



**Kagau v Kagau (Environment and Land Appeal 15 of 2018)
[2023] KEELC 22542 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 22542 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 15 OF 2018
A KANIARU, J
OCTOBER 12, 2023**

BETWEEN

SUSAN MBOGO KAGAU APPELLANT

AND

JOSPHAT MBOGO KAGAU RESPONDENT

*(Being an appeal from the judgement and decree of the Senior Principal Magistrate at Siakago
Hon. Thomas T. Nzyoki dated 13th September, 2018 in Siakago Civil Case No. 63 of 2015)*

JUDGMENT

1. This appeal arose from the judgement of the lower court in Siakago Civil Case No. 63 of 2015 - *Josphat Mbogo Kagau vs Susan Wanja Mbogo* by Hon Thomas T. Nzyoki, Senior Principal Magistrate. The Appellant – Susan Wanja Mbogo – was the defendant while the Respondent – Josphat Mbogo Kagau – was the plaintiff. In the lower court the Respondent had sued the Appellant seeking to have a caution lodged by the Appellant against land parcel No. Nthawa/Riandu/4689 removed. He testified that he was the registered proprietor of the suit land which he had acquired together with his 1st wife and that he had been unable to subdivide the same due to the said caution. He testified further, that the Appellant was his 2nd wife and that her actions of placing the said caution were illegal and unlawful and have resulted in the restriction and deprivation of the Respondent’s absolute right over the suit land.
2. The appellant denied the same by filing a defence in which she claimed that she had vested interest in the suit land and that the caution was meant to protect her interests as their matrimonial home is on the said land. The lower court heard both party’s arguments and in its judgment held that the caution lodged by the Appellant in its view was not justified and that although the appellant in lodging the caution claimed licensee interest, her evidence did not support that claim. The court was of the view that the Appellants claim over the suit land can be safeguarded by other lawful remedies but not through a caution. The court made an order that the caution be removed as prayed. That is what provoked this appeal.



3. A memorandum of appeal was filed on 15.01.2019. Its substance is as follows;
 1. That the learned trial magistrate erred in law and fact when he made a finding that the Appellant had no right to continue putting a caution on Land Parcel No. Nthawa/Riandu/4689 and made an order for removal of the same.
 2. That the learned trial magistrate erred in law and fact when he made a finding that the Appellant had no right to continue putting a caution over the suit land.
 3. That the learned trial magistrate erred in law and in fact when he failed to find that the Respondent had not established that he and his 1st wife live on the suit land.
 4. That the learned trial magistrate erred in law and fact when he failed to find that the Respondent was on the verge of selling the suit land to the detriment of the Appellant and her children.
 5. That the learned trial magistrate erred in law and fact when he failed to consider the Appellant is a licensee over the suit land.
 6. The decision by the trial magistrate was against the weight of evidence on record.
 7. The learned trial magistrate erred in law and fact when he failed to consider the fact that the Appellant is entitled to the suit land absolutely as the Respondent lives in another parcel of land with his 1st wife.
 8. The learned trial magistrate erred in law and fact when he failed to find that the Appellant has been using the suit land solely for the benefits of herself and her children.
4. The appellant then prayed that the appeal be allowed and the decision of the trial court be set aside.
5. The appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 20.04.2023. In her submissions, the appellant gave an analysis of the issues for determination. According to the Appellant, she had the right to caution the suit land to preserve her matrimonial home from sale which fact the trial magistrate failed to consider in making her determination. That the trial magistrate failed to consider the evidence on record. That is to say it is the Appellant and her children who live on the suit land and that the Respondent lives on a separate parcel of land with his other family.
6. That had the trial court considered that fact, it would have found that the Appellants caution was justified. That the court ought to have taken into consideration the fact that the Respondent had expressed a desire to subdivide the suit land, which would have justified the Appellants fears. That the court also failed to hold that the Appellant was a licensee over the suit land and that it failed to consider and analyze the evidence as adduced by the parties. She sought to rely on the case of *Eunice Wairimu vs Edward Kibe Maina & 2 others* (2011) eKLR.
7. The Respondent on the other hand submitted that the trial court arrived at a just decision in the circumstances as the Appellant failed to prove that she had reasonable cause to caution parcel of land no. Nthawa/Riandu/4689. That the trial court was correct in holding that the Appellant was not justified in cautioning the suit land for over 3 years without taking any steps to pursue any interest she deems to have in the parcel of land. That the suit land was acquired by the Respondent and his wife Mary Wambeti Mbogo through joint effort and that at the time the Respondent started cohabiting with the Appellant on the suit land the same had already been developed by the Respondent and his 1st wife.



8. That the Respondents 1st wife testified that she was entitled to a share of the suit property since she had contributed towards its acquisition. He submitted further that the fact that the Appellant occupies the suit property with her children does not bestow upon her a greater interest than the interests of the Respondent and his 1st wife - Mary Wambeti Mbogo. That the intention of the Respondent has all long been well meaning and that his wish was to share the property into 3 portions for his wife, himself and the Appellant, notwithstanding that the Appellant did not contribute anything towards acquisition of the suit property.

9. I have considered the appeal as filed, the rival submissions, and the lower court record, including the contested judgement. This is a first appeal and as the first appellate court, the task ahead is as spelt out in *Selle vs Associated Motor Boat* (1968) EA 123 where the court observed:

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

10. From the court record, it is clear to me that the lower court judgment was premised on the issue whether the court should order for the removal of the caution lodged against the parcel of land no. Nthawa/Riandu/4689. On this, as highlighted above, the court held that the caution lodged by the Appellant has lasted for over three years and in its view the caution was not justified. Further that although the appellant in lodging the caution claimed licensee interest, her evidence did not support that claim.

Section 71 of the [Land Registration Act](#) provides for persons who may register cautions as follows;

1. A person who-
 - 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 made an application for a bankruptcy order against the proprietor of any registered land, lease or charge.

11. From the evidence and the proceedings, it is not in dispute that the Appellant is a 2nd wife to the Respondent, and that she currently resides on the suit land. It was also not disputed that the Appellant had put a caution on the suit land for 3 years, which had prevented the Respondent from any dealings with the land. The Respondent’s position was that he had acquired the land with his 1st wife. He said it was his desire to subdivide the land among himself and his two wives.

12. My understanding of the claim herein is that the Appellant lodged the caution against the suit land claiming a licensee interest. She is the 2nd wife to the Respondent who is the registered owner of the land. She desired to protect her interests in the land as she claimed that that is where their matrimonial home is and where she currently resides with her children.



13. On whether she has a recognizable interest in the suit land, the court in the case of *Tolelinyang Lomongoni v Chemoru Tolelinyang* [2018] eKLR observed as follows;

A licensee cannot bar the registered proprietor from enjoying the full rights he is otherwise entitled to under title that he holds. However where the licensee is a spouse to the land owner, other additional statutory rights do exist under *the Constitution* and the law. Article 68 (c) (vi) of *the Constitution* of Kenya 2010 provides that Parliament shall enact legislation to protect the dependants of deceased persons holding interests in any land including the interests of spouses in actual occupation of land. Article 45 of *the Constitution* of Kenya 2010 recognizes the family as the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the State. This court must have the provisions of the latter clause in mind when dealing with the question of whether lodging of a caution by the spouse is proper and if that caution should be removed. Emphasis mine

14. The court in the same case further observed;

In *Ngari Nthumbi -vs- Faithi Kathoni M’Kanga* [2015] eKLR the court ordered the caution removed for the reason that the plaintiffs were not holding the land as trustees and the defendant had not demonstrated any recognizable interest such as that shown by the defendant herein. However even in this case the court is mindful of the fact that the plaintiff is registered as the proprietor of the suit land and is therefore entitled to all rights and privileges that are protected by Sections 24 and 25 of the *Land Registration act*.

In the case of *Simon Kimemia Muthobundu -vs- Moses Mugo Maringa* [2017] eKLR as cited therein the court stated as follows:-

“In considering an application for the removal of a caution placed on land which is the subject of a dispute the court will no doubt take into account the circumstances and justification for which the caution was lodged; what interests the person lodging the caution has on the land and what prejudice will be caused to the other party if the caution is removed”.

15. From the above, it is clear that the Appellant’s interest in the land is recognizable in law. However, the court in determining whether to remove a caution or not has to balance the rights of both parties and consider what prejudice the removal of the caution will cause to the parties involved. As highlighted above, the Respondent being the registered proprietor of the suit land herein is protected under section 24 and 25 of the Land Registered Act as an absolute owner to the land. In my view, trial court was right that the appellant has not given any justification why the caution should continue to be placed on the Respondent’s land. The Appellant has not given any evidence that the Respondent is in the process of disposing the land or that there is any threat of her being removed from the said land. In any case, the Respondent has reiterated that he desires to sub divide his land and distribute it among his two wives, the Appellant being one of them.
16. I am of the opinion that there is no evidence of prejudice that will be occasioned to the Appellant should the caution be removed. Therefore I agree with the trial magistrate that there is no basis for the defendant to continue having a caution placed against parcel of land no. Nthawa/Riandu/4689. I order that the same be removed.
17. The upshot of the above is that I find no merit in the appeal herein and thereby dismiss the same.



18. The Respondent being the successful party shall have the costs of the appeal herein.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 12TH DAY OF OCTOBER, 2023.

A.K. KANIARU

JUDGE

In the presence of Rose Njeru for respondent and Andade for appellant.

