



**Ndungu & 2 others v Ruigu & another (Environment & Land Case
28 of 2019) [2024] KEELC 1134 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1134 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 28 OF 2019**

JG KEMEI, J

FEBRUARY 28, 2024

BETWEEN

JOSEPH NGIGI NDUNGU 1ST PLAINTIFF

ANDREW MWANGI WACHINJI 2ND PLAINTIFF

ANTONY MWANGI KARIUKI 3RD PLAINTIFF

AND

JACK BONIFACE RUIGU 1ST DEFENDANT

KAHUTHU ANTHONY MAGERIA T/A KAHUTHU & KAHUTHU CO.

ADVOCATES 2ND DEFENDANT

RULING

1. The 1st Defendant/Applicant filed the instant Motion dated 9/11/2022 expressed under Order 40 Rules 7 & 11, Order 50 rule 5 and Order 51 Rule 1 [Civil Procedure Rules](#) and Sections 1A, 1B, 3A, 27 (2) and 63 (e) [Civil Procedure Act](#) against the Plaintiff/Respondent for Orders that;
 - a. Spent.
 - b. This Honorable Court be pleased to enlarge the period within which the 1st Defendant is to deposit the sum decreed against him in the sum of Kshs. Two Million only (Kshs. 2,000,000/=) for a period not exceeding 30 days from the date of the grant of the Order herein.
 - c. The said sum of Kenya Shilling Two Million Only (Kshs. 2,000,000/=) be deposited in an escrow account in the names of the Defendants Advocates pending the taxation taxation of their respective bills of costs, filed in this matter.
 - d. The orders issued on the 12th February 2019 by the Hon. Justice S.Okongo that directed the County Land Registrar Thika Registry to secure under lock and key the files, binders,



green cards and any other registration documents relating to Land Reference Nos. Ruiru East/Juja Block 2/27785-27807 and prohibited him from dealing over the said parcels, be vacated forthwith and the County Land Registrar Ruiru Lands Registry be ordered to now unlock the files, binders, green cards and any other registration documents over the parcels of land that had been stated in the Order made on the 12th February 2019.

- e. The cautions placed by the Plaintiffs on the 18th June 2018 over the underlisted parcels of land be removed forthwith
 - a. LR NO. Ruiru East/Juja East Block II/27785
 - b. LR NO. Ruiru East/Juja East Block II/27786
 - c. LR NO. Ruiru East/Juja East Block II/27787
 - d. LR NO. Ruiru East/Juja East Block II/27788
 - e. LR NO. Ruiru East/Juja East Block II/27789
 - f. LR NO. Ruiru East/Juja East Block II/27790
 - g. LR NO. Ruiru East/Juja East Block II/27791
 - h. LR NO. Ruiru East/Juja East Block II/27792
 - i. LR NO. Ruiru East/Juja East Block II/27793
 - j. LR NO. Ruiru East/Juja East Block II/27794
 - k. LR NO. Ruiru East/Juja East Block II/27795
 - l. LR NO. Ruiru East/Juja East Block II/27796
 - m. LR NO. Ruiru East/Juja East Block II/27797
 - n. LR NO. Ruiru East/Juja East Block II/27798
 - o. LR NO. Ruiru East/Juja East Block II/27799
 - p. LR NO. Ruiru East/Juja East Block II/27800
 - q. LR NO. Ruiru East/Juja East Block II/27801
 - r. LR NO. Ruiru East/Juja East Block II/27802.
 - s. LR NO. Ruiru East/Juja East Block II/27803
 - t. LR NO. Ruiru East/Juja East Block II/27804
 - u. LR NO. Ruiru East/Juja East Block II/27805
 - v. LR NO. Ruiru East/Juja East Block II/27806
 - w. LR NO. Ruiru East/Juja East Block II/27807
- f. The costs of this Application be provided for in any event.

2. The Application is based on the grounds that the Plaintiff's suit was dismissed on 26/9/2022 whereby inter alia the 1st Defendant was ordered to refund the Plaintiff a sum of Kshs. 2M within 30 days from the date of Judgment; that before the lapse of the said 30 days, the Plaintiff filed an Application



- dated 11/10/2022 against the payment of the said refund on grounds that it would compromise their intended appeal; the Plaintiff's Application dated 11/10/2022 was dismissed on 9/11/2022 for non-attendance; that the Defendant having been awarded costs is now intent on taxing the Bill of Costs and have the costs deducted from the decretal award and lastly that this Court having dismissed the Plaintiff's suit, it is only fair and just to vacate the cautions on the suit parcels of land.
3. The Application is supported by the Affidavit of even date of Jack Boniface Ruigu, the 1st Defendant. Reiterating the above grounds, he annexed copy of the Orders issued by Hon. Justice Okong'o as JBR1, JBR2 - copies of the official searches confirming the cautions over the suit land parcels. He further deponed that he has been ailing and therefore unable to pay the decretal sum as ordered as shown by medical documents, JBR3 hence the prayer for extension of time to enable him seek funds.
 4. Joseph Ngigi Ndungu, the 1st Plaintiff swore his Replying Affidavit on 2/12/2022 on his behalf and his co-Plaintiffs. He conceded filing an Application for stay of execution of the Judgment adding that the said Application did not in any way mean that the decretal sum owing to him is available for the Defendants' utilization. That the prayer to deposit the decretal sum in an escrow account of the Defendants' Advocates is baseless noting that there is a procedure in law for settling a Certificate of Costs. Regarding the removal of cautions, it was deposed that the Plaintiffs are pursuing an appeal and such removal will prejudice them since the 1st Defendant might adversely deal with the suit properties. Further that the 1st Defendant has not followed the laid down procedure for removal of those cautions through the land registrar first. The Court was urged to dismiss the Application with costs.
 5. The Application was argued orally before Court on 6/11/2023. Parties echoed their rival positions as summarized above.
 6. The issues for determination in my view are; whether the prayer for enlargement of time is merited; whether the decretal sum can be paid in to an escrow account; whether the Court orders issued on 12/2/2019 can be vacated; whether the cautions over the suit parcels of land can be removed and lastly who bears costs.
 7. It is commonly accepted that the Judgment was delivered herein on 29/9/2022 inter alia ordering the 1st Defendant to refund the Plaintiff a sum of Kshs. 2M within 30 days and the Plaintiff to pay the Defendants costs of the suit. The period of 30 days was to expire on or about 28/10/2022. The instant Application was filed on 14/11/2022; over two weeks after the deadline for refund.
 8. The Applicant seems to argue that his failure to refund the decretal sum is partly due to the Applicant's Application for stay of execution that was filed after Judgment. Further that due to his illness, he seeks extension of time to enable him dispose some of the suit properties to enable him get the decretal sum. The period of time for refunding the decretal sum having lapsed, and their being no order varying/reviewing the payment period, there is no live period of time to enlarge/extend. A reading of the Judgment is clear that failure to pay the decretal sum as ordered, the same would be recovered summarily.
 9. On the prayer to pay the decretal sum in an escrow account, it is noted that in prayer 3 of the motion, the Applicant sought to have the monies deposited in his Advocates account but in para. 7 of the Supporting Affidavit, he deponed that the same be paid into a joint account of the both his Advocates and the Plaintiffs'. The Applicant seems to invite this Court to review the terms of the Judgment without a cogent basis to do so. There is no provision in the law allowing a Court to reopen its decision to the extent sought herein. The Court cannot sit on its own appeal.
 10. Concerning the Court orders dated 12/2/2019, the Court granted the said order on a temporary basis. Whereas the period of the temporary basis is not specified in the Order, the Court record shows that



the order was granted in respect of prayer no. 4 of the Plaintiffs' Notice of Motion dated 8/2/2019 which was coached as follows;

“That pending the hearing and determination of this suit the County Land Registrar Thika Registry be hereby ordered to secure under lock and key the files, binders, green cards and any other registration documents relating to Land Reference Nos. Ruiru East/Juja East Block 2/27785-27807 and be prohibited from accepting and registering any further dealings over these parcels until further orders of this Honorable Court.”

11. The purpose and extent of restrictions are provided under Section 78 of the *Land Registration Act* to endure a particular period; until the occurrence of a particular event; or until the making of a further order.

12. Further Section 78 (2) *Land Registration Act* provides for removal of restriction that;

“(2) Upon the Application of a proprietor affected by a restriction, and upon notice to the Registrar, the Court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.”

13. This suit as earlier mentioned has already been determined. The Plaintiffs' objection on vacating the Court orders issued on 12/2/2019 on account of their intended appeal does not hold water in view of the final orders of this Court that are still in force. It is also trite that a restriction cannot remain in force indefinitely.

14. Can the Court order for removal of cautions? The answer is in the affirmative as provided under Section 73 *Land Registration Act* which inter alia states;

“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.”

15. The law also empowers the Registrar to remove cautions when appropriately moved. There is no evidence before the Court that the Registrar's intervention has been sought in vain.

16. This Application has partially succeeded to the extent of vacating the orders of the Court issued on 12/2/2019.

17. I make no orders as to costs.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 28TH DAY OF FEBRUARY, 2024.

J G KEMEI



JUDGE

Delivered online in the presence of;

Kawanda HB Wachira Maina for 1st, 2nd and 3rd Plaintiffs

Njenga Muchai for 1st Defendant

Muchai HB Mrs. Njoroge for 2nd Defendant

Court Assistants – Phyllis/Oliver

