



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mugun v Naibei & another (Environmental and Land Originating Summons  
E003 of 2022) [2025] KEELC 270 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 270 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2022  
EC CHERONO, J  
JANUARY 30, 2025**

**BETWEEN**

**BINEAH CHESIARI KAAAN MUGUN ..... APPLICANT**

**AND**

**JOAN NAFULA NAIBEI ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Applicant, Bineah Cheriari Kaan Mugun commenced these proceeding vide Originating Summons dated 22<sup>nd</sup> March, 2022 seeking the following orders;
  - a. That this Honourable court be pleased to issue an order compelling and/or directing the 2<sup>nd</sup> Respondent to remove and/or lift the caution placed by the 1<sup>st</sup> Respondent on the land parcel N.Malakisi/W.Sasuri/1484.
  - b. That the Respondents herein Joan Nafula Naibei And Land Registrar Bungoma be ordered to pay costs of the proceedings herein.
2. The suit is based on grounds on the face of the Originating Summons supported by the Applicant's affidavit sworn on even date.

The 1<sup>st</sup> Respondent filed a Replying affidavit sworn on 9<sup>th</sup> May 2022 while the 2nd Respondent through the office of the Attorney General (Juma Collins Sate Counsel) filed Grounds of opposition dated 27/4/2023 and a Replying affidavit sworn the same date.
3. When this matter came up for directions on 17/7/2024, it was directed that the suit be canvassed by written submissions. The parties were given timelines within which to file and serve their written submissions.



### **Applicant's Case.**

4. The Applicant in his supporting affidavit sworn on 22<sup>nd</sup> March 2022 stated that he is the absolute registered proprietor/owner of the suit property parcel NO. N.Malakisi/W.Sasuri/1484. He stated that when he went to apply for a loan with Kenya Commercial Bank, he declined on the basis that a caveat placed on the land. He deposed that the 1<sup>st</sup> Respondent has no beneficial interest or otherwise on the suit land to warrant her place the caution, the subject of this suit. He stated that he is in possession and has been residing on the suit land until the 1<sup>st</sup> Respondent lodged the caution at Bungoma Land Registry. He stated that he made numerous efforts to have the Land Registrar Bungoma remove the caution placed by the 1<sup>st</sup> Respondent on the suit Land without success.

### **1<sup>st</sup> Respondent's Case.**

5. The 1<sup>st</sup> Respondent through the Firm of M/S Wamalwa Simiyu & Company Advocates filed Replying affidavit sworn on 9<sup>th</sup> May 2022 and confirmed placing the caution complained of to protect her interest in the suit property. She deposed that it is not true that the Applicant resides in the suit land. She deposed that the Applicant had lodged complaints with the 2<sup>nd</sup> Respondent to remove the caution and that she was issued with notices to attend meetings before the 2<sup>nd</sup> Respondent where she was heard and the matter was determined. She annexed a copy of a Notice to remove caution dated 18<sup>th</sup> May 2021 and a Notice for hearing on application to remove caution for 11<sup>th</sup> August, 2021. She stated that this court lacks jurisdiction to deal with this matter as it was already determined by the 2<sup>nd</sup> Respondent.

### **2<sup>nd</sup> Respondent's Case**

6. The 2<sup>nd</sup> Respondent through the HON. Attorney General filed grounds of opposition and a Replying affidavit dated on 27/4/2023 and sworn the same date. According to the 2<sup>nd</sup> Respondent, the issue before court is within her knowledge as it falls within the powers and mandate of the Land Registrar under the Land Registration Act. She confirmed that a caution was registered on the suit Land on 08/09/2020 by the 1<sup>st</sup> Respondent claiming beneficial interest. She stated that the Applicant made an application for removal of the aforementioned caution and thereafter She issued a notice to the 1<sup>st</sup> Respondent on 18/05/2021 to which filed an objection dated 15/06/2021. She thereafter set a hearing session for the for removal of the said caution for 11<sup>th</sup> August, 2021. She deposed that on the material date, the 1<sup>st</sup> Respondent and her witness were seated by 10.00AM but the Applicant did not show up despite even having made phone calls and confirming attendance and waiting for him for over 1 hour. She annexed copy of the application for removal of caution, notice to the 1<sup>st</sup> Respondent, a copy of Hearing notice, as well as a copy of caution proceedings marked as VKL-1A, 1B, 1C, 2 & 3 respectively. She stated that at around 2.30 PM, the Applicant appeared accompanied by two other people and after introducing herself and welcoming them, the Applicant said he was not ready for the hearing and that he had nothing to say or produce and immediately left. She stated that since the statement by the 1<sup>st</sup> Respondent could not be discredited by the Applicant and she did not get the side of his story, She made an order for the caution to remain in force until such a time all the parties have been heard.
7. In conclusion, the 2<sup>nd</sup> Respondent stated that to date, she has not heard from the Applicant and therefore the suit herein is premature, misconceived and an outright abuse of the court process.

### **Applicant's Submissions**

8. The Applicant through his Advocates on record submitted that the court has powers to remove a caution under Section 73(1) of the [Land Registration Act](#). He submitted that the jurisdiction of this



court emanates from Article 162 of the Constitution as read with Section 2 of the ELC Act. He further submitted that the court has wide and original jurisdiction on matters that relate to the use of, title to and rights over land which is both a statutory and constitutional mandate of the ELC Court.

9. In conclusion, the Applicant submitted that they place emphasis on the doctrine of indefeasibility of title because after the transaction was completed, the suit property was transferred to the Applicant and a title issued in his favour. He submitted that at the time he was registered. There was no encumbrances registered against the title. He submitted that the 1<sup>st</sup> Respondent has no registrable interest on the suit property and that the caution has been wrongly placed and urged the court to find that the Applicant has been vested with absolute rights of ownership in terms of sections 24 and 25 of the Land Registration Act, 2012. He relied in the case of Wanjara & 2 Others v Wanjara (2004) eKLR.

### **The Respondent's Submissions**

10. The 1<sup>st</sup> Respondent through the Firm of Wamalwa Simiyu & Company Advocates submitted on two issues as follows

#### **a. Whether the caution lodged on the suit land by the 1<sup>st</sup> Respondent should be removed**

11. On this issue, the learned counsel submitted that Section 40 of the constitution of Kenya 2010 provides for the protection of the right to property and the 1<sup>st</sup> Respondent is not an exception. He submitted that the 1<sup>st</sup> Respondent herein holds a share in the suit property herein registered in the name of the Applicant herein after purchasing the same and taking possession. He submitted that the Applicant herein attempted to sell the suit land on numerous occasions under possession and occupation of the 1<sup>st</sup> Respondent which led him to register the caution to safeguard her interests.

#### **b. Whether the 1<sup>st</sup> Respondent should be ordered to pay costs of the proceedings herein.**

12. The learned counsel urged this court to dismiss this suit with costs to the 1<sup>st</sup> Respondent

### **Legal Analysis And Decision.**

13. I have considered the pleadings by the parties, the affidavit evidence, the submissions by the parties and the applicable law. The facts of this case are fairly simple. It is apparent that the Applicant is the registered owner of the suit land parcel NO. MALAKISI/W.SASURI/1484. It is also important to note that the Respondent lodged a caution on the suit property on 8<sup>th</sup> September, 2020 claiming purchaser interest. Upon coming to his knowledge of the said caution, the Applicant made an application to the Land Registrar for removal of the said caution. Upon receipt of the application to remove the said caution, the Land Registrar gave notice to the 1<sup>st</sup> Respondent/cautioner to remove the said caution within 30 days from the date thereof unless she receives an objection. The said notice is dated 18/5/2021. By a letter dated 15/6/2021, the 1<sup>st</sup> Respondent wrote to the County Land Registrar Bungoma objecting to the removal of the said caution stating inter-alia that the Applicant obtained title to the suit property fraudulently. The County Land Registrar thereafter invited both parties for a hearing on 11<sup>th</sup> August, 2021. On the hearing date, only the 1<sup>st</sup> Respondent attended with her witnesses. The Applicant is said to have arrived later at 2.30 P.M in the company of two people and stated that he had nothing to say or produce and thereafter left.
14. Section 73 of the Land Registration Act, 2012 provides for withdrawal and/or removal of caution and states as follows;  

“73(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 an 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 cost.”

15. The County Land Registrar Bungoma at paragraph 11 of his Replying affidavit sworn on 27/4/2023 deposed as follows;

“11. That since the statement by the 1<sup>st</sup> Respondent could not be discredited by the Applicant and I also did not get the side of his story, I made an order for the caution to remain until such time all parties have been heard.”

16. From the averments by the County Land Registrar given on oath and a copy of the caution proceedings annexed to his Replying affidavit, it is clear that as we speak, there is an order for the said caution to remain in place. The said order by the County Land Registrar was issued upon the hearing of an application by the Applicant to remove the said caution. That order has not been appealed against, vacated and/or reviewed. In my view, the Applicant cannot seek to remove the very same caution which was declined by the County Land Registrar, Bungoma. His remedy lies in either appealing, setting aside or reviewing the said orders.

17. In view of the matters aforesaid, I find these proceedings commenced by way of Originating Summons dated 22<sup>nd</sup> March 2022 devoid of merit and the same is hereby dismissed with costs.

18. Orders accordingly.

**READ, DATED AND SIGNED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF JANUARY, 2025**

**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Mugun for the Applicant.
2. Respondent/Advocate-absent.
3. Bett C/A

