



Ndundo & another (Suing as the office bearers of Aume Ni Meko Self-Help Group) v Mwangela & 3 others (Environmental and Land Originating Summons 107 of 2022) [2024] KEELC 7503 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7503 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 107 OF 2022
TW MURIGI, J
NOVEMBER 13, 2024
IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012
-AND-
IN THE MATTER OF AN APPLICATION FOR REMOVAL OF CAUTION
REGISTERED AGAINST TITLE NO. SULTAN HAMUD TOWNSHIP/93

BETWEEN

MICHAEL M NDUNDO 1ST APPLICANT
. JOHN MUSYIMI MUTAKI 2ND APPLICANT
SUING AS THE OFFICE BEARERS OF AUME NI MEKO SELF-HELP GROUP

AND

ANNECIATA NTAMBI MWONGELA 1ST RESPONDENT
MARY CONCEPTA NDUKU MUTIE 2ND RESPONDENT
ROBERT KYALO MUTIE MWONGELA 3RD RESPONDENT
MAKUENI COUNTY LAND REGISTRAR 4TH RESPONDENT

JUDGMENT

1. By an Originating Summons dated 8th November, 2018 brought under Articles 40 and 159 of *the Constitution*, Section 73 of the *Land Registration Act*, 2012, Sections 1A, 1B and 3A of the *Civil Procedure Act* in addition to Order 37 Rule 8 of the Civil Procedure Rules, 2010 the Applicants seek the following orders: -



- i. That an order do issue directing the 4th Respondent to remove the caution registered against Title No. Sultan Hamud Township/93 by the 1st, 2nd and 3rd Respondents on 30th November, 2016 forthwith.
 - ii. That the 1st, 2nd and 3rd Respondents be condemned to pay costs of this application.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Michael M. Ndundo the Applicant's Chairman sworn on his behalf and on behalf of the Office bearers on even date.

The Applicants Case

3. The deponent averred that the Applicant is the registered owner of land parcel Nos. Sultan Hamud Township/91 and Sultan Hamud Township/93 having purchased the same on 24th October, 1997 from one Germani Pius Kaiba. He further averred that on 11th February, 2015, Germani Pius Kaiba swore an affidavit to confirm that he had sold the two parcels of land to the Applicant.
4. He further averred that on 30th November, 2016, the 4th Respondent registered a caution against land parcel No. Sultan Hamud Township/93 pursuant to an application made by the 1st, 2nd and 3rd Respondents. He contended that the 1st, 2nd and 3rd Respondents' lodged the caution against the suit property claiming purchasers' interest which allegation is unfounded since the Applicant purchased the suit property.
5. He averred that the 4th Respondent has declined to remove the caution without a court order. He argued that the 4th Respondent acted unfairly in registering the caution against the suit property as the Respondents did not demonstrate their interest in the suit property. In conclusion, he urged the court to allow the application as prayed.
6. Though duly served, the Respondents did not file any response to the Originating Summons.
7. On 25th April 2024, the court directed that the Originating Summons be canvassed by way of written submissions. The court further directed the Applicant to serve the directions upon the Respondents.

The Applicant Submissions

8. The Applicant filed its submissions dated 20th May, 2024.
9. On its behalf, Counsel identified the following issues for the court's determination: -
 - i. Who has ownership and proprietary interest and/or rights of the suit property?
 - ii. Whether the 1st, 2nd and 3rd Respondents are entitled to lodge a caution on the suit property.
 - iii. Whether there is sufficient ground for removal of the caution.
 - iv. Who bears the costs of the suit?
10. On the first issue, Counsel relied on the provisions of Section 24 of the [Land Registration Act](#) to submit that the registration of the Applicant as the proprietor of the suit property vests in the Applicant the absolute ownership of the suit property. Counsel submitted that the sale agreement dated 24th October, 1997 and the affidavit sworn on 11th February, 2015 were uncontested evidence of the Applicant's ownership of the suit property. Counsel further relied on the provisions of Section 26 of the [Land Registration Act](#) to submit that the registration of the Applicant as the proprietor of the suit property is conclusive proof of its ownership as the same has not been revoked or challenged.



11. Counsel submitted that the 1st, 2nd and 3rd Respondents claim of ownership of the suit property is unfounded as they have not adduced any documentary evidence in support of their claim. Counsel further submitted that the Applicant being the registered proprietor of the suit property is protected by the doctrine of indefeasibility of title against any unregistered claims.
12. With regards to the second issue, Counsel relied on the provisions of Section 71 of the [Land Registration Act](#) to submit that a person lodging a caution must have a bona fide interest in the land. Counsel submitted that the 1st, 2nd and 3rd Respondents' failure to substantiate their claim undermines the legality of the caution registered against the suit property. Counsel argued that a caution should be registered in good faith and not as a means to vex or hinder the legitimate rights of the registered owner.
13. Counsel submitted that the 4th Respondent registered the caution in bad faith as the 1st, 2nd and 3rd Respondents did not demonstrate that they have a legitimate interest in the suit property.
14. On the third issue, Counsel submitted that the 1st, 2nd and 3rd Respondents did not adduce any evidence to show that they have a legitimate interest in the suit property. Counsel contended that the 1st-3rd Respondents have not demonstrated any legal or equitable right to justify lodging the caution against the suit property and as such, it ought to be removed. Counsel argued that the Applicants being the registered owners of the suit property are entitled to exercise their rights without any interference.
15. Concluding his submissions, Counsel submitted that the Applicants have proved their case on a balance of probabilities and urged the court to allow the application with costs.
16. None of the authorities cited by Counsel were availed for the Court's perusal.
17. Though duly served with the directions issued 25th April, 2024, the Respondents did not file their submissions as directed.

Analysis and Determination

18. Having considered the application and the submissions by the Applicant, the only issue that arises for determination is whether the caution registered against the suit property should be removed.
19. Although the suit was undefended, the Plaintiff has a duty to formally prove its case on a balance of probabilities as is required by the law.
20. In the case of *Kirugi and Another Vs Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
21. Similarly, in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) ekLR the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
22. The Applicant is seeking for the removal of the caution registered against the suit property. The parameters on who should register a caution are provided for under Section 71 of the [Land Registration Act](#). Section 71(1) 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. is entitled to a licence, or
 - c. has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, 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.
23. Section 73 of the [Land Registration Act](#) makes provisions on the removal of a caution. Section 73(1) stipulates that;
1. A caution may be withdrawn by the cautioner or removed by the order of the court or subject to sub section (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 the 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.
 5. After the expiry of thirty days from the date of the registration of a transfer by a charge in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealings by the charge that was registered after the charge by virtue of which the transfer has been effected.
 6. On the withdrawal or removal of a caution, the registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.”
24. The Applicant contended that it is the registered owner of the suit property having purchased the same from Germani Pius Kaiba. Section 107 (1) of the [Evidence Act](#) provides that: -
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
25. To prove ownership, the Applicant produced the sale agreement dated 24th October 1997(exhibit MMN-3), an affidavit sworn by German Kaiba on 11/02/2015 (Exhibit MMN-4) confirming that he sold the suit property to the Applicant, a copy of the certificate of official search dated 7th November, 2017 (Exhibit MMN-5) which shows that a certificate of lease was issued to the Applicant on 23rd August, 2016. It also shows that 1st, 2nd and 3rd Respondents lodged a caution on 30/11/2016 against the suit property claiming purchasers interest.
26. The Respondents did not file any response to challenge the evidence of the Applicant that it is the registered proprietor of the suit property.



27. The law is very clear on the position of a holder of a title in respect of the land. Section 24(a) of the *Land Registration Act* provides for the interest conferred by registration. It provides;
- “Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”
28. Section 25 of the *Land Registration Act* provides for the rights of a proprietor. It provides as follows:
- (I) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;...
29. Section 26(1) of the *Land Registration Act* provides as follows:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party or;
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
30. These provisions vest on the registered owner of land with rights and privileges and provides for instances when the right can be taken away.
31. No evidence was adduced to show that the Applicant obtained the title through fraud or misrepresentation, illegally, unprocedurally or through a corrupt scheme.
32. I therefore find that the Applicant has proved that it is the registered proprietor of the suit property. The Respondents therefore have no basis for continuing to have the caution lodged against the suit property.
33. In the case of *Maria Ngangi Gwako v Charles Mwenzi Ngangi* [2014] eKLR the court aptly held as follows: -
- “When a Caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said Caution and the need for it to remain in place. It is my finding that the Respondent has failed to discharge this burden. The Applicant has demonstrated that she is the registered proprietor of the suit property and that the Respondent has no basis for continuing to have a Caution lodged against the title to the suit property. In the absence of any reasonable cause shown by the Respondent as to why the said Caution should not be removed, the application for the removal of the same must succeed.”
34. In the end, I find that the Applicant has proved its case against the Respondents on a balance of probabilities as required. The upshot of the foregoing is that the Originating Summons dated 8th November, 2018 is merited and the same is hereby allowed in the following terms:-



- i. An order be and is hereby issued directing the 4th Respondent to remove the caution registered against Title No. Sultan Hamud Township/93 by the 1st, 2nd and 3rd Respondents on 30th November, 2016 forthwith.
- ii. The 1st, 2nd and 3rd Respondents shall bear the costs of the suit herein.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF NOVEMBER, 2024.

In the Presence of:

Muli for the Applicant

Court assistant Alfred

