

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC APPEAL NO. E024 OF 2023

ROSELYNE ADHIAMBO HUMPHREYS.....
APPELLANT

-VERSUS-

KISUMU COUNTY LAND REGISTRAR.....1ST
RESPONDENT

MAURICE ODUOR OMONDI.....2ND
RESPONDENT

THE ATTORNEY GENERAL.....3RD
RESPONDENT

(Being an appeal from the judgment and decree of Hon. J. WAMBILYANGA (SPM) delivered on 19th September 2023 in Kisumu Chief Magistrate’s Court ELC No. 92 of 2022)

JUDGMENT

This appeal challenges the judgment and decree of Hon. J. Wambilyanga (SPM) made on 19th September 2023 in Kisumu Chief Magistrate’s Court ELC No. 92 of 2022 (hereinafter referred to as “the lower court”). The Appellant sued the Respondents in the lower court suit seeking the removal of the caution that had been registered against the title of all that parcel of land known as Title No. Kisumu/Municipality Block 8/309 (hereinafter referred to as “the suit property”) by the 1st Respondent on application by the 2nd

Respondent. The Appellant averred that the said caution was lodged against the title of the suit property by the 2nd Respondent pending the hearing of a suit between the parties, which was conclusively determined on 31st January 2018 in favour of the Appellant. The Appellant averred that upon determination of the suit, there was no justification for the continued maintenance of the said caution on the register of the suit property. The Appellant averred that she applied formally to the 1st Respondent for the removal of the said caution pursuant to the provisions of Sections 73 and 80 of the Land Registration Act 2012, but the 1st Respondent did not act on the application despite repeated reminders by the Appellant.

The Attorney General entered an appearance and filed a defence for the 1st and 3rd Respondents. The 1st and 3rd Respondents denied that the 1st Respondent had refused to act on the Appellant's application for the removal of the caution registered against the title of the suit property. The 2nd Respondent did not defend the suit. At the trial, only the Appellant gave evidence. The 1st and 3rd Respondents, who had filed a defence, did not tender evidence in their defence.

In its judgment delivered on 19th September 2023, the lower court dismissed the Appellant's suit. The lower court held that the Appellant did not prove her case against the Respondents. The court held that the Appellant did not prove that he had applied to the 1st Respondent for the removal of the caution. The court held further that there was no evidence that the Appellant's letters demanding the removal of the caution were delivered to the 1st Respondent. The court held that the Appellant failed to prove that the 1st Respondent had refused to remove the caution.

The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In her argumentative Memorandum of Appeal dated 18th October 2023, the Appellant challenged the lower court's judgment on the following grounds:

1. That the learned Magistrate erred in law and fact by holding that the dispute over the suit property was determined in a previous suit between the parties, and as such, it was not clear why the Appellant had sought the removal of the caution in a fresh suit.
2. That the learned Magistrate erred in law and fact by holding that there was no indication that the Appellant's application for the

removal of the caution dated 28th October 2021 was received by the 1st Respondent.

3. That the learned Magistrate erred in law and fact in its finding that the Appellant failed to prove that her letters to the 1st Respondent were received by the 1st Respondent.
4. That the learned Magistrate erred in fact and in law by failing to appreciate that once the Appellant applied to the 1st Respondent for the removal of the caution, the Appellant had no duty to remind the 1st Respondent to act on the application.
5. That the learned Magistrate erred in law and in fact by failing to appreciate that the donor of the power of attorney on the strength of which the 2nd Respondent lodged the impugned caution had died in 2010, and as such the said power of attorney and the actions undertaken pursuant thereto had ceased to have effect.
6. That the learned Magistrate erred in law and fact in failing to appreciate that the 1st Respondent had a statutory administrative role in respect of the registration and removal of cautions, and in the absence of an objection raised by the Respondents against the Appellant's application for the removal

of the caution, the 1st Respondent abdicated her duty as there was no justification for maintaining the caution against the title of the suit property.

7. That the decision of the learned Magistrate was against the weight of evidence presented to the court by the Appellant.

The Appellant prayed that the appeal be allowed, the judgment and decree of the lower court be set aside, and be substituted with an order allowing the prayers sought in the lower court. The Appellant also prayed for the costs of the appeal.

The appeal was heard by way of written submissions. The Appellant filed submissions dated 12th February 2025, while the Respondents did not file submissions.

Analysis and Determination

I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the Appellant, and the submissions by the Appellant. This being a first appeal, the court has to re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court.

In Gitobu Imanyara & 2 Others v. Attorney General [2016] KECA 557 (KLR), the Court of Appeal stated as follows on the mandate of the court on a first appeal:

“...this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of 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 always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123* and *Williamson Diamonds Ltd. V. Brown [1970] E.A.L.*

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters -vs- Sunday Post Ltd [1958] EA 424*. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or

had plainly gone wrong, the appellate court will not hesitate so to decide.””

I am of the view that the Appellant’s seven grounds of appeal raise only three issues for determination by this court, namely, whether the lower court erred in its finding that the Appellant had not proved her case against the Respondents, and whether the appeal should be allowed, and if so, on what terms.

In Kurshed Begum Mirza v Jackson Kaibunga [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the Evidence Act, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”

In Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

I agree with the lower court that the burden of proof of the Appellant’s case rested with the Appellant even if the suit was not defended. In Kirugi and Another v. Kabiya & 3 Others [1987] KLR 347, the Court of Appeal stated that:

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

In Gichinga Kibutha v. Caroline Nduku [2018] eKLR, the court stated that:

“It is not automatic that (in) instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must prove his case

however much the opponent has not made a presence in the contest.”

Although the Respondents did not tender evidence at the trial, the Appellant still had the burden of proving her case against them. The burden of proof could only shift to the Respondents if the Appellant established a prima facie case of wrongdoing on the part of the Respondents, which, if not answered by the Respondents, would have been taken by the court as true. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR stated as follows on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant

impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law...”

The Appellant produced evidence before the lower court showing that she was the registered proprietor of the suit property and that her interest in the suit property was confirmed by the court in Kisumu ELC No. 720 of 2015 (formerly Kisumu HCCC No. 60 of 2008), Alice Afandi Eboyi & Another v. Roselyne Adhiambo Humphreys & Attorney General (Third Party) (hereinafter referred to as “the previous suit”). The Appellant produced evidence showing that the 2nd Respondent participated in the previous suit as an attorney of the Plaintiffs in the suit and that while the suit was pending, the 2nd Respondent applied to the 1st Respondent register a caution against the title of the suit property to last until the determination of the suit, which caution was registered by the 1st Respondent on 22nd January 2015. The Appellant

produced evidence showing that the previous suit was determined on 31st January 2018 through a judgment in which the Plaintiffs in the previous suit, who were represented by the 2nd Respondent, were found to have no interest in the suit property. The Appellant placed before the court evidence showing that after the determination of the previous suit, the Appellant applied to the 1st Respondent for the removal of the caution that was registered at the instance of the 2nd Respondent as aforesaid. The Appellant produced in evidence the application and the receipt for Kshs. 500/- paid to the 1st Respondent for processing the same. The Appellant testified that the 1st Respondent did not act on the application despite reminders sent to it by the Appellant's advocates. The Appellant produced in evidence copies of the letters which were written to the 1st Respondent by her advocates on the issue.

Section 73 of the Land Registration Act 2012, which deals with the removal of the cautions, provides as follows:

“73. (1) 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.

(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

(3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

(4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.”

Under Section 73 (1) of the Land Registration Act 2012, the only thing the Appellant was required to do was to apply to the 1st Respondent to remove the caution that was registered against the title of the suit property at the instance of the 2nd Respondent, and to appear before the 1st Respondent for a hearing in case the 2nd Respondent had objected to the application. I am satisfied from the evidence on record that the Appellant discharged the burden of proof that was placed upon her by the law. The Appellant proved that she applied to the 1st Respondent to remove the caution and that the 1st Respondent refused to act. The burden shifted to the 1st Respondent to prove that

the Appellant did not make the application. It is common ground that the 1st Respondent did not give evidence at the trial. A defence is not evidence and cannot prove or disprove a fact. The evidence by the Appellant on the filing of the application for the removal of the caution and the inaction by the 1st Respondent was not controverted.

The lower court erred in its finding that the Appellant did not prove her case against the Respondents on a balance of probabilities. The Appellant testified that she filed the application for the removal of the caution at the 1st Respondent's office and paid for the same. The Appellant produced both the application and the receipt for the payment made in evidence. No evidence was produced by the Respondents to counter that of the Appellant. The 1st Respondent having refused to act on the Appellant's application for the removal of the caution, the Appellant's remedy lay in court. It is my finding that the Appellant proved her case before the lower court and was entitled to the orders that she had sought. I agree with the Appellant that she could not apply for the removal of the caution in the previous suit because the caution was not in issue in that suit, and the same was not registered pursuant to any order issued in the suit.

Conclusion

In conclusion, I find merit in the appeal. I allow the appeal, set aside the judgment of the lower court delivered on 19th September 2023, and in place thereof enter judgment for the Appellant in terms of prayer (a) of the plaint filed in the lower court dated 17th August 2022. The 1st Respondent, Kisumu County Land Registrar, shall forthwith remove from the register of Title No. Kisumu Municipality/Block 8/309, the caution that was registered on 22nd January 2015 as entry No. 5 at the instance of the 2nd Respondent. The Appellant shall have the costs of the appeal and of the lower court suit to be paid by the 1st and 3rd Respondents.

Delivered and signed at Kisumu on this 9th day of October 2025

S. OKONG'O
JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Omondi h/b for Ms. Onyango Jael for the Appellant

N/A for the Respondents

Ms. J.Omondi-Court Assistant

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