



**Ireri v Kasimu (Environment and Land Appeal 10 of 2018)
[2023] KEELC 15931 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15931 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 10 OF 2018
A KANIARU, J
FEBRUARY 16, 2023**

BETWEEN

MARY WARUE IRERI APPELLANT

AND

JANE S KASIMU RESPONDENT

*(Being an appeal against the Judgment of Embu CM Hon. M.N.
Gicheru dated 21.5.2018 in CM's Civil Case No. 119 of 2012)*

JUDGMENT

1. The parties in this appeal, Mary Warue Ireri and Jane S. Kasimu, are mother-in-law and daughter-in-law respectively. In the appeal, Mary is the appellant while Jane is the respondent. In the lower court, they were disputants in suit No. CMCC 119 of 2012 where the appellant, as plaintiff, had impleaded the respondent, as defendant, in respect of cautions placed by the respondent on Land parcels Nos. Kagaari/Kigaa/7973, Kagari/Kagaari/Kigaa/1976, all of which were resultant subdivisions of the then larger parcel No. Kagaari/Kigaa/4157. The appellant is the registered owner of the parcels of land and she wanted the caution removed.
2. The respondent on the other hand wanted the appellants suit dismissed for reasons, *inter alia*, that she and her children had been in possession of the then larger parcel of land and had extensively developed it.
3. The lower court handled the matter and in a judgement delivered on 21/5/2018, the presiding magistrate (Hon. M.N. Gicheru, Chief Magistrate, as he then was) dismissed the appellants suit. That dismissal is what provoked this appeal.



4. The appeal is premised on eight (8) grounds as follows:
- 1) The Learned Chief Magistrate erred in law and in fact in failing to appreciate that parcels of Land Nos Kagaari/Kigaa/7973, 7974, 7975 and 7976 were registered in the name of the appellant in absolute.
 - 2) The Learned Chief Magistrate erred in law and in fact when he failed to appreciate that the respondent did not contribute towards acquisition of the parcels of land in issue.
 - 3) The Learned Chief erred in law and fact when he failed to consider that the respondent could not claim spousal rights over the plaintiffs land.
 - 4) The Learned Chief Magistrate erred in law and fact when he failed to consider that the fact that the respondent and her husband were only granted licence over the parcels of land in issue.
 - 5) The Learned Chief Magistrate erred in law and fact in relying heavily on the allegations raised by the respondent which allegations were not substantiated.
 - 6) The learned chief magistrate erred in law and fact when he failed to consider that the respondent had in her written statement indicated that she had vacated the parcels of land in issue in 1999 which was over 12 years before the suit was filed.
 - 7) The learned magistrate erred in law and fact in failing to give the necessary weight to the plaintiff's evidence.
 - 8) That the judgement was against the weight of the evidence adduced.
5. The judgement of the lower court started with a synoptic presentation of the dispute before singling out only one issue for determination. The issue was whether the respondent was “justified in law in lodging the cautions”. The analytical part of the judgement shows the lower court pointing out that Section 71 of the [Land Registration Act](#) entitled a person claiming an interest in land to place a caution. The respondent was said to have an interest by dint of her marriage to the appellant's son and the allegedly unchallenged evidence that the son was colluding with the appellant in order to dispose of the land.
6. The respondent was also said to have demonstrated that she had developed the land and that there was danger that the appellant intended to sell the land to one Peter Gikandi. According to the lower court, the respondent's husband had already been allocated the land. The alleged fact of the allocation of the land to the respondent's husband and the fact the respondent was a wife to that husband meant that the land was matrimonial property over which the respondent has an overriding interest as a spouse under Section 28(a) of the [Land Registration Act](#). As the respondents husband was said to be colluding with the appellant to dispose of the land, the respondent was said to be justified in lodging the caution.
7. The case cited by the appellant in support of her case in the lower court – [Toroitich Suter v William Toroitich & others](#); ELC No. 317 of 2016, Eldoret – was said to be supporting the respondent's case. With that, the appellants case was dismissed.
8. The appeal now before this court was canvassed by way of written submissions. The appellant's submissions were filed on 1/11/2022. According to the appellant, she and the respondent have no spousal relationship and the latter can not therefore be said to have spousal interests in the



former's properties. The occupation of the land by the respondent together with her husband was acknowledged but they were said to occupy the land as licensees, not as owners. It was pointed out further that the respondent had not contributed in any way towards acquisition of the land and that as the appellant is the absolute owner of the land, she is entitled to deal with it as she pleases. The appellant was further said to have stated her willingness to transfer parcel No. 7974 to the respondent's husband.

9. The respondents submissions were filed on November 21, 2022. According to her, she has a right in her husband's property. The appellant was said to have subdivided the property in order to sell some of it but not to transfer to the respondent's husband. She stated that she has four children who are issues of the marriage between her and the appellant's son and that gives her "vested interest in the estate of her husband". The court was asked to dismiss the appeal.
10. I have considered the appeal as filed, rival submissions, and the lower proceedings and judgment. This is a first appeal. The Law – see *Selle & Another Vs Associated Motor Boat Co Ltd & Others*: [1968] EA 123 and *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR – obliges me as the first appellate court to consider the evidence afresh and come up with my own conclusion and to bear in mind while doing so that I did not have the opportunity of seeing or hearing the witnesses. I am supposed to give due allowance in that regard. It is required that I should not rush to differ from the lower court findings unless it is sufficiently clear to me that the court failed to take into account some particular circumstances or probabilities which materially affected the case.
11. As I pointed out at the beginning of this judgement, the appellant and the respondent are mother-in-law and daughter in law respectively. The parcels of land on which the cautions are placed are registered in the name of the appellant. I understand the lower court judgement to mean that as the respondent is married to the appellant's son, she enjoys an overriding interest under Section 28(a) of the [Land Registration Act](#), 2012. That interest is in the nature of spousal rights over matrimonial property. This was the basis of the justification that the lower court found to exist for placement of cautions on the appellant's property.
12. Section 7(1) of the [Land Registration Act](#), 2012, provides the statutory basis for placement of a caution on a parcel of land. Section 71(1) is as follows:
71(1) 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.
13. The respondent seems to have placed the cautions because she claims to have a right or interest under Section 71(a) of the [Land Registration Act](#). The appellant on the other hand seemed to suggest that the respondent and her husband were licensees on the land. But the lower court found justification of the placement of the caution under Section 28(a) of the same Act. That section is about spousal rights over matrimonial property. The lower court in effect treated the land as the respondent's matrimonial property.



14. Under section 24(a) of the [Land Registration Act, 2012](#), the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges pertaining to such registration. But there are claw-back provisions to be found in Sections 26 and 28 of the same Act, which make the enjoyment of the right of ownership subject to leases, charges and other encumbrances shown on the register and also to some overriding interests not necessarily shown on the register.
15. A caution is one of the legal devices or instruments allowed by law to circumscribe the rights of an absolute proprietor. But the person placing a caution on a parcel of land needs to demonstrate a right or interest recognized or recognizable in law in order to justify such placement. The appellant and the respondent are not spouses. The lower court was wrong in my view to make a finding that she had spousal rights under Section 28(a) of the [Land Registration Act, 2012](#). The land on which she placed cautions is not registered in her husband's name. It is registered in the name of her mother in law. To me, her relationship does not therefore afford her protection under Section 28 (a) of the [Land Registration Act, 2012](#). The appellant is not her spouse.
16. The respondent's right or interest that may be protected under Section 71(1) (a) of the [Land Registration Act, 2012](#), is not clearly expressed to the court. It therefore seems rather nebulous. The respondent's husband seems to me to be the one with a clearer right or claim. In my view, the respondent can only claim a right or interest through him. The only understandable situation that would enable her to do what she did would be if the husband was not alive.
17. But the appellant seemed to me to be scoring an own goal when she submitted that the respondent and her husband were licensees on the land. A look at Section 71(b) of the [Land Registration Act](#) shows that a person with a claim of licence over a certain land can place a caution on its register. If we accept that the respondent is a licensee, then it appears clear that she was entitled to place cautions on the land. Bearing this in mind, would the court be justified to allow the cautions to continue being in place? I think the answer to this question is No and here is why:
18. A caution is not supposed to be an end in itself. It is a means to an end. The law is clear that only a person with a claim or interest in land can place a caution on its register. It is clear that the respondent believes she has a claim or interest by virtue of her marriage to the appellant's son. But it's also clear that the appellant wants the caution removed because the respondent has placed it on her pieces of land "without any colour of right or reasonable cause at all."
19. When the prevailing scenario is like this, it's clear that the respondent would need to take action in order to realize her claim or interest. When the lower court case was filed against her by the appellant, one would have expected that she would file a defence and a counter-claim. If that had been done, it would be possible for the court to believe that the cautions are on the land pending the outcome of the respondent's case. In a situation like that, the caution would be rightly seen as a means to an end, not an end in itself. But that is not the case. The respondent seems to desire that the cautions remain on the land permanently.
20. The rights of a registered owner are generally inviolable. Such owner is entitled to enjoy the rights and privileges that go with such ownership. Such rights should not therefore be easily trifled with. Where, as in this case, the person who places a caution on the land is not pursuing her claim or interest, the justification for continued placement of the caution diminishes and even ceases.
21. It may be useful to add that even where a cautioner is pursuing a claim or interest, such claim or interest should not be frivolous or whimsical. If it is for instance a claim in a court of law, it should be at least arguable and/or reasonably well-founded. I don't agree with every ground of appeal raised by the



appellant. Infact I only agree with grounds 1, 3 and 5. These, and the other reasons stated, persuade me to consider the appeal in appellant's favour.

22. My appreciation of the matter before me is that it would be an unjustifiable affront to the appellant's rights of ownership to allow the caution placed on her land to be a permanent encumbrance on her proprietary rights. The upshot is that the merits of the appeal before me are well demonstrated. I therefore allow the appeal with no order as to costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16TH DAY OF FEBRUARY, 2023.

In the presence of the appellant and the respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

16.02.2023

