



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA ELC CASE NO.794 OF 2017

JOSEPH WAITIRUKA KAMAU

ALIAS JOSEPH NGOCHI MWANIKI.....APPLICANT

VERSUS

GABRIEL NGARIUYA MWANIKI.....1ST RESPONDENT

LAND REGISTRAR GATUNDU.....2ND RESPONDENT

JUDGMENT

Matter for determination herein is an *Originating Summons* dated 5th April 2017, brought by the Applicant herein under *Order 37 Rule 4 and 8* of the *Civil Procedure Rules, Sections 1A, 1B, 3 and 3A* of the *Civil Procedure Act, Section 73(1)* of the *Land Registration Act* and all enabling provisions of law and seeks for the following orders:-

- 1) *A court order directing the 2nd Respondent to remove and/lift the caution placed by the 1st Respondent on the land parcel Ngenda/Nyamangára/883 and Ngenda/Mitero/T.51.*
- 2) *That the respondents be ordered to pay costs of the proceeding herein.*

The application is supported by the grounds stated on the face of the application and on the *Supporting Affidavit* of *Joseph Waitiruka Kamau alias Joseph Ngochi Mwaniki*. These grounds are:-

- i. *That the Applicant is the absolute proprietor and registered owner of that property known as Ngenda/Nyamangára/883 and Ngenda/Mitero/T.51.*
- ii. *That the 1st Respondent has got no interest in the two parcels of land Ngenda/Nyamangára/883 and Ngenda/Mitero/T.51 beneficial or otherwise to make him place a caution on the two parcels of land.*
- iii. *That the Judgment of Justice A.O. Muchelule in High Court ELC No 146 of 2007 made a finding that the Applicant herein is the absolute owner of the two parcels of land in respect of which he is registered.*
- iv. *That further Justice G.K Kimondo delivered a Ruling on 31st July 2012, reviewing the Judgment of Justice A.O Muchelule by issuing an order that the Applicant herein is the absolute owner of the two parcels in respect of which he is registered. Further, he ordered the Respondent to vacate forthwith from parcel of land Ngenda/Nyamangára/883 and Ngenda/Mitero/ T.51.*
- v. *That Respondent has already been evicted from parcels of land Ngenda/Nyamangára/883 and Ngenda/Mitero/T.51 and has got no interest on the same.*
- vi. *That the efforts by the Applicant to have the Land Registrar remove the caution placed by the 1st Respondent over the said properties have been futile.*
- vii. *That the Respondents have continued to deliberately refuse to remove and/or lift the caution from the two parcels of land insisting on issuance of court orders first.*

In his *Supporting Affidavit*, **Joseph Waitiruka Kamau alias Joseph Ngochi Mwaniki**, the Applicant herein, reiterated the averments made on the grounds in support of the application. He urged the Court to allow the application.

The application is unopposed.

The Applications was canvassed by way of written submissions which this Court has carefully considered.

Issues for Court's Determination

1. Whether the Applicant is the absolute proprietor and registered owner of the two parcels of land.

2. Whether or not the 1st respondent has interest on the said parcels of land, beneficial or otherwise to make him place a caution on the two parcels.

1. Whether the Applicant is the absolute proprietor and registered owner of the two parcels of land.

The Applicant contends that he is the absolute proprietor of the suit property as evidenced by copies of title deeds as well as a *Judgment* and a *Ruling* issued by two *Environment and Land Court* Courts stating the same.

The Applicant relied on *Section 26* of the *Land Registration Act* which states as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

He further relied on the case of *Elijah Makeri Nyangw'ara...Vs.....Stephen Mungai Njunguna & Another 2013 eKlr*, where the court held that:-

“ Title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally or through a corrupt process.”

It is also evident that a *Judgment* was entered in favour of the Applicant herein by *Justice Muchelule* on 25th January 2011 and the same was reviewed by *Justice Kimondo* on 31st July 2012 and the Respondent herein was ordered to vacate the suit properties. Further eviction orders were issued by the court and the 1st Respondent was evicted from the suit land. There is no evidence that the above orders of the court have ever been upset by the Court of Appeal. It is apparent that the Respondents are still maintaining the caution lodged on the suit properties though the court ruled that the Applicant herein is the absolute and indefeasible owner of the same.

As a proprietor of the suit property, the Applicant has his rights protected by *Section 24(a)* and *25(1)* of the *Land Registration Act*. He cannot enjoy such rights with the existence of the caution on the suit land.

2. Whether or not the 1st Respondent has interest on the said parcels of land, beneficial or otherwise to make him place a caution on the two parcels.

The Applicant argues that the 1st Respondent has no interest in the aforementioned two parcels of land. This issue was indeed determined in *ELC No.146 of 2007*, which declared the Applicant the absolute owner of the suit properties. He relied on *Section 71* of the *Land Registration Act* which states that:-

“A caution can only be lodged by a person who has a claim, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act.”

Though the 1st Respondent lodged the said caution his claim was dismissed by the court and he can certainly have no beneficial interest over the suit properties.

The Court will be guided by the case of *Maria Ngagi Gwako.....Vs..... Charles Mwenzi Ngangi [2014] Eklr*, where the Court had removed a caution on a piece of land after the Respondents failed to demonstrate that they had any interest in the land. The 1st Respondent did not appeal in court and has equally failed to demonstrate his interest over the suit properties.

The Applicant argues that the 1st Respondent placed a Caution arguing that he had a beneficial interest in the property and that he held the two parcels in trust for the Applicant. The matter was taken to court and heard and determined by **Justice A.O Muchelule** declaring the Applicant the absolute owner. The Applicant further argued that however, **Justice Muchelule's Judgment** omitted an eviction order and therefore he moved back to court to apply for the same which was granted by **Justice G.K Kimondo** in a **Decree** given on **25th January 2011**. The findings of this Court have not been set aside and so the applicant remains the absolute owner of the suit properties.

The Applicant reiterated that the 2nd Respondent has refused to remove the caution without the issuance of a court order. The Applicant asked the court to remove the caution placed by the 1st Respondent to enable him give to his children their various inheritances. Indeed the court has discretion to remove such caution as provided by **Section 73(1)** of the **Land Registration Act**.

The **Land Registration Act** under **Section 71** gives directions on the persons entitled to place a Caution as follows:

“A person who—

a) claims the right, whether contractual or otherwise, to obtain an interest in any land, 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,”

Under **Section 73 (1)** of the **Land Registration Act**, a caution may be removed by the **Cautioner** or by the **Registrar** or by the **Court**. The caution herein has remained in place even after **Judgments** were entered against the Defendant and he has not removed the said caution nor has it been removed by the Registrar.

In the case **Milkah Muthoni Wagoco...Vs...County Council of Kirinyaga & 2 others [2017] eKLR**, the Court held inter alia that:-

“Further, a caution can only be lodged and maintained on a parcel of land by a party who can demonstrate a right or interest in the land, lease or charge. The 1st Respondent has not advanced any interest in the suit property or any reason why the caution lodged thereon should remain on the register. I would therefore make a finding that the 1st and 2nd Respondents have violated the Petitioner's rights under Article 47 of the Constitution and further order the removal of the caution lodged on the suit property.”

Having now carefully considered the pleadings herein and the annexures thereto and the fact that the Respondent did not attend court to controvert the Applicant's averments, the Court finds that the Applicant has proved his case against the Respondents on the required standard of balance of probabilities.

For the above reasons, the **Court enters Judgment for the Applicant against the Respondents** as sought in **prayers No.(a) and (b)** of the instant **Origination Summons**.

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of November 2018.

L. GACHERU

JUDGE

16/11/2018

In the presence of

Mr. Githui holding brief for Mr. Onsembe for Applicant

No appearance for 1st Defendant

No appearance for 2nd Defendant

Lucy - Court clerk

Court – Judgment read in open court.

L. GACHERU

JUDGE

16/11/2018