produced as 3D.Exhibit 1, DW3 testified that it was, as a first registration,



- registered in the name of FESTO EGUNZA PAUL on 16/05/1994. It was then transferred to the Plaintiff on 16/06/1997. A title deed was issued on the same day. Thereafter, on 24/04/2019, a caution was registered by the 1st Defendant claiming beneficial interest as a son.
23. In support of the caution dated 01/03/2019 whose copy she produced as 3D.Exhibit 2, the 1st Defendant annexed a statutory declaration produced as 3D.Exhibit 3 sworn on that day together with a letter dated 25/07/2019 produced as 3D.Exhibit 8 from the area chief, letter dated 25/07/2019 from the area assistant chief produced as 3D.Exhibit 9 and the 1st Defendant's birth certificate serial number 5237319 produced as 3D.Exhibit 4. The caution sought to forbid the registration of dealings and making further entries in respect to the suit land without the 1st Defendant's consent unless withdrawn or removed by order of the court or registrar. The 1st Defendant also lodged a notice of caution dated 16/03/2019 a copy of which was produced as 3D.Exhibit 5.
 24. The Plaintiff complained about the said caution. He thus lodged a notice of intention to remove caution dated 07/11/2019 produced as 3D.Exhibit 6. It was served upon the 1st Defendant who in response, filed a notice of objection to remove caution dated 19/11/2019 produced as 3D.Exhibit 7. The Registrar summoned the parties for hearing. However, the 1st Defendant was not in attendance. Consequently, the Land Registrar removed the said caution under Section 79 of the [Land Registration Act](#) on 07/02/2020.
 25. Come 12/02/2020, the Registrar reinstated the caution on grounds that the cautioner had not been duly and properly served with the notice. It was established that the said notice had been received by SIMON RUTO of Suwerwa Location as the chief instead of the 1st Defendant.
 26. In light of the above, the 3rd Defendant averred the placement of the caution was proper as they were under the reasonable belief, as stated by the 1st Defendant, that the Plaintiff was intent on secretly selling the suit land without involving his family. This would have resultantly adjudged them homeless.
 27. DW3 explained that the Plaintiff obtained title by way of transfer. Also, that when one receives ownership by way of inheritance in the form of succession, the same is registered as a grant. If land is transferred by way of sale, it is indicated as a transfer. She thus urged the court to dismiss the claim with costs.
 28. In her cross examination, she clarified that entry 6 made on the green card, stating that the caution was reinstated on 07/01/2020 was a typing error. That beneficial interest does not have to accrue after the death of the proprietor. As beneficiary, he had interest in relation to the title to land thus had a right to lodge the caution. That he was a licensee but whose interests were similar to those of a beneficial interest. She continued that the Plaintiff bore an obligation to safeguard the interest of those in occupation of the suit land. When questioned by the court, DW3 stated that this is not an isolated case as children have previously lodged cautions against the sale of land by their parents.

Written submissions

29. At the close of the hearing, parties filed and exchanged written submissions. The Plaintiff filed written submissions dated 09/08/2023 on 23/08/2023 where he framed four (4) issues for determination. On the first issue, the Plaintiff argued that he is the registered proprietor of the suit land. That by dint of Section 26 (1) of the [Land Registration Act](#), he was vested with all the rights and privileges belonging or appurtenant to.
30. On whether the 1st and 2nd Defendants were capacitated to lodge a caution over the suit land, the Plaintiff answered in the negative. Relying on Section 71 (1) of the [Land Registration Act](#), the case of *Boyes vs. Gathure* (1969) EA 385, *Ali Athman Mawiya vs. Maria Chausiku Msechu* [2004] eKLR,



Maria Ngangi Gwako vs. Charles Mwenzi Ngangi [2014] eKLR and Mamut Hardware Stores Limited vs. Chief Land Registrar Nairobi and Another [2017] eKLR, the Plaintiff submitted that the beneficial or licensee interest relied upon by the said Defendants was not registrable hence could not qualify their right to lodge a caution.

31. On whether the caution registered by the 3rd Defendant was lawful, the Plaintiff submitted that the same violated Section 72 of the [Land Registration Act](#) as he was never served with any notice to effect that a caution had been registered on the suit parcel of land. That he only discovered when he conducted a search that a caution had been registered against the suit property on 24/04/2019. He further lamented that the notices of 07/02/2020 and 12/02/2020 were not served hence unlawful.
32. Finally, on the reliefs sought, the Plaintiff submitted that by virtue of Section 73 (1) of the [Land Registration Act](#), he was entitled to an order removing the caution. He prayed for general damages for wrongful registration of the caution on the strength of Section 75 of the [Land Registration Act](#) in the sum of Kshs. 300,000.00. He further prayed for an order compelling the 1st and 2nd Defendants to surrender the title deed to him and costs.
33. The 1st and 2nd Defendants filed joint written submissions dated 15/09/2023 on 18/09/2023. They framed five (5) issues for determination. Analyzing the evidence on record, they submitted that much as the suit land is registered in the name of the Plaintiff, it continues to remain ancestral land. For that reason, the 1st Defendant was well within his right to register a caution and the same remains lawful. That the 3rd Defendant registered the said caution pursuant to Section 71 (3) of the [Land Registration Act](#) having complied with the parameters set out thereto.
34. On the third issue, the 1st and 2nd Defendants argued that the 2nd Defendant lawfully and for bona fide reasons, retained the title deed because the Plaintiff was intent on disposing it off. They went ahead to classify the suit land as not only ancestral but also matrimonial to the extent that the 2nd Defendant was a spouse of the Plaintiff within the meaning ascribed to the term under Section 2 of the [Matrimonial Property Act](#). For those reasons, the suit land morphed to matrimonial property as described in Section 9 of the [Matrimonial Property Act](#).
35. The 1st and 2nd Defendants continued that the 2nd Defendant has considerably developed the suit land through farming and general husbandry. She has harvested and utilized the proceeds to educate their children. It would thus be unlawful and unfair to defeat her overriding beneficial interests over the suit land. As such, she was not in illegal possession of the title document.
36. In light of the above, they submitted that the Plaintiff was not deserving of the orders sought. They thus prayed that the suit be dismissed with costs.
37. The 3rd Defendant filed its written submissions dated 19/10/2023 on 25/10/2023. According to it, four (4) issues fell for determination. On the first issue, the 3rd Defendant submitted that the Plaintiff failed to establish that it acted outside the statutory and constitutional dictates of land laws. Citing Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi [2013] eKLR and Evans Otieno Nyakwana vs. Cleophas Bwana Ongaro [2015] eKLR, it urged this court to find that no evidence was adduced to demonstrate illegality and unlawfulness.
38. On second issue, the 3rd Defendant opined that the suit was premature since the two cautions dated 24/04/2019 and 12/02/2020 and in particular the one dated 12/02/2020, was yet to be determined. That the Plaintiff had not exhausted the available internal dispute resolution mechanisms before filing suit. In its view, his remedy lay in the procedure set out in Section 73 and 78 of the [Land Registration Act](#).



39. On whether the registration of the caution was lawful, the 3rd Defendant applied Section 2 and 71 (2) of the [Land Registration Act](#) while analyzing the evidence to arrive at the conclusion that the registration was lawful having established that the 1st Defendant had interest in the land. That noting could establish that the documents in support of the caution were not authenticated.
40. Lastly, the 3rd Defendant relied on Section 75 of the [Land Registration Act](#) to submit that since the caution was properly lodged, the Plaintiff was not deserving of the order for damages. In fact, no proper claim lay against it as the dispute was purely family oriented. For those reasons, it urged this court to dismiss the suit with costs.

Analysis and Disposition

41. I have carefully considered the pleadings, scrutinized the evidence together with the submissions of the rival parties and considered the law applicable. The undisputed facts are as follows: The Plaintiff was the father to the 1st Defendant and husband to the 2nd Defendant. He was the registered proprietor of all that parcel of land namely Trans Nzoia/Cherangani/373 measuring approximately 0.809 Ha (2 acres) since 16/06/1997. The same was acquired by way of transfer from his father FESTO EVUNZA.
42. In 1993, the Plaintiff deserted the said parcel of land leaving his wife and children living on the suit land. Although parties do not have a consensus as to how the 2nd Defendant obtained title from the Plaintiff, it was apparent that the 2nd Defendant continued to have custody of the title document.
43. Thereafter, on 24/04/2019, the 1st Defendant registered a caution against the suit property claiming beneficial interest as a son. In support of the caution dated 01/03/2019, produced as 3D.Exhibit 2, the 1st Defendant annexed a statutory declaration produced as 3D.Exhibit 3 sworn on that day together with a letter dated 25/07/2019 produced as 3D.Exhibit 8 from the area chief, letter dated 25/07/2019 from the area assistant chief produced as 3D.Exhibit 9 and the 1st Defendant's birth certificate serial number 5237319 produced as 3D.Exhibit 4. The caution sought to forbid the registration of dealings and making further entries in respect to the suit land without the 1st Defendant's consent unless withdrawn or removed by edict of the court or Registrar.
44. According to the grounds in support of the caution, the Plaintiff was intent on disposing of the suit land to third parties. The 1st Defendant justified that if the caution was not registered, they would be rendered homeless.
45. The Plaintiff lodged a notice of intention to remove caution dated 07/11/2019 produced as 3D.Exhibit 6. The 1st Defendant filed a notice of objection to remove caution dated 19/11/2019 produced as 3D.Exhibit 7. The Registrar summoned the parties for hearing on 07/02/2020. However, the 1st Defendant was not in attendance. Consequently, the Land Registrar removed the said caution under Section 79 of the [Land Registration Act](#) on 07/02/2020.
46. Come 12/02/2020, the Registrar reinstated the caution on grounds that the cautioner had not been duly and properly served with the notice. It was established that the said notice had been received by SIMON RUTO of Suwerwa Location as the chief instead of the 1st Defendant.
47. According to the Plaintiff, the cautions registered on 24/04/2019 and subsequently on 12/02/2020 were illegal and unlawful since he was not duly served or at all with the notice. It was his evidence that he was only aware of the cautions when he conducted a search on 27/02/2020. The search certificate was produced and marked P.Exhibit 1. Furthermore, since he was still alive, the 1st Defendant could not instigate beneficial rights and as such, was not justified to lodge a caution.



48. Contra, the 1st and 2nd Defendants, who spoke the same language, contended that the registration of the caution was necessary, lawful, just and expedient since they were under the reasonable belief that the Plaintiff wanted to sell the suit land, a fact vehemently denied by the Plaintiff. This in turn would render them homeless yet they had made considerable developments on the suit land. In fact, the Plaintiff sold a portion of the land to a one mama Happy for a sum of Kshs. 140,000.00 thereby prompting a dispute before the chief.
49. Section 2 of the [Land Registration Act](#) sets out the definition of a caution to mean:
- a. “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; or
 - b. a caveat.”
50. In essence, a caution bars a person from unilaterally making any transactions in respect to a parcel of land without notifying the cautioner. In other words, no transactions can be made on the parcel of land until the intention of the lodged caution has been disposed of. The [Land Registration Act](#) at Section 71 through to Section 75 governs the procedure and effect of cautions. Section 71 (1) of the Act sets out the criteria of persons eligible to register a caution as follows:
- “71. A person who-
- (1) (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.”
51. On the one hand, the Plaintiff contended that the 1st and 2nd Defendants had no qualified rights to register a caution as he was still alive. In his perception, any rights as to property could only ripen upon his death by way of succession proceedings. In this very statement, the Plaintiff admits that indeed the 1st and 2nd Defendants were his beneficiaries. On the other hand, the 1st and 2nd Defendants justified that they would be rendered homeless after having lived on the suit land since 1993. For those reasons, the caution ought to remain on record.
52. This Court is of the opinion that when the property was transferred from the Plaintiff’s father to the Plaintiff, the interest he acquired therein was for the beneficial interest of him and his family jointly; which in fact, he did not deny save that he added that the same would only mature upon his death.
53. That Plaintiff’s argument and view is however unsustainable and irrational. This is because if the court were to agree, then it would in essence be bestowing sweeping and draconian powers to registered proprietors of ancestral property to do as they so please without considering the best interests of their beneficiaries. It is common ground that the Plaintiff acquired the suit land from his (now late) father by virtue of him being a son to the person who bequeathed it for reason of descendency and therefore a beneficiary of the same. He cannot act inconsistent with the underlying customary trust concept which is recognized in law, except with the consent of all the beneficiaries.



54. According to the Black's Law Dictionary, 9th Edition, a trust is defined as:
- “The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”
55. The *Trustee Act* extends that definition to implied and constructive trust as well as the cases where the trustee has a beneficial interest in the trust property.
56. It cannot be gainsaid that the intention of the Plaintiff's acquisition of the suit land was beneficial to his wife and children. It was for this reason that even after deserting the home, they continued to live on the premises. In fact, they were self-sufficient to an extent where they sustained themselves by way of farming and general husbandry. As such, the Plaintiff acquired ownership of the suit land in trust for his family, including the 1st and 2nd Defendant.
57. A trust, including a customary one, is an overriding interests as mandatorily couched in Section 28 (b) of the Act. In the circumstances, the said parcel of land is subject to the said overriding interests. Taking cue from that exposition, it is my finding that the 1st Defendant, as a son to the Plaintiff, was a trustee and was well within his rights to seek registration of the caution. He was thus capacitated to register the caution.
58. The Plaintiff was also dissatisfied with the 3rd Defendant's conduct. He alleged that he was not served with any notices as contemplated in Section 72 (1) of the Act which compels the Registrar to issue a notice to the proprietor of the fact that a caution has been registered over his parcel of land. The Plaintiff argued that the absence of the statutory notices discredited the cautions all together. According to his evidence, he was only made aware of the caution when he sought to conduct a search over the parcel of land.
59. Was the Plaintiff served with the necessary notices? The answer to this lies in an extrapolation of the facts adduced before this court. According to the green card, P.Exhibit 6, and 3D.Exhibit 1, the 1st Defendant registered a caution on 24/04/2019. It was supported by the 1st Defendant's statutory declaration, two letters both dated 25/07/2019 and the 1st Defendant's birth certificate.
60. DW3, the 3rd Defendant's Land Registrar and custodian of land transactional documents produced the Plaintiff's notice of intention to remove caution dated 07/11/2019 that galvanized presentation of the 1st Defendant's notice of objection to remove caution dated 19/11/2019.
61. Following this exchange of papers, the Registrar summoned the parties for hearing on 07/02/2020. In view of the absence of the 1st Defendant on that day, the caution was removed under Section 79 of the *Land Registration Act* on 07/02/2020. However, it was reinstated on 12/02/2020 when the Registrar established that the caution had not been served upon the 1st Defendant. Moreover, the proximity of the complaint by the Plaintiff on the existence of the registration to its registration goes to show that indeed the Plaintiff had the knowledge of the same, and it could only be by way of service of the same.
62. What comes to the fore is that the Plaintiff was not candid with the facts. This is because the Plaintiff only conducted a search on 27/02/2020; four (4) months after Plaintiff's notice of intention to remove caution dated 07/11/2019. So that contrary to his assertions, he was apparently aware of the caution but not as a result of conducting a search on the suit land. Noteworthy, the Plaintiff's mobile number was recorded in the documents adduced by DW3.



63. Secondly, DW3's unwavering testimony was that the Plaintiff was duly served with the notice. For those reasons, I find that the Plaintiff was simply casting a net without any basis. In other words, I am satisfied to hold that the requisite notices were duly served upon the Plaintiff in line with Section 72 (1) of the *Land Registration Act*.
64. The crux of the dispute is that the Plaintiff urges this court to remove the caution on the strength of the provisions of Section 73 (1) of the Act which provides that 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. As established by the said provision, this Court has discretion to remove any caution placed on the suit property.
65. Looking at the facts of this case, it is apparent that the 1st Defendant registered a caution over the suit property on 24/04/2019. Dissatisfied, the Plaintiff lodged a notice of intention to remove caution that was objected to by the 1st Defendant. This prompted the Registrar to summon the parties for hearing on 07/02/2020. The hearing took place ex parte where the caution was removed pursuant to Section 79 of the Act. However, that removal was retracted when the Registrar reinstated the caution on 12/02/2020 on the strength of the fact that the cautioner had not been duly served.
66. In view of the above circumstances, it is my considered view that the 1st Defendant had the right to place the caution over the suit land to protect his and other family interests. To that extent, I find at this stage, that the removal of the caution, would be an adverse order to the cautioners hence it should remain so registered until either upon the transmission of the respective shares of the beneficiaries to them upon the demise of the Plaintiff or upon the agreement on, distribution and transfer, during the lifetime of the Plaintiff, of the respective shares of the beneficiaries to them.
67. It is noteworthy that the court's powers as per the said provision are only restricted to removal of the caution. During his testimony, the Plaintiff informed the court that if the family agreed to refund the costs of the suit incurred, he would not challenge the caution until an agreement is reached in terms of distribution of the property. This statement is a demonstration of the fact that in the absence of strife, an agreement is actually achievable when the root cause of the matter is resolved.
68. It is apparent that the 1st and 2nd Defendants were apprehensive that they would be disinherited. It appears from the evidence that the apprehension was real and likely. At the same time, the Plaintiff is amenable to some negotiations to distribute the property to the beneficiaries. Thus, this court finds that the real issue in controversy and the issues before it are a mere façade.
69. On the one hand, the Plaintiff has failed to establish any illegality occasioned by the Defendants. On the other hand, I find that the Defendants have established reason why the sustenance of the caution should subsist in terms of paragraph 66 above, and in the interest of justice, I so order. Furthermore, the Plaintiff expressed willingness to amicably resolve the real issue in dispute, and he better do so. It is for these reasons I find that his suit lacks merit. It is hereby dismissed but with no orders as to costs.
70. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 8TH DAY OF FEBRUARY 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE.

