



Gumo & another (Personal Representatives and Administrators of the Estate of Pius Gumo) v Kenya Revenue Authority & another (Environment and Land Miscellaneous Application 1 of 2023) [2024] KEELC 1088 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1088 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2023
FO NYAGAKA, J
FEBRUARY 29, 2024**

BETWEEN

**MARGARET SIKUKUU GUMO 1ST APPLICANT
OLIVER MAGERO GUMO 2ND APPLICANT
PERSONAL REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE
OF PIUS GUMO**

AND

**KENYA REVENUE AUTHORITY 1ST RESPONDENT
THE CHIEF LAND REGISTRAR 2ND RESPONDENT**

RULING

1. Margaret Sikukuu Gumo and Oliver Magero, the Applicants herein, are Legal Representatives and Administrators of the Estate of Pius Magero Gumo (Deceased).
2. Through the Originating Summons Application dated 14/07/2023, supported by the Affidavit and Supplementary Affidavit of Margaret Sikukuu Gumo deposited to the same date as the Summons and 31/08/2023 respectively, they sought the following reliefs:
 1. ...spent.
 2. That the caveat lodged on the parcel of land number Land reference No. 2116/38/IV as entry No. 287 be removed forthwith.
 3. That the caveat lodged on the parcel of Land number Land Reference No. 2116/20/V as entry No. 299 be removed forthwith.



4. That the Chief Registrar, the 2nd Respondent herein is ordered to deregister the caveats registered over Land Reference No. 2116/38/IV and Land reference No. 2116/20/V.
3. The Applicants sought the foregoing Orders on the grounds that, in Kitale Succession Cause No. 350 of 1998, In the Matter of the Estate of Late Pius Magero Gumo, (hereinafter ‘The Succession Cause’) there is an Order requiring them to liquidate the Estate’s assets among them Land Reference No. 2116/38/IV and Land reference No. 2116/20/V. They stated further that pursuant to the foregoing, they entered into a time-sensitive agreement for the sale of Land Reference No. 2116/38/IV and Land reference No. 2116/20/V whose completion date was on 31/03/2023 but upon conducting official searches at the Lands Registry, it came to their attention that the said properties had *caveats* registered on them by Kenya Revenue Authority, the 1st Respondent herein, on 07/09/1962 and 07/07/1998 respectively.
4. The Applicants contended that the prospective purchasers may rescind the sale thereby occasioning the Estate of Pius Gumo loss by way of damages for breach of contract. Also, that the 1st Respondent indicated that there were no records of unpaid taxes but nonetheless refused to remove the caveats. They thus pleaded that the denial to remove the caveat is breach of their right to fair administrative action since the Respondent is under an obligation to act and communicate its decision expeditiously. They asserted that the delay was occasioning them and beneficiaries of the Estate economic prejudice. They claimed that there was no justifiable reason for keeping the caveats and in default of showing case why they should not be removed, the same ought to be deregistered forthwith.
5. In the Supporting Affidavit, it was deposed that it was likely the caveats were placed in error. Reference was made to the letter addressed to the Chief Registrar of Lands, the 2nd Respondent herein, indicating their concern on the error and requesting for deregistration of the Caveat. Further, that the 1st Respondent’s demand of 16/01/2023 for production of the deceased’ Personal Identification Number Certificate and Identity Card was one which had already been done 27 years ago in the year 1996 and that efforts to trace the same had been futile.
6. In the Supplementary Affidavit, it was the Applicant’s case that the caveat lodged as entry No. 299 on Land Reference No. 2116/20/V was registered on 07/09/1962 before the deceased died but the 1st Respondent had not shown any outstanding taxes sent to the deceased’s address that necessitated the caveat.
7. As for the caveat lodged as entry No. 287 on Land reference No. 2116/38/IV registered on July, 1998, a year after the deceased died, it was their case that the 1st Respondent had not produced any evidence of how it assessed the tax arrears of the deceased.
8. The Applicant deposed that the 1st Respondent could not cite tax provision enacted in the year 2015, 19 years after the death of the deceased. It was their case that laws are applied prospectively unless expressly proved for in legislation.
9. It was the Applicant’s case that the 1st Respondent had not produced any evidence of tax arrears due to them and the mechanisms or system payment they used to generate invoices and or penalties if at all before self-assessment system of i-tax. The Applicants urged the Court to declare the registration of the caveats void and unconditionally lift them

The Submissions

10. In its written submissions dated 29/09/2023, the Applicants implored the Court to allow the Application on the basis that the 1st respondent had not provided any justification for or showed cause



- why the Caveats ought not to be removed. They argued that the Respondent had neither provided any evidence of legal demand notices sent to the deceased for the said dues during his lifetime nor the assessment of his taxes as to justify the caveats.
11. They submitted that under Section 57(5) of the [Registration of Titles Act](#) the Court was empowered, either *ex-parte* or otherwise, to make such order against the caveator if it was satisfied that the caveator had been duly served with summons to show cause why caveat should not be withdrawn. They submitted that their right property guaranteed under Article 40 of the [Constitution](#) continue to be violated and despite writing to the 1st Respondent calling for lifting of the caveats, it has not produced any evidence of the substantial tax liability that necessitated the registration of the said caveats.
 12. They relied on the decision in Civil Appeal No. 287 of 2012, [Maria Nganga Gwako -vs- Charles Mwenzi Nganga](#) (2014) eKLR to claim the position that the onus is upon the cautioner to justify the lodging of the caution and the need for it to remain in place.
 13. About the caveat to Land Reference No. 2116/38/IV registered on 07/07/1998, they submitted that it ought to be lifted unconditionally as it was registered posthumously and as such is exempt from tax by virtue of Section 36 of the First Schedule of the [Income Tax Act](#) which was in operation at the material time. Their argument was that the 1st Respondent had not established any legal basis upon which it issued instructions to the 2nd Respondent to place *caveats* on the suit properties without any reference to the deceased.
 14. In reference to the decision in Misc Civil Application No. 743 of 2006, [Keroche Industries Limited -vs- KRA & Others](#) the Applicants stated that 1st Respondent's actions are not only arbitrary but in contravention of Article 47 of the [Constitution](#) that requires administrative action to be lawful, reasonable and procedurally fair.
 15. On the question whether [Tax Procedure Act](#) 2015 applies retrospectively, the Applicant submitted that its commencement date is 19/01/2016. Support was drawn from the decision of the Supreme Court in [Samuel Kamau macharia & Anor -vs- Kenya Commercial Bank Limited & 2 Others](#) [2012] eKLR where among other things, it was observed that a retroactive law is not unconstitutional unless it divests vested rights. Further, that unfairness on retroactive application of the [Tax Procedures Act](#) emanates in the imposition of tax on the beneficiaries of the estate who were not aware of the unpaid taxes and the applications are denied the opportunity to carry out their duties of liquidating the estate as per the court Order.
 16. In conclusion, they submitted that Section 40(1) of the [Tax Procedure Act](#) 2015 is unreasonable as it imposes an impossible task on them and its application is capricious and oppressive. They urged the Court to declare the caveats null and void and be unconditionally lifted.

The Response

17. Kenya Revenue Authority challenged the Application through the Affidavit of Lemmy Mgao deposed to on 26/07/2023. She deposed that under Section 40(1) of the [Tax Procedures Act](#), 2015, the Commissioner may direct the Registrar of Lands to make land be subject of security where tax is not paid.
18. She deposed that whereas Caveats are not a permanent feature, under Section 40 of [KRA Act](#) the registration of the Commissioner's direction will serve as if it were a charge or instrument and not temporary protection. It was her claim that the caveat was supposed to be retained in the register until the unpaid taxes are made in full. She deposed further that under Section 32(1), tax payable by a person under tax law is debt due to the State and shall be payable to the Commissioner.



19. It was her case that it is the Cabinet Secretary in charge of Treasury who had the power to waive or write off outstanding tax arrears as provided in *Tax Procedure Act*, The *Public Finance Management Act* 2012 and the *Public Finance Management (National Government) Regulations* 2015.
20. It was her deposition that until tax debtor pays the outstanding taxes to the Government abandons the tax debt or waives the debt or writes off the debt or the debtor provides alternative security, the charge registered as a security for unpaid taxes under Section 40 of *KRA Act* cannot be lifted. In conclusion, it was its case that the Application is an abuse of process.

The Submissions

21. The Respondent further urged its case through written submissions dated 20/11/2023. It argued that under Section 5 of the *Kenya Revenue Authority Act*, it is mandated to collect tax from all taxpayers. It cited Section 113 of the *KRA Act* to counter the claim that it was unjustifiably applying laws upon the Applicant retrospectively. That the caveats on the two portions of land had not been challenged before any Court and continues to subsist and as such it has not attempted to apply the laws retrospectively.
22. The 1st Respondent relied on the transition clauses under *Tax Procedures Act* which proved for recourse on settlement of tax disputes that subsisted before its commencement. It claimed further that the Applicant had not exhausted all the possible remedies before approaching Court. Further to the foregoing, it was its firm position that Caveats are not meant to be a permanent feature and cannot be lifted unless the unpaid tax is made as require under Section 32(1) of the *KRA Act*.
23. To buttress the foregoing, it relied on the decision of *Masel Ole Tinkoi & 3 Others -vs- Grain Growers Limited & 2 Others* (2018) eKLR where it was observed that the import to Section 32 and 40 of the *Tax Procedures Act* is that the suit property is used or enjoyed by the government for security for tax liabilities.
24. It submitted further that under Section 83 of *Succession Act*, personal representatives have a duty to ascertain and pay out of the estate of the deceased, all his debts. It submitted that it could only waive the tax liability in accordance to Section 77 of the *Public Finance Management Act* as read with Regulation 145 of the regulation thereon.
25. In the end, the 1st Respondent relied on Section 56(1) of The *Tax Procedures Act* 2015 to assert the position that the Applicants had not discharged their burden that the tax decision is incorrect. The case of *Afred Kioko Muteti -vs- Timothy Mibeso & Another* (2015) eKLR was referred to reiterate the legal position on burden of proof.

Issues for Determination

26. I have intently considered the rival positions taken by the parties herein. In my assessment, save for the award of costs, the only pertinent issue that emerges for determination is whether the caveats placed on Land Reference No. 2116/38/IV as entry No. 287 and Land Reference No. 2116/20/V as entry No. 299 by Kenya Revenue Authority are lawful.
27. I straight away proceed to analyse the issues.



Analysis and Determination

i. Whether the caveats placed on Land Reference No. 2116/38/IV as entry No. 287 and Land Reference No. 2116/20/V as entry No. 299 by Kenya Revenue Authority are lawful

28. From the outset, it is imperative for this Court to make a tour on the legislation on Caveats generally. But before delving into the substance of the foregoing sections, it is important to first appreciate of the import of the word ‘Caveat’. It is not defined by the repealed Registration of titles Act. It is also not expressly defined by the [Land Registration Act](#) No. 3 of 2012.
29. The term is, however, given meaning by Section 2 of the [Land Registration Act](#) in reference to the term ‘caution’. The said section defines a caution as follows;
- “caution” means -
- (a) a notice in the form of a register to the effect that no action of a specified nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave the notice; or
 - (b) a caveat”.
30. It can be deduced from the foregoing that a caveat shares the same meaning as a caution. Its effect is to restrict transaction on the land in question without first informing the person who had the notice registered. I will now interrogate the facts in the instant dispute.
31. The Originating Summons herein was instituted on the basis of Section 57(5), (6) and (10) and Section 63 of the [Registration of Titles Act](#) (Repealed).
32. The Official Search Certificate done by the Applicant under the [Registration of Titles Act](#) (Repealed) was produced as Exhibit 1. It is in reference to Land Refence No. 2116/38/IV. The Tenure system indicates that the land is leasehold for a period of 99 years from 01/08/1973.
33. The proprietary section indicates that the property is registered to Pius Gumo Mogero, the deceased herein.
34. Entry No. 9 is the encumbrance section. It has the following entry;
- “1998/07/07:Notification of charge by the Commissioner of Income Tax for Kshs. 2,000,000/=”.
35. By the letter dated 12/06/2023, the Applicant wrote to the 2nd Respondent, The Chief Land Registrar, bringing to its attention the Orders of the Court in The Succession Cause to liquidate the estate of the deceased.
36. In the letter the Applicant requested the particulars of the caveat on suspicion that it was registered in error against the deceased’s estate. He requested further for an unconditional lifting of the *Caveat*. It was couched in the following manner;
- “...We therefore write to you to furnish us with particulars of the caveat because the same was surreptitiously placed and it is disrupting the disposal of the property and it appears to be in error



We have been instructed to demand which we hereby do that you lift the said caveat without further reference and in event within 7 days, failure to which we have firm instructions to take necessary legal action...”

37. In response, Kenya Revenue Authority wrote to the Applicant the email dated 16/06/2023. It requested for the Identification Card and the Personal Identification Number of the deceased. There was no further exchange of correspondence between the Applicant and the Respondent towards resolution of the dispute hence this dispute.
38. As can be gathered from Exhibit 1, the *Caveat* herein was registered during the currency of the Registration of Titles Act.
39. Section 57(5) of the *Registration of Titles Act* (Repealed) allows a person to oppose a *Caveat* in the following terms;
- “(5) The proprietor or other person claiming land may, by summons, call upon the caveator to attend before the court to show cause why the caveat should not be withdrawn, and the court may, upon proof that the caveator has been summoned, and upon such evidence as the court may require, make such order in the matter, either ex parte or otherwise, as it deems fit; and, where a question of right or title requires to be determined, the proceedings shall be as nearly as may be in conformity with the rules of the court in relation to civil causes”.
40. Further to the foregoing, Section 57(6) and (10) of the *Registration of Titles Act* provide for the removal of a *Caveat* as follows;
- “(6) Except in the case of a caveat lodged by the registrar, the caveatee may make application in writing to the registrar to remove the caveat, and thereupon and upon payment of the prescribed fee the registrar shall give forty-five days’ notice in writing to the caveator requiring that the caveat be withdrawn, and, after the lapse of the service of the notice at the address mentioned in the caveat, the registrar shall remove the caveat from the register by entering a memorandum that it is discharged, unless he has been previously served with an order of the court extending the time as herein provided.
- (10) An entry shall be made by the registrar in the register of the withdrawal, lapse or removal of any caveat or of any order made by the court”.
41. Whereas it is claimed that the registration of the caveats happened during the currency of the Registration of Titles Act, the Applicants did not place any material before the Court to demonstrate that, in terms of Section 57 of the Act, the proprietor of the land initiated the process of removal of the caveats in time in accordance with the Act or he did not. And if he did not do so, the question is, why he did not do it in time? In such circumstances, the provisions of the Act would have applied then. Assuming that he did not move the Registrar and the court at the appropriate time to remove the caveats, then he would be guilty of laches by moving the Court now hence the application would be time barred.
42. Even then, the Applicants, vide paragraphs 2 of the Supporting Affidavit depone that there was an order in Kitale Succession Cause No. 350 of 1998 in the matter of the Estate of Pius Magero Gumo that required them to liquidate the assets of the deceased. But in elsewhere they depone that the grant of letters of administration were issued to them. Then they state in paragraphs 3 and 4 that they had



entered into agreements for the liquidation of the assets in order to comply with the order in the Succession Cause and to comply with the contractual timelines. But they are extremely evasive as to when they entered into the agreements or when they conducted the searches and discovered that there were caveats registered against the two parcels of land or even when the grant of letters was issued to them. Moreover, the official search in respect of LR. No 2116/38/IV is undated. It makes it even more suspect. It cannot be known when the same was done and did reveal the existence of the caveat. At paragraph 6 they only mention that they conducted searches in the Land Registry and discovered the existence of the *Caveats*.

43. Even then it does not accord with reason that the applicants would enter into agreements for the sale of the parcels of land before the removal of the caveats. Such agreements would be and are illegal. Even under the *Law of Succession Act*, Chapter 160 of the Laws of Kenya, the Applicants or indeed any administrator of the Estate of the late Pius Magero Gumo should have paid off any debts or all the liabilities of the deceased before dealing with his Estate in any way. It cannot be the other way round. They have placed the cart before the horse.
44. In my view these half-truths or failure to reveal the information in order to aid the court to arrive at a just decision is a deliberate step by the Applicants to make the Court grant orders which it would otherwise not grant for reason of them being overtaken by events or being done illegally. To repeat, it is virtually impossible to have an official search conducted over a parcel of land and comes out undated or does not reveal when it was done. I am not convinced that under the repealed land regime the Applicants have made out a case for grant of the orders sought.
45. If the Court were to take it that the dispute herein crystallised after the repeal of the Registration of Titles Act, then the applicable law would be *Land Registration Act*, 2012 and my analysis on the effect of the same on the prevailing facts is as hereunder.
46. Having in mind the principle against retroactive application of laws the applicable legislation in one that was in place when the dispute arose. Therefore, the applicative law is the *Land Registration Act* 2012. I will hence look at the process anticipated by the *Land Registration Act*.
47. Section 71 (2) of The *Land Registration Act* provides substantively on the effect of a caution. It states;
 - “ (2) A caution may either-
 - (a) forbid the registration of dispositions and the making of entries;
or
 - (b) forbid the registration of dispositions and the making of entries
to the extent expressed in the caution.
 - (3) A caution shall be in the prescribed form, and the Registrar may require the cautioner to support the caution by a statutory declaration.
 - (4) The Registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under this Act.
 - (5) Subject to this section, the caution shall be registered in the appropriate register”.
48. The notice and effect of caution is provided for in Section 72 of the *Land Registration Act* in the following manner;

“72. Notice and effect of caution



- (1) The Registrar shall give notice, in writing, of a caution to the proprietor whose land, lease or charge is affected by the caution.
- (2) A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court”.

49. The withdrawal of a caution is provided for in Section 73 in the following terms;

“73. Withdrawal and removal of caution

- (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”.

50. The procedure set by Section 73 of the [Land Registration Act](#) is straightforward. The Court may withdraw a caution. The Act does not give the parameters but is axiomatic that such withdrawal can only happen upon by the rigours of evidence being adhered to.

51. A caution may also be withdrawn at the instance of the Registrar. According to the Section 73(2) of [Land Registration Act](#), a person wishing to have a caution removed applies to the Registrar.

52. The Registrar then serves a time bound notice to the Cautioner to the effect that the caution will be removed at the expiry of the time indicated.

53. According to Section 73(3), the Registrar is at liberty to withdraw the caution where the cautioner fails to raise any objection at the expiry of the notice.

54. In instances where the cautioner raises an objection to the removal, parties are accorded an opportunity to be heard and Orders are made as the Registrar shall consider fit.

55. Applying the foregoing to the instant dispute, this Court is of the assessment the dispute is not ripe for this Court’s adjudication. The facts are not ripe enough for this Court to conclusively adjudicate on and the documents relied upon by the Applicant are inadequate as to enable this Court withdraw the Caution against Kenya Revenue Authority. That therefore leaves the avenue for recourse for the Applicants as the one anticipated in Section 73 (2) of the [Land Registration Act](#).

56. Accordingly, the Applicants herein ought to have applied to the relevant Land Registrar (County or Chief Land Registrar) seeking to remove the caution registered on their two pieces of land.



57. The Registrar would then be obligated by law to serve Kenya Revenue Authority of the notice that the caution registered on the Applicants' land will be removed upon the expiry of the time indicated thereon. If Kenya Revenue Authority would be opposed to the removal of the caveat, it would raise an objection indicating the taxes owed to it by the Applicants and hearing would ensue. If the 1st Respondent were to fail to respond, the Registrar would remove the caveat.

58. In the case of *Mwangi Rukwaro and another vs Land Registrar Nandi* (2019) eKLR the court made the following remarks;

“There is no evidence that the Applicant made the applications contemplated in section 73 and 78 of the *Land Registration Act* cited above.

19. Whilst this Court has power to order removal of the caution/restrictions herein it cannot do that through a process where the cautioner or his legal representative has not been given an opportunity to participate. In the special circumstances of this case, I am of the considered view that the Applicants should invoke the process in section 73(3)(4) of the *Land Registration Act*. As it is the only through that process that it may be determined that there is no person with an interest in maintenance of the caution.’

59. Having regard to the process contemplated in the preceding paragraphs, the totality of the circumstances of the instant Application, including the insufficiency of documents relied upon by the Applicant as well as their failure to avail to the 1st Respondent the deceased's Personal Identification Number for resolution of the dispute, I find that the Application is akin to short-circuiting the otherwise very comprehensive process anticipated by the *Land Registration Act*. The procedure under the Act was not given a chance.

60. My finding is further tempered by the fact that whereas the Applicants' claim is for the lifting of the caveat registered on two distinct pieces of land, L.R. No. 211/38/IV and L.R. 2116/20/V, the documents availed is in respect to one of them, L.R. No. 211/38/IV only.

61. That said, the claim by the Applicant that the 1st Respondent has violated their right to fair administrative action guaranteed under Article 47 of the *Constitution* is premature. There has been no express refusal to remove the caveat, just a contention on how and why there is a caveat on the Applicants' pieces of land. That contention, in this Court' assessment, can be resolved by application of the procedure under Section 73 of the *Land Registration Act*.

62. In the premises, the Application suffers a false start and is hereby dismissed. Each party shall bear their own costs.

63. Orders Accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 29TH DAY OF FEBRUARY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

