



Kiriamburi & another v M'ikunyua & another (Environment & Land Case E016 of 2022) [2023] KEELC 21257 (KLR) (1 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E016 OF 2022
CK NZILI, J
NOVEMBER 1, 2023**

BETWEEN

CATHERINE MICIRII KIRIAMBURI 1ST PLAINTIFF

MARGARET KANINI KIRIAMBURI 2ND PLAINTIFF

AND

CYPRIAN M'MUGA M'IKUNYUA 1ST DEFENDANT

KABERIA DENNIS MWENDA 2ND DEFENDANT

JUDGMENT

1. Before the court is a plaint dated 18.8.2022. The plaintiffs are the legal wives of the 1st defendant, who is the owner of LR No. Amwathi/Maua/378, (hereinafter the suitland). They have sued the defendants, claiming that they colluded and fraudulently effected a transfer of 0.10 acre out of the suit land and registered it under the 2nd defendant's name without their spousal consent and in breach of a customary trust held in their favor by the 1st defendant. The plaintiffs who are elderly averred they risked being evicted from their homes where they have invested immensely.
2. The plaintiffs prayed for
 - a. A declaration that LR No. Amwathi/Maua/378 and its resultant subdivision was ancestral land held in trust by the 1st defendant for himself, the plaintiffs, and the descendants of the late M'Muga M'Ikinyua.
 - b. The removal of the caution placed on the title on account of Maua CMCC No. ELC 139 of 2021, which they term as illegal.
 - c. An order directed at the District Land Registrar Meru North to cancel the title issued to the defendants on 28.2.2022 and reinstate the land to its original status as of 31.1.2022 and



- d. A permanent injunction restraining the defendants from evicting them from the suit land.
3. The plaint was accompanied by a list of documents and a witness statement dated 18.8.2022.
4. By an amended joint defense and counterclaim dated 17.4.2023, the 1st and 2nd defendants denied the contents of the plaint, terming it an abuse of the court process, vexatious and frivolous, and described the plaintiffs as being misused by their children, who had lost in previous litigation, namely Maua Chief Magistrates ELC No. 139 of 2021. The 2nd defendant averred that he bought 0.10 acres of the suit land with the full approval of the 1st defendant's larger family, though some of the members of the polygamous family kept changing their minds, leading to disputes. On his part, the 1st defendant averred that he owns huge parcels of land where he has settled his family, and only sold 0.10 acres of his land to meet legal costs for many ongoing civil cases in court over some of his properties, to meet his food and medical needs, since his wives abandoned him, while others remarried.
5. The 2nd defendant, on his part, averred that he rightfully acquired the parcel of land, which was separate and fenced off. He denied that the plaintiffs were the ones occupying it. By way of a counterclaim, the defendants pleaded that after the son of the plaintiffs lost in the previous suit, he sponsored numerous unjustified cautions to be registered against the land to frustrate the 1st defendant, aged 97 years.
6. The defendants prayed for an order directing the Land Registrar Igembe to remove the caution, subdivide, and transfer 0.10 acres of LR No. Amwathi/Maua/378 to the 2nd defendant and the balance to remain with Domitilla Karimi. The amended defense and counterclaim was accompanied by a list of documents dated 3.4.2021, a further list of documents and witness statements dated 17.4.2023, contained in a paginated bundle dated 18.4.2023.
7. In reply to the defense and defense to the counterclaim dated 25.5.2023, the plaintiffs averred that their claim was for the removal of a caution lodged on 25.1.2022, which was not similar to the previous suit on the removal of a caution lodged by one John Ntonjira Kiriamburi. Further, the plaintiffs averred that the 2nd defendant was not an innocent purchaser for value worthy of any protection in law, given their caution was removed fraudulently and without being accorded any opportunity to be heard. Additionally, the plaintiffs termed the suit land as ancestral in nature and held by the 1st defendant in trust for their children. The plaintiffs sought the dismissal of the defence and counterclaim and judgment as per the plaint.
8. The suit came for directions on 20.4.2023 in the absence of plaintiffs since there was no evidence of service of the notice upon the plaintiffs, the court directed that a fresh notice be issued for 25.5.2023 and for parties to comply with Order 11 of the *Civil Procedure Rules*. When the case came for hearing on 26.7.2023, Mr. Kirimi advocate for the plaintiff pleaded with the court for an adjournment on the basis that the 2nd plaintiff had allegedly passed on a date he could not recall. Mr. Mutembei for the defendants opposed the application since the defendants were all present before the court, the 1st defendant was elderly and sickly, and even if the 2nd plaintiff was dead, the cause of action had not survived, for it was personal in nature. Counsel termed the application as a delaying tactic that would prejudice the plaintiffs in view of the previous litigation. The court declined to grant an adjournment and dismissed the plaintiff's suit for non-attendance and non-prosecution, paving the way for the prosecution of the counterclaim.
9. Cyprian M'Muga M'Ikinyua, Dennis Mwenda Kaberia, and Domitilla Karimi testified as PW 1, 2, and 3, respectively, and adopted their witnesses' statements dated 17.4.2023 as their evidence in chief. PW 1, told the court that the plaintiffs in the main suit had placed a caution on his land, which was not justified at all. He termed the 1st plaintiff as his estranged wife, while the 2nd plaintiff had passed on. He



- said that though elderly and sickly he had been abandoned by his wives and children and was currently staying with his daughter PW 3. He produced a doctor's report dated 16.11.2022, a medical bill report dated 15.11.2022, and a copy of title for LR No. Igembe/Amwathi/Maua/5873, marked as P. Exh no's 1-4 respectively. PW 1 stated that he had transferred several parcels of his land to all his children. He sought for an order to transfer one acre of his land to PW 3.
10. PW 2 adopted his witness statement dated 17.4.2023 as his evidence in chief and produced the lower court proceedings for Maua ELC No.1 39 of 2021, ruling thereof, pleadings and proceedings, and a copy of the title for LR No. Amwathi/Maua/378 marked as P. Exh No. 5-9 respectively. He testified that he paid Kshs.800,000/= to the 1st defendant to cater for his legal fees, medical and food needs. Despite this, PW 2 said the 1st defendant was unable to transfer the portion due of a caution registered by the plaintiffs, yet the 1st defendant had no objection to the transfer. He urged the court to allow the prayers in the counterclaim.
 11. PW 3 on the other hand told the court that his father, PW 1, was abandoned by the 1st plaintiff in the main suit after she married another man. Regarding the litigation in Maua Law Courts, PW 3 testified that his step-brother, John Ntonjira Kiamburi, chased away PW 1 from his homestead and abandoned him until PW 2 offered to assist him. She denied that the land was ancestral in nature, as alleged by the plaintiffs in the main suit. With this evidence, the defense was closed.
 12. The court has carefully reviewed the pleadings, evidence tendered, and the defendant's written submissions. The issues for determination are:
 - a. If the defendants have a competent counterclaim before the court.
 - b. If the defendants have proved the claim in the counterclaim.
 - c. If the plaintiffs in the main suit were justified in placing a caution on the 1st defendant's title
 - d. If the defense by the defendants to the counterclaim is res-judicata.
 13. Order 7 Rule 3 of the *Civil Procedure Rules* grants a defendant a right to set off or set up through a counterclaim in any right or claim. Under sub-rule 7, a counterclaim must be accompanied by a verifying affidavit. A counterclaim must have a title similar to that of a plaintiff.
 14. In this suit, the defendants' counterclaim has no title as required under Order 7 Rule 8 of the *Civil Procedure Rules*. The verifying affidavit was not signed by the 2nd defendant. No authority to plead or act for and on behalf of the 2nd defendant was attached as required under Order 1 Rule (13) (2) of the *Civil Procedure Rules*. Similarly, there is no evidence if the reliefs sought in the counterclaim were assessed and paid for. In *Muchai Mwai vs Peter Wangio Thuku* (2015) eKLR, the court observed in the spirit of Article 159 of the *Constitution* was that courts should, as much as possible, sustain cases instead of striking them if the defect was curable by a simple step. See also *Peeria General Trading vs Mumias Sugar* (2016) eKLR. In my view, the defects in the counterclaim can be cured by ordering any outstanding filing fees to be cleared before the decree is released to the defendants.
 15. The next question is whether the defendants have proved that the caution placed on the LR Amwathi/Maua/378 by the defendants in the counterclaim was lawful. Looking at the proceedings and judgment in Maua ELC No. 139 of 2021, PW 2 had indicated the sale of the land to him by PW 1. He had produced P. Exh No's. (1), (2), (3) and (4).
 16. PExh No. (4) indicates the 1st defendant as the owner of LR no. Igembe/Amwathi/Maua/5873 measuring 0.39 had. P. Exh No's 5, 6, 7, 8 & 9 related to Maua CMCC No. 38 of 2020 between PW 1 and PW 3 and Zaberia Muturia. There is also a judgment in Maua Chief Magistrate ELC No. E139



of 2021 which involved the 1st defendant and one John Ntonjira, over a caution placed on LR No. Amwathi/Maua/378.

17. In the body of the judgment, the trial court indicated that 13 people had bought the suit land, including the 2nd defendant herein. The 1st plaintiff to the main suit herein testified as DW 2. She confirmed placing a caution on the suit land. PW 1 in this suit had expressed his wish to give a portion of his land to PW 2 in the Maua suit. In paragraphs 21 and 24 of the said judgment, the trial court made a finding that the 2nd defendant in this suit had placed the caution out of instructions by the plaintiffs in this suit though their names did not appear in the search certificate.
18. The trial court observed that the defendant's submissions were based on an alleged matrimonial property and spousal consent. The trial court, in paragraph 26, held that the plaintiff's wives had failed to lodge the caution personally and or file a counterclaim seeking a declaration that the property was matrimonial in nature and hence was held in trust by the plaintiff. The trial court made a finding that the claim could not be sustained by written submissions instead of viva voce evidence.
19. The plaint in this suit was accompanied by an official search for LR No. Amwathi/Maua/378. Entry number 6 shows that a caution was lodged on 25.1.2022 on account of beneficial interest. Entry No. 7 made on 17.2.2022 following the outcome in Maua CMC ELC No. 139 of 2021 removed the caution lodged in entry number 5 of the copy of the records. This was the caution John Ntonjira Kiriamburi had placed on behalf of the plaintiffs in the instant suit. Entries number 8 and 9 of the copy of records show that the 1st and 2nd defendants herein acquired a title deed to the suit land.
20. In *Maina Kiai vs IEBC*, the court observed that the doctrine of *res judicata* ensures that there is an end to litigation and that parties do not to re-open matters where a court of competent jurisdiction has previously pronounced itself with finality on similar issues. From the documentary evidence, it is clear that a day after the judgment by the lower court on 24.1.2022, the plaintiffs changed roles with the defendant in the previous suit and lodged a fresh caution against the 1st defendant's title and now urge this court to find that they have a afresh cause of action and justification against the 1st defendant's title.
21. The parties herein previously litigated on the same subject matter and issues that a court of competent jurisdiction determined on merits and to finality. The justification for placing the caution, by the defendants, to the counterclaim was before the lower court.
22. In this suit, the defendants to the counterclaim have not substantiated their defense that the suit property is ancestral in nature and therefore held in trust for them by the 1st defendant.
23. The defense to the counterclaim did not specify the nature and the circumstances in which the ancestral trust arose and its extent. Without such particulars and evidence, the court finds that the Land Registrar Igembe has no justification to encumber the title held by the defendants. Therefore, the court directs the caution placed on 25.1.2022 to be vacated. The second prayer in the counterclaim is not merited. Costs of the suit and the counterclaim to the defendants.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 1ST DAY OF NOVEMBER 2023.

HON. CK NZILI

ELC JUDGE

In presence of;

C.A Kananu/Mukami



Asuma for Mutembei for 1st & 2nd defendant

