



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 363 OF 2017

JANE WANJIKU MWANGI.....1ST PLAINTIFF

CATHERINE NYAMBURA MWANGI.....2ND PLAINTIFF

VERSUS

NATHAN NDEGWA NJERU.....DEFENDANT

RULING

1. This Ruling relates to a motion filed by the Defendant/Applicant seeking an order that the caution lodged on LR No loc19/RWATHIA/1675 on the 1/8/2006 by the 1st Plaintiff be removed by the District Land Registrar.

2. The motion is supported by the affidavit of the Applicant and the grounds stated thereon. That the Defendant was adjudged as the registered owner of the suit land by the Honourable Court vide its judgement issued on the 31/10/18 when the Court dismissed the Plaintiffs case. That the said judgement extinguished the alleged beneficial interests claimed by the cautioner and that the judgement aforementioned settled the rights of the parties and therefore an order to remove the caution would be proper in the circumstances to enable him enjoy the fruits of the judgment.

3. The Respondents have opposed the application through their grounds of opposition filed on the 28/8/2020; that the Court is now functus officio having rendered its decision without making any orders for the removal of the caution. The Respondents opine that the Applicant's relief under section 73 of the Land Registration Act would be to file a fresh suit for removal of the alleged caution with a Court with the requisite jurisdiction. In conclusion that the Applicant is trying to reopen the suit from the backdoor.

4. Parties canvassed the application by way of oral arguments which by and large reiterated the above arguments.

5. The key issue for determination is whether the caution lodged on the title of the suit land on the 1/8/06 should be removed.

6. The power to remove a caution is given to this Court vide section 73(1) of the Land Registration Act which states as follows;

“A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar”.

7. The section gives three ways in which a caution can be removed; it may be withdrawn by the cautioner or removed by the Court or by the order of the Land Registrar.

8. The question is whether this is a separate cause of action or an action that forms part of the execution of the decree. This suit was filed in 2007 while the caution was lodged in the 2006 by the 1st Plaintiff claiming a beneficial interest. It is correctly stated that the Plaintiffs lost their case and the Court held that the Defendant is the rightful owner of the suit land. The key step missed by the Defendant was to include a counterclaim for the removal of the caution in his pleadings.

9. That said section 73 (1) of the Land Registration Act empowers the Court to remove a caution. The section has given power to the cautioner or the Court or the Land Registrar to remove a caution. The Environment and Land Court (ELC) enjoys original jurisdiction over matters land. The issue that was raised by the Respondents is that even though the Court has jurisdiction to so remove a caution, the removal of caution was not a cause of action pleaded in the suit. That the Court being functus, it cannot reopen the case and determine an issue that was not pleaded. The Respondents challenged the process in which the Applicant has moved the Court and in their opinion the Applicant should file a fresh suit. That the proper forum is before the Land Registrar who is empowered under the Act to so remove the caution.

10. The jurisdiction of this Court emanates from Article 162 of the Constitution as read together with Section 2 of the ELC Act. The Court has wide and original jurisdiction on matters that relate to use of, title to and rights over land. This is a statutory and constitutional mandate of the ELC Court.

11. In the case of **Wanjara & 2 Others v Wanjara [2004] eKLR** Vishram. J dismissed an objection where the Respondent/Applicant in the objection argued that the Court had become functus officio. That the Honourable Court did not have the jurisdiction to entertain an application to remove a caution in view of the provisions of the Registered Land Act, Cap 300, Laws of Kenya.

12. The objection was premised on the argument that the orders sought by the appellant/Applicant ought first to be requested for at the appropriate Land Registrar's office as required by law under Section 133 (2) of the Registered Land Act, Cap 300. That the Applicant must first apply to the Land Registrar to remove the caution registered against the suit land, and only after the Registrar has determined the same, may an Applicant apply to the High Court. His Lordship held that:

“... This argument is wholly untenable, and without any basis in law. Section 133 (1) of the Registered Land Act clearly outlined the methods by which a Caution may be removed. It states as follows:

“133 (1) A Caution may be withdrawn by the cautioner or removed by the Court or subject to subsection (2) by order of the Registrar.” (underlining mine). In any event, this Court's original and unlimited jurisdiction cannot be ousted by any other procedure.”

13. Following this principle, it can be argued that the Environment and Land Court can invoke its original jurisdiction especially where judgment favours the Applicant and there is no pending Appeal nor orders setting aside the judgment of the Court. In any event even if the Applicant was to file a fresh suit would the Court arrive at a different verdict than to hold that there exist no grounds to keep the said caution persisting on the title in view of the judgment of the Court. I would hold differently where the cautioner is not a party to the suit because then the Applicant would have to move the Land Registrar who would notify the cautioner. Or alternatively the Applicant may file a fresh suit against the cautioner in that regard. The two routes are a sure way of affording the cautioner the right to be heard on the caution. In this case the Respondents were parties to the suit where the Court pronounced itself upon conclusion of the hearing. The rights of the parties were fully determined.

14. Further in the case of **Christian Wafula Omusolo & 2 others v Pauline Jerotich & another [2019] eKLR** Odeny J held that

....the Applicant is entitled to the removal of the caution as it does not serve any purpose judgment having been delivered dismissing the Plaintiff's originating summons. I therefore allow the application and direct that the Land Registrar removes the caution lodged on L.R. No. UASIN GISHU/KIMUMU/107. Each party to bear their own costs.

15. Similarly in the case of Kithu **Mucamo v Edward Kagane Kagoce [2019] eKLR** Angima J sitting on Appeal held that:

“The Court has considered and re-evaluated the entire material on record and the reasons tendered by the trial Court in its ruling dated 14th July 2016. The Court has also considered the circumstances of the case and the nature of the application before the trial Court. The Court finds no error of law on the part of the trial Court. The reasons given for allowing the application for removal of a caution were perfectly plausible. The Respondent had succeeded in the suit. He had a decree in his favour against the Appellant. There was no pending application for setting aside the judgement. There was no order for stay pending Appeal in force at the time. There was surely no plausible reason why the application could not be allowed.

16. It is to be noted that in this case there is no order of stay or an Appeal in respect to the judgment of this Court in which the Defendant was determined as the owner of the suit land. The Respondent has not demonstrated any interest on the suit land or the justification for leaving the caution to subsist on the land.

17. In keeping with the provisions of the overriding interests as set out section 3 (1) of the ELC Act namely to facilitate the just expeditious proportionate and accessible resolution of disputes and section 1B of the Civil Procedure Act where this Court has a duty to handle all matters before it for the purpose of attaining the just determination of proceedings and to administer substantive justice without undue regard to technicalities. Litigation must come to an end.

18. In the end and bearing the circumstances of this case, I find for the Applicant and grant the application. I direct the Land Registrar to remove the caution lodged on the LOC 19/RWATHIA/1675.

19. It is trite law that costs follow the event. However, in the circumstances of this case I order the Applicant to meet the costs of the application in favour of the Respondents. This is because they have been brought to Court unnecessarily. I say so because the Defendant should have exercised prudence and included the removal of the caution in his pleadings given that the caution was lodged in 2006 before the suit was filed in 2007.

20. **It is so ordered.**

DATED, SIGNED & DELIVERED THIS 1ST DAY OF OCTOBER 2020

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Mwangi Ben for 1st& 2ndPlaintiffs/Respondents

Defendant: Absent

Njeri & Kuiyaki, Court Assistants