



Kamili & 2 others v Barasa & another (Environment & Land Miscellaneous Case E002 of 2023) [2024] KEELC 4546 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND MISCELLANEOUS CASE E002 OF 2023**

EC CHERONO, J

JUNE 6, 2024

BETWEEN

PERITA NAKHANU KAMILI 1ST APPLICANT

MARTIN MASOLOLWE KHAEMBA 2ND APPLICANT

MESHACK WANJALA KHAEMBA 3RD APPLICANT

AND

ROSEMARY NEKESA BARASA 1ST RESPONDENT

LAND REGISTRAR, BUNGOMA 2ND RESPONDENT

RULING

1. By a Notice of Motion dated the 24th July, 2023 brought pursuant to Section 73(1) of the [Land Registration Act](#) and Article 159 of the [Constitution](#) of Kenya, 2010 the Applicant seeks for the following orders:
 - a. The cautioned lodged against Land Parcels No. W.Bukusu / N.Mateka/ 3686, W.Bukusu / N.Mateka /3687, W.Bukusu / N.Mateka/ 3688 and W.Bukusu / N.Mateka/ 3689 by the respondent be lifted/removed.
 - b. Costs of this application be provided for.
2. The application is premised on the grounds on the face of the application and the supporting affidavit by the 1st applicant sworn on 24th July, 2023.
3. It was deposed that the 1st applicant is the registered owner of Land Parcel No. W.Bukusu/ N.Mateka/3686, the 2nd applicant is the registered owner of Land Parcel No. W.Bukusu/ N.Mateka/3687, both the 1st and 2nd applicants are the registered owners of Land Parcel No. W.Bukusu/N.Mateka/3688 while both the 2nd and 3rd respondents are the registered owners of Land



- Parcel No. W.Bukusu/N.Mateka/3689. It is deposed that the 1st respondent unlawfully, illegally and wrongfully lodged a caution over the said parcels of land claiming interests as a beneficiary. She contends that the 2nd respondent did not consult them prior to accepting the registration of the caution.
4. She further deposed that the 1st respondent filed an objection based on the caution in a Succession Cause at the High Court at Bungoma in Succession 31 of 2007 in which she wanted the grant issued to the 1st applicant revoked and a share of land be allocated to her. She stated that the High Court dismissed the objection vide its ruling delivered on 2nd May, 2003 and observed that she (the 1st respondent) had not proved any interest in the land. The applicants contend that the 1st respondent has not preferred any appeal against the ruling of the High Court and as such, there is no basis for maintaining the caution. The applicants urged the court to lift the said caution.
 5. By way of a response, the 1st respondent filed a replying affidavit dated 8th December, 2023 in which she deposed that she is the wife of the late Joseph Barasa Wakhanya, a son to the late Wafula Fumula who bought the suit land from one Kamili Khaemba Masololwe and allocated his sons 2.75 acres thereof. She stated that the applicants are beneficiaries of the estate of the said Kamili Khaemba Masololwe. She deposed that she has been in use and occupation of 2.75 acres comprised in W.Bukusu/ N.Mateka/396 for over 5 decades with the knowledge of the applicants who are being untruthful.
 6. She deposed that the applicants filed a succession cause for the estate of Kamili Khaemba Masololwe and failed to include the family of Wafula Fumula despite demanding Kshs.50,000/= from her to process the succession cause. The 1st respondent states that she filed an objection in the succession cause P & A 3 of 2007 and the succession court advised her to file her claim in the appropriate court and therefore, she filed Bungoma ELCOS No. E008 of 2023. It is her contention that the applicants sub-divided W.Bukusu/ N.Mateka/396 into four portions to wit; Land Parcel No. W.Bukusu/N.Mateka/3686, Land Parcel No. W.Bukusu/N.Mateka/3687, Land Parcel No. W.Bukusu/N.Mateka/3688, Land Parcel No. W.Bukusu/N.Mateka/3689 (hereinafter referred to as 'the suit parcels') after removing the caution which caused confusion as to which plot she was occupying and has therefore caused injustice upon her. She stated that the applicants have been selling neighbouring parcels of land and are keen in kicking her and her family out. She urged the court to dismiss the application
 7. Parties agreed to have the application disposed of orally on 9th April, 2024. During the hearing, both parties reiterated their averments as deposed in their affidavits. I note that the applicant filed submissions dated 6th March, 2024 despite their being no directions to that regard.

Legal Analysis and Decision

8. I have considered application, the affidavit evidence and the annexures thereto as well as the submissions by the Applicant and the 1st Respondent herein.
9. It is not in contention that the applicants are the registered owners of the four parcels of the suit land. The 1st respondent on her part alleges that she is a beneficiary of the estate of Wafula Fumula who bought 2.75 acres from one Kamili Khaemba Masololwe comprised in one of the four parcels of land whom the applicants acquired through succession of the estate of Kamili Khaemba Masololwe without disclosing her interest as a purchaser. According to the applicants, the caution has curtailed their usage of the land and wish to have the same removed since the 1st respondent has not lodged any claim/ complaint with regard to the suit parcels. The 1st respondent on her part states that she placed the caution and even filed an objection against the grant being confirmed in favour of the applicants as the registered owners of the four resultant parcels of the suit land upon sub-division.



10. From the annexures to the 1st respondent's replying affidavit, I note that the 1st respondent did institute objection proceedings against the said confirmation of grant vide summons for revocation of grant dated 4th May, 2018. The succession court delivered its ruling on the summons for revocation on 2nd May, 2023. Consequently, the 1st Respondent filed an Originating Summons dated 4th December, 2023 seeking orders for inter-alia a declaration that she has acquired a portion of the suit lands measuring 2.75 acres comprised in LR No. W.Bukusu/N.Mateka/396 by operation of law through adverse possession. The applicants also filed the current miscellaneous application under Section 73 to have the caution removed.
11. In my considered view, the issue for determination in this application is whether the Applicants have made a case for the orders sought.
12. The lodging of caution on any property is governed by Section 71(1) of the [Land Registration Act](#), which provides as follows:-

“ 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) ...
 - c) ...

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.”
13. Cautions are ideally registered by the land registrar and their purpose is to forbid the registration of dispositions in the subject land because the cautioner is apprehensive that such registration may obliterate their interest in the land. From the above provision of law, a person who lodges caution over any property is one who claims right whether contractual or otherwise. The 1st Respondent in her application for revocation before the Succession Court was a beneficial interest as a purchaser. Section 73 of the [Land Registration Act](#) makes provision for the removal or withdrawal of a caution. Ideally cautions can be removed by the cautioner, by order of the court or by order of the registrar. For the Caution registered against the title of the suit property to remain in place, the 1st respondent has to show that she has an interest in the subject property.
14. As I have already stated above, the 1st respondent is claiming “beneficial interest”. The 1st respondent has explained that her late husband was the son of one Wafula Fumula who bought 2.75 acres from one Kamili Khaemba Masololwe comprised in one of the four parcels whom the applicants acquired through transmission. Annexed to her affidavit is a copy of an agreement that was made between the said Kamili Khaemba Masololwe and Wafula Fumula for the sale of 2.75 acres of land which she now claims. The agreement referred to above gave rise to a contractual obligation to have a portion of the suit property measuring 2.75 acres registered in the name of Wafula Fumula in fulfilment of the terms of the said agreement and the provisions of the law. That right entitles the respondent who is a beneficiary of the estate of Wafula Fumula (deceased) to lodge a Caution against the title of the suit property under the provisions of section 71(1) of the [Land Registration Act](#) No.3 of 2012.
15. The 1st respondent also stated that the widow of Kamili Khaemba Masololwe upon his death approached her to contribute towards the legal fees payable for the succession cause of his estate in



order to secure her interests in the estate but the said widow failed to include her interest as promised. It is noteworthy that this evidence was not rebutted by the applicants. From the evidence before this court, the validity of that agreement has not been challenged and the applicants herein are not barred from bringing a suit challenging that agreement which forms the basis of the 1st respondents claim. Further, the court has been informed that there is a pending suit between the parties herein relating to the suit properties. In view of the matters aforesaid, I am find that the Caution complained of by the applicant was properly lodged. It is my view that no prejudice would be suffered by the applicant if the same remains in place pending the hearing and determination of Bungoma ELCOS No. E008 of 2023 to establish her interest in the disputed portion of the suit property. If the 1st respondent fails in those proceedings, the caution herein would be without any basis and the applicants would be at liberty to move the court for the appropriate orders to have the same removed.

16. The upshot of the foregoing is that the application dated 24th July, 2023, has no basis. The same is accordingly dismissed with costs to the 1st Respondent.
17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 06TH DAY OF JUNE, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1st Respondent in person-present.

Applicants/Advocate-absent

Bett C/A

