



REPUBLIC OF KENYA



**Kinoti v Rukuma (Environment and Land Appeal E011 of 2023)  
[2024] KEELC 5545 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5545 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

**CK NZILI, J**

**JULY 17, 2024**

**BETWEEN**

**JAMES NKONGE KINOTI ..... APPELLANT**

**AND**

**TIMOTHY MURIITHI RUKUMA ..... RESPONDENT**

*(Being an appeal from Meru CM ELC Case No. 134 of  
2019 delivered on 1.8.2023 by Hon. D.W Nyambu – CM)*

**JUDGMENT**

1. The appellant, who was the plaintiff at the lower court, had sued the respondent as the defendant vide a plaint dated 20.11.2019 for unlawfully or illegally registering a caution over his LR No Nkuene/Ukuu/643. He sought for its removal and general damages. By a statement of defense dated 27.2.2020, the respondent admitted that he lodged the caution over the land as a member of Kianjogu Farmers Society after the suit land changed hands from the appointed liquidator to the appellant; yet the said society was a member of Nkuene Farmer's Cooperative Society Limited under liquidation.
2. The respondent raised a preliminary objection dated 27.2.2020 that the suit disclosed no cause of action against him, no notice to sue had been served, the suit offended Sections 11 & 12 of the *Civil Procedure Act*, it was *res judicata* in view of the determination in Meru Misc Application No 11 of 2019 determined on 27.2.2020; It was otherwise incompetent, scandalous, frivolous, vexatious and an abuse of the court process. By a reply to the defense dated 9.3.2020, the appellant denied the contents of the statement of defense in its entirety.
3. At the trial, James Nkonge Kinoti testified as PW1 and adopted his witness statement dated 20.11.2019 as his evidence in chief and produced two demand letters dated 22.8.2019 and a copy of the official search for LR No Nkuene/Ukuu/643 as his exhibit. He denied any relationship with the respondent.



4. In cross-examination, PW1 told the court the land size was 1.01 acres, which was under his occupation. He said that the caution was lifted in 2010 by the land registrar. PW1 said that he bought the land for Kshs 50,000 in 2012 from Boniface Mwaura Karanja, a liquidator, and obtained a title deed on 18.3.2015. About entry number 3 in the copy of records, PW1 said that it showed that the suit land belonged to Nkuene Farmers Co-operative Society (under receivership). He was uncertain if the Kianjogu factory was the one that registered the caution. PW1 denied that he was out to grab public land.
5. In re-examination, PW1 said that it was the respondent who lodged the caution in 2016, alleging beneficial ownership on behalf of Kianjogu coffee farmers. PW1 insisted that the respondent lodged the caution in his personal capacity.
6. Regarding the caution lodged in 2010, PW1 said that Francis M'Kiambati had registered as per entry number 6 in the copy of the register. Further, PW1 said that they had also lodged a caution on account of purchaser's interest as per entry number 7, both of which were lifted by the court, and a title deed was issued to him as per entry number (10). PW1 told the court that efforts by the land registrar for the respondent to lift the caution fell on deaf ears, hence the suit. He denied that his late father was a one-time liquidator of Nkuene Cooperative Society Limited.
7. Timothy Muriithi Gitari testified as DW1. He told the court that the suit land belonged to Nkuene Cooperative Society Ltd. He said that he was a member of the said society and Kianjogu Farmers Society who had contributed towards purchasing the land for the construction of coffee factories. He said that the plot was held in trust for the benefit of local farmers. DW1 said that after learning of plans to dispose of their land, members held a meeting on the way forward, and he was appointed to protect the members' interests; hence lodged the caution on behalf of members of Kianjogu Farmers Society to protect their interests.
8. Similarly, DW1 said that if the caution was lifted, the members would suffer, for third parties may acquire the land. He produced copies of the record, minutes for the meetings held on 15.11.2011, copies of cheques dated 30.5.2013 and 5.6.2013 and a letter dated 12.11.2019.
9. In cross-examination, DW1 said that the society had been placed under liquidation. He insisted that he was a member of the Kianjogu Farmer Society even though he had no membership card before the court. DW1 said that the Kianjogu Farmers Society was not registered. Similarly, DW1 said that he had no ownership documents of the land by the society though liquidation started in 2010 and was still ongoing. According to him, D. Exh No (1) showed that the land was held in trust. DW1 said that they had been pursuing the issue with the minister for Cooperatives as per D. Exh No (4) and had also been unable to trace the liquidator.
10. Francis Muaki Kiambati testified as DW2 and adopted his witness statement dated 20.7.2021 as his evidence in chief. He told the court that he was a member of Nkuene Farmers Cooperative Society Ltd under liquidation. DW2 said that the land initially belonged M'Buria M'Ikiara, who exchanged it with another land. Again DW2 told the court that he had lodged a caution over the title which the court removed without notice to him as per entry number 7 and said that the liquidator sold the land to the appellant who acquired a title deed in 2015. DW2 said that he was among the ten people who chose the respondent to lodge the caution. Further, DW2 stated that in 2019, a letter was jointly written to the Director of Cooperatives over the matter that was not responded to.
11. In this appeal, the appellant faults the judgment by the trial court for:
  - a. Finding the respondent had a registrable interest in the title.



- b. Holding that he should have approached the land registrar for determination of the issue.
  - c. Condemning him to pay costs.
  - d. Upholding the respondent's right.
  - e. Misinterpreting Section 73 (1) of the *Land Registration Act*.
  - f. Shifting the burden of proof.
  - g. Questioning the legality of his title without evidence of illegality.
12. Parties herein were directed to canvass the appeal by filing written submissions by 17.7.2024.
  13. An appellate court of the first instance has the mandate to re-appraise and review the lower court record and come up with independent findings on facts and the law while mindful that the trial court had an opportunity to see and hear the witnesses firsthand. See *Abok, Gitobu Imanyara & others v AG & others* [2016] eKLR.
  14. The single issue for my determination is whether the respondent could lodge a caution on behalf of members of a cooperative in liquidation.
  15. A party lodging a caution must have justification for it as held in *David Macharia Kinyuru v District Land Registrar Naivasha & another* [2017] eKLR. Section 73 (1) & (2) of the *Land Registration Act* provides that the first port of call is before the land registrar to remove or lift the caution before moving to court under Section 78 (2) thereof.
  16. In *Mwangi Rukwaro & another v Land Registrar Nyeri* [2019] eKLR, the court held that while it has the power to order the removal of a caution, the cautioner has to be given an opportunity to participate unless there are exceptional circumstances to show that there was no person with an interest in the maintenance of the caution.
  17. In this appeal, the justification by the respondent was that he had a beneficial interest in the land since it belonged to a society under liquidation and that he was a member of a society.
  18. The appellant had pleaded and produced exhibits that he acquired the property for value by paying the liquidator money. The respondent had to satisfy the requirements under Section 71 of the *Land Registration Act* by defining the right or interest capable of being created by way of a registrable instrument under the Act.
  19. The respondent had nothing to show that he was a member of any such society whose rights or interests he was representing. He had alleged that the suit property belonged to a society under liquidation. There was no gazette of liquidation or an appointment of the liquidator attached to his statement of defense. Evidence of appointment or approval as the representative to represent the liquidator was missing. The period for which the liquidator had been appointed was also missing. Liquidation in law cannot be indefinite. It is the liquidator who has the mandate to collect and dispose of properties belonging to a society under liquidation.
  20. In *Kiraithe v John Quadco Ltd & another* (I.P.) E & L.C. 73 of 2015 [2022] KEELC 12711 (KLR) (28<sup>th</sup> September 2022 (Judgment), the court held that the power to determine membership and officials of a society is bestowed upon the Cooperative Tribunal under Section 76 of the *Cooperative Societies Act*. The court cited *Mathew Mutuku Muli & others v Peter Wanjobi Kiama official liquidator Drumvale Farmers Corporation Society Ltd and others* [2022] eKLR that a dispute seeking for a permanent injunction on land interference and transfer of land fell under the court and not the



cooperative tribunal. The court cited the *New Kamwangi Gumba Company Ltd v Kiambu Coffee Growers Cooperative Union and others* [2015] eKLR that once a cooperative is placed under liquidation, it ceases to exist and all its properties under Sections 63 & 65 of the new Act fell under the liquidator after a liquidation order is gazetted.

21. The liquidator has the power to sell the movable and immovable properties of the society as part of the liquidation process. For ten years, the respondent was unable to trace the liquidator and impeach the title held by the appellant issued in 2015 under Sections 24, 26, 27 & 28 of the *Land Registration Act*.
22. There was no certified copy of the register to show that the respondent was a member of any Society that was under liquidation and whose interests he was representing in registering or justifying the subsistence of the caution for an indefinite period. A court of law cannot be used to sanction an illegality. The upshot is that I find there was no justification to keep the caution alive. If the members of the society were questioning the powers of the liquidator or seeking recovery of the land, which claim appears statute-barred, they would have been joined in the suit or moved to the right forum to agitate for their rights.
23. I find the appeal meritorious. The same is allowed with costs both in appeal and before this court. General damages of Kshs 300,000/= to be paid for lodging an illegal caution.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 17TH DAY OF JULY, 2024**

In presence of;

C.A Kananu/Mukami

Miss Kerubo for the respondent

**HON. C K NZILI**

**JUDGE**

