

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**MISCELLANEOUS CIVIL CASE NO. E023 OF 2024 (O.S)**

**RUTH MURUGI WABARU ..... 1<sup>ST</sup> PLAINTIFF/  
APPLICANT**

**WANJIKU KARIUKI ..... 2<sup>ND</sup> PLAINTIFF/ APPLICANT**

**VERSUS**

**LAND REGISTRAR RUIRU ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT/  
RESPONDENT**

**JUDGMENT**

1. This Court is called upon to determine an Originating Summons (OS) dated 2<sup>nd</sup> December 2024 brought pursuant to Order 37 Rule 5 of the Civil Procedure Rules. Through it, the Plaintiff/Applicants seek the removal of the caution placed against titles known as Ruiru/Ruiru East Block 2/72 and Ruiru/Ruiru East Block 2/73 together with the attendant costs.
2. The OS is premised on the grounds on the face of it together with the supporting affidavit of Ruth Murugi Wabaru sworn on even date.
3. It is the Applicants' case that they are the registered proprietors of Ruiru/Ruiru East Block 2/72 and Ruiru/Ruiru East Block 2/73 (herein after '*the suit properties*').
4. The Applicants contend that one, Lucy Wairimu Waititu registered a caution against the suit properties.

5. The Applicants further aver that a dispute arose between them and Lucy Wairimu Waititu and judgment was entered in their favour declaring them as the owners of the suit properties.
6. The Applicants thus beseech this court to remove the cautions registered on the suit properties.
7. The respondents filed their grounds of opposition dated 9<sup>th</sup> June 2025 challenging the OS. It is the respondent's contention that the application for removal of caution ought to have been launched at the lands registry and not through this instant OS.
8. The respondent further contends that the applicants ought to have joined the cautioner in the matter.
9. It is the respondent's prayer that the application be dismissed with costs.
10. The OS proceeded by way of written submissions duly filed by the Applicant which I have read and considered together with the relevant authorities.

### **Issues for Determination**

11. Having scrutinised the pleadings, the evidence on record, the written submissions and the entirety of the material presented, I am satisfied that the central issue for determination is whether the caution ought to be removed.

### **Analysis and Determination**

12. The Court's inquiry begins where the law itself directs. Section 73 of the Land Registration Act provides the framework within which any caution must be assessed. It provides that:

*“(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.*

*(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.*

*(6) On the withdrawal or removal of a caution, its registration shall be cancelled.”*

13. Thus, a caution may be removed in any of the following three ways:

- a) By voluntary withdrawal by the cautioner.
- b) By an order of the Court directing its removal.

c) By an order of the Registrar in accordance with the statutory provisions.

14. These statutory provisions make clear that a caution, while serving as a protective measure for a claimed interest, cannot endure absent a lawful basis. It exists not as a perpetual obstacle, but as a temporary encumbrance, contingent on the cautioner's ability to demonstrate a legitimate claim.
15. In the present matter, the applicant has invoked Order 37 Rule 5 of the Civil Procedure Rules through an Originating Summons seeking removal of the caution placed on the suit properties.
16. An examination of the searches dated 15<sup>th</sup> October 2024 annexed to the applicants' supporting affidavit reveal that on Lucy Wairimu Waititu has placed a caution in the title of the suit land beneficiary's interest.
17. Section 71(1) of the Land Registration Act, No. 3 of 2012, sets out the circumstances under which a caution may be lodged. The provision is in the following terms:

*"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 presented a bankruptcy petition against the proprietor of any registered land, lease, or charge,*

*may lodge a caution with the Registrar forbidding the*

*registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land, lease or charge.”*

18. The statute thus reserves the remedy of a caution to persons asserting a cognisable claim to an interest in the land, a licence, or a pending bankruptcy process. It is not an open invitation to cast a shadow over the register; it is a mechanism intended to protect legitimate, demonstrable interests, not speculative or defensive assertions untethered from proof.
19. The evidence annexed to the supporting reveals that this dispute has its genesis in 1999 when the dispute between the applicants herein and Lucy Wairimu Waititu crystalized.
20. The Court must confront the inescapable reality that a caution does not exist in the abstract. It is the juridical expression of a claim by a named person, anchored in Section 71 of the Land Registration Act, and it subsists upon the law’s insistence that the cautioner be accorded notice, audience, and fairness before any step is taken to uproot the barrier he has planted upon the register.
21. Section 73 of the Land Registration Act, requires that any removal, whether sought before the Registrar or the Court, must not be undertaken behind the cautioner’s back. The law insists upon a hearing; justice demands no less.
22. In this dispute, the applicants have invoked the Court’s authority to order the removal of the caution. That avenue, while unquestionably available under Section 73(1), is not self-executing.

23. The statute recognises that even the litigant who ultimately proves to have no sustainable claim must be notified and afforded the dignity of response.
24. The cautioner in this matter is absent from the proceedings; her voice has not been summoned, and her position has not been tested. The respondents raise this defect squarely, arguing that the applicants seek to dislodge the caution without joining the very party whose claim gave rise to it. That submission is neither trivial nor technical. It goes to the integrity of the proceedings themselves.
25. In ***Ngugi v Land Registrar, Murang'a [2023] KEELC 18578***, the Court declined to remove a caution where the cautioner had not been notified and the statutory safeguards under Section 73 had been overlooked. The Court observed, with a clarity that bears repetition, that removal of a caution by court order must honour the Legislature's command that the cautioner be alerted and afforded a chance to object. It further recognised that to proceed in the cautioner's absence would erode the very fairness that the Act enshrines.
26. The same thread appears in ***Jane Wanjiku Mwangi & another v Nathan Ndegwa Njeru [2020] eKLR***, where the Court held that although the Environment and Land Court may exercise original jurisdiction regarding cautions, such jurisdiction cannot be deployed to extinguish a caution without first extending a hearing opportunity to the cautioner. Two lawful avenues were identified: move the Registrar under Section 73(2) so that statutory notice may issue, or

file a substantive suit against the cautioner where the dispute may be adjudicated directly.

27. This rationale is neither perfunctory nor formalistic. The cautioner is the holder of the very interest the applicants seek to nullify. The law does not permit the scalpel of judicial power to cut away such a claim without the claimant's presence or consent.
28. In the absence of any evidence that the cautioner was served, heard, or even identified as a party in these proceedings, the Court cannot ignore the statutory architecture. A caution may indeed be removed by court order; but only when the court's intervention does not trample upon the cautioner's right to be heard. Where, as here, the cautioner stands outside the courtroom door, uninformed and unheard, the Court must proceed with circumspection.
29. The Applicants urge that the caution has long outlived its purpose and now stands as an unwarranted impediment to the enjoyment of their proprietary rights. That may, in the fullness of time, prove to be true. But the law does not sanction the removal of a caution merely because the registered proprietor has grown weary of it.
30. Section 73 requires more: it requires notice, opportunity, and fairness. None of these elements has been demonstrated.
31. The record is silent as to any attempt to engage the cautioner, to notify her of these proceedings, or even to ascertain the present standing of the claim he lodged against the land. Justice, like light, cannot pierce what the parties choose to leave in shadow.

32. To order the removal of the caution in these circumstances would be to unfasten a claim without ever examining its moorings. It would extinguish a recorded interest without offering its holder the dignity of response. Such a course would neither respect the statutory text nor honour the constitutional commitment to fair hearing.
33. A court of law cannot stride past these safeguards merely to expedite convenience. Its duty is sterner, and its standards more austere.
34. In consequence, the applicants have not satisfied the statutory conditions for the removal of the caution under Section 73. They have not invoked the Registrar's process under subsection (2); they have not issued or proved service of notice upon the cautioner; and they have not brought the cautioner before this Court to answer for the interest she claimed.
35. The Court therefore finds that the application, as framed and prosecuted, cannot succeed. The law requires that before a caution is lifted, its author must be heard or, at the very least, afforded the opportunity to be heard. That has not occurred.
36. Accordingly, the Originating Summons dated 2<sup>nd</sup> December 2024 is hereby struck out with costs.

It is so Ordered.

**Dated, Signed and Delivered, at Thika this 11th day of December 2025**

.....  
**J. M. ONYANGO**  
**JUDGE**

**In the presence of:**

1. Mr. Olwande for the Applicant
2. No Appearance for the Respondent

Court Assistant: Hinga

ORIGINAL