



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO. 301 OF 2017 (O.S)**

**FORMERLY MERU ELC CASE NO. 217 OF 2013**

**JULIET CIONJOKA MUTEGLI.....APPLICANT**

**VERSUS**

**HILDAH KARIMI NJERU.....RESPONDENT**

**RULING**

1. This application states that it has been brought to court under sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The application seeks the following orders:-

1. That this honourable court be pleased to grant orders directing the Land Registrar Chuka to withdraw the caution against land parcel No. Mwimbi/Murugi/504.
2. The court does make other orders that may meet the ends of justice in this matter.
3. Costs of this application be in the cause.

2. The application has the following grounds:

- i) That the Land Registrar Chuka has refused to remove a caution placed against the title by Francis Anampiu Mutegi.
- ii) That the caution has expired as well as outliving its purpose since the said Francis Anampiu Mutegi is now deceased.
- iii) That there is need to remove the caution in order to implement the judgment and decree of this honourable court.

3. The application is supported by the affidavit of Hilda Karimi Njeru sworn on 26<sup>th</sup> March, 2019 which states:

I, Hildah Karimi Njeru of P. O. Box 524, Chuka do hereby make oath and state as follows:-

1. That I am the applicant herein and I am competent to swear this affidavit.
2. That judgment has already been entered in this suit.
3. That there is need to remove the caution that was placed against the and by one Francis Anampiu on 25<sup>th</sup> June, 2009. (Annexed and marked as HKN '1' is a copy of official search.)
4. That the said Francis Anampiu Mutegi is now deceased.
5. That the applicant cannot implement the judgment and decree of this honourable court as issued on 28<sup>th</sup> November, 2018 due to the caution.
6. That the applicant has asked the Land Registrar Chuka to remove the said caution but the Land Registrar has refused to remove the caution without giving any reasons.
7. That the decree and judgment of this honourable court cannot be executed unless and until the said caution is removed.

8. That it is absolutely necessary to have an order removing the said caution to pave way for the subdivision of the suit land as ordered by this honourable court.

9. That what is stated herein is true to the best of my knowledge, understanding and belief.

4. The application has been responded to through the affidavit of Juliet Cianjoka Mutegi, the respondent, sworn on 9<sup>th</sup> April, 2019 which states:

**I, JULIET CIANJOKA MUTEGI** care of M/s A.G. RIUNGU & CO ADVOCATES of P.O Box 1503-60200 Meru in the Make oath and state as follows;

1. **THAT** I am the plaintiff in this case.

2. **THAT** I am well versed with all the matters of this suit.

3. **THAT** the Notice of Motion dated 26<sup>th</sup> March, 2019 and the supporting Affidavit sworn by HILDA KARIMI NJERU sworn on the same day has been read to me by my advocates on record.

4. **THAT** Prayer no. 1 in the Notice of Motion aforesaid is seeking to remove a caution lodged against parcel of land known as MWIMBI/MURUGI/504 by one FRANCIS KANAMPIU MUTEGI-Deceased.

5. **THAT** it is very clear, from the face of the Notice of Motion ground (ii) that FRANCIS MUTEGI ANAMPIU the cautioner is deceased.

6. **THAT** the said FRANCIS MUTEGI ANAMPIU has never been a party in this suit.

7. **THAT** this application is not properly before the Court as it is against a deceased person who is not represented in Court either by a Counsel or his legally appointed representative.

8. **THAT** FRANCIS MUTEGI ANAMPIU whose caution the Order is sought to be removed has not been enjoined as a party in this suit.

9. **THAT** no evidence is tendered of service or attempted service to upon FRANCIS MUTEGI ANAMPIU or if dead, upon his legal representative.

10. **THAT** supporting affidavit of the applicant has not disclosed when, the cautioner died or whoever survived him or his successor(s).

11. **THAT** the applicant`s application is asking this Honourable Court to Condemn the cautioner FRANCIS MUTEGI ANAMPIU unheard.

12. **THAT** the orders sought by the applicant are essentially against the rules of natural justice.

13. **THAT** I verily and conscientiously urge this Honourable court to find that the application before the court is unmeritorious, wrongfully before the court and abuse of court process and vexatious.

14. **THAT** what is deponed to herein above is true to the best of my knowledge save as to matters deponed to on belief, grounds where upon have been given and matters deponed to on information have been disclosed.

5. The respondent, Juliet Cianjoka Mutegi has also filed a further replying affidavit sworn on **30<sup>th</sup> April, 2019** which states:

**I, JULIET CIANJOKA MUTEGI** care of M/s A.G. RIUNGU & CO ADVOCATES of P.O Box 1503-60200 Meru in the Make oath and state as follows;

1. **THAT** I am the named respondent in the application dated 26<sup>th</sup> march, 2019 herein.

2. **THAT** I have read and understood the applicant`s further supporting affidavit.

3. **THAT** the applicant`s language is akin to putting me in trial over matters that does (sic) not concern me.

4. **THAT** the purported cautioner in this matter was according to the applicant FRANCIS ANAMPIU MUTEGI, and if he is deceased the burden of proof lies with the one alleging his death and not me.

5. **THAT** the person who effects the registration of caution is actually the land registrar and should be made a party in this application.

6. **THAT** it is up to the applicant to prove that FRANCIS ANAMPIU MUTEGI he is referring to is deceased by procedure in court the necessary documentary evidence i.e. Death certificate and also to bring in her application the estate of the cautioner as a party.

7. **THAT** in absence of any prove of death by the applicant she should file an application for presumption of death under Section 118A of the Evidence Act, Cap. 80 Laws of Kenya.

8. **THAT** the authority brought by the applicant is vide, “*In re withdrawal of caution by Mary Njeri Mwaura {2017} eKLR (E&L Misc.38 of 2017 in Thika)*” distinguishable from the current matter because that application was brought by way of miscellaneous application and the cautioner was a registered company and not a living person or deceased.

9. **THAT** what is deponed to herein above is true to the best of my knowledge save as to matters deponed to on belief, grounds where upon have been given and matters deponed to on information have been disclosed.

6. During interpartes hearing the parties told the court that they were relying on their pleadings. Mr. Riungu, for the respondent told the court that the applicant had tried to remove the caution but was asked by the Registrar to produce documents to prove that the cautioner was deceased. He told the court that the name used by the cautioner could be shared by a million people. By saying so, Mr Riungu was suggesting that the cautioner Francis Anampiu Mutegi could be alive. He also told the court that the proper way for the applicant to obtain the orders she sought was by filing a miscellaneous application.

7. Miss Kithaka, the applicant’s advocate, told the court that parties ought to be bound by their pleadings. She pointed out in an affidavit, in Chuka ELC No. 164 of 2017 which involved the same parties sworn by the respondent, Juliet Cianjoka Mutegi, dated 5<sup>th</sup> August, 2013 the respondent swore that she was married to one Francis Mutegi, who was deceased. She also had averred that he was buried in the suit land. She opined that the respondent should not be allowed to say one thing in this suit and then say another thing in another suit. The court notes that Chuka ELC Case No. 164 of 2017 was dismissed by this court for lack of prosecution.

8. Miss Kithaka went on to submit that section 73 of the Land Registration Act empowered the court to order removal of a caution when conditions permitted such removal. She told the court that this section did not require the presence of a cautioner so long as the ends of justice were met. She further said that the ends of justice could be met by the removal of the apposite caution so that the judgment of this court could be implemented.

9. The applicant has proffered the authority of Thika ELC Miscellaneous Application No. 38 of 2017 as her authority that section 73(1) of the Land Registration Act, 2012, gave the court the discretion to remove any caution and also as an authority for the principle that powers to remove a caution can be exercised in accordance with sections 3A and 63(e) of the Civil Procedure Act to make necessary orders for the end of justice to be met. Mr. Riungu, the respondent’s advocate, countered that the circumstances of this case and those one of the authority proffered by the applicant were different in that the cautioner in Thika Miscellaneous Application No. 38 of 2017 was a limited company whereas in this case the cautioner was a natural person. I do not agree with Mr. Riungu’s proposition. Both natural and legal persons are equally PERSONS in civil suits.

10. I find as a fact that the cautioner, Francis Mutegi Anampiu is dead. He is the deceased husband of the respondent. I opine that it is preposterous for her to argue that the said Francis Mutegi Anampiu is being condemned unheard. She unequivocally swore that he is dead in her affidavit dated 5<sup>th</sup> August, 2013 in Meru ELC 54 of 2012 which upon transfer to Chuka ELC Court became Chuka ELC 168 of 2017. This suit was dismissed for non-prosecution on 23<sup>rd</sup> November, 2017.

11. I do find that the name of the cautioner does not relate to any of the million other people as submitted by the respondent’s advocate. It pellucidly refers to only one person. This is Francis Mutegi Anampiu, the husband of the respondent, Juliet Cionjoka. This finding is amply buttressed by the plaintiff’s witness statement in Meru ELC Case No. 54 of 2012 (which became ELC No. 168 of 2017 when the suit was transferred to Chuka). She is, therein, laconic and unequivocal that Francis Mutegi, her husband was deceased. The statement is dated 26<sup>th</sup> September, 2012. The death of Francis Mutegi, the respondent’s husband is also averred in her Originating Summons in this case which is dated 21<sup>st</sup> August, 2013. This position is restated in her witness statement dated 13<sup>th</sup> April, 2018.

12. I opine that the narration in paragraph 10 above (op.cit) definitively settles the issue of if or if not the cautioner, Francis Mutegi Anampiu, is dead or alive. He is indubitably dead.

13. I do not agree that the orders sought in this application can only be sought through a Miscellaneous application. Being orders sought to facilitate the implementation of a judgment of this court, they are properly sought in this file.

14. Section 73(1) of the Land Registration Act states 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.”

15. Ipso facto, paragraph 14 above, in proper circumstances the Environment and Land Court, has unfettered discretion, power and jurisdiction to remove a caution.

16. I find it necessary that the caution registered against the suit land be ordered removed to facilitate the implementation of this court’s judgment delivered on 28<sup>th</sup> November, 2018. This order will meet the ends of justice and is in consonance with the provisions of sections 1A, 1B and 3A of the Civil Procedure Act.

17. In the circumstances, it is ordered as follows:

- a) The Land Registrar, Chuka, is directed to remove the caution in favour of one Francis Anampiu Mutegi (deceased) registered against Land Parcel Number MWIMBI/MURUGI/504 forthwith.
- b) The Land Registrar Chuka, is directed not to entertain any other caution or any restriction over Land Parcel No. MWIMBI/MURUGI/504 until the judgment of this court delivered on **28<sup>th</sup> November, 2018 is fully implemented.**
- c) Parties being close family members will bear their own costs.

Delivered in open court at Chuka this **11<sup>th</sup> day of June, 2019** in the presence of:

CA: Ndegwa

I.C. Mugo h/b Kithaka for the Applicant

AG Riungu for the Respondent - Absent

**P.M. NJOROGÉ**

**JUDGE**