



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 387 OF 2010

IN THE MATTER OF THE ESTATE OF MIRIAM GATHONI MWATHI (DECEASED)

PHILIP WAMBAA KARANJA

PRISCILLA NJERI WACHIRA

CLEMENT MWAURA GACHUNGA

LOISE NJERI KAMAU.....OBJECTORS/RESPONDENTS

VERSUS

HANNAH WAMBUI MUTHONI.....ADMINISTRATOR

AND

DANIEL KANYI MWATHI.....INTERESTED PARTY/APPLICANT

RULING

1. Before this Court for determination is the summons dated **24th August 2021** by which the Interested Party/Applicant **DANIEL KANYI MWATHI** seeks the following orders:-

“1. Spent.

2. THAT the court be pleased to order the Registrar of Lands, Kiambu, to remove and/or cancel the court order/Restriction registered on Title Number Dagorretti/Thogoto/1256 on 17th January 2014.

3. THAT the property Title Number Dagoretti/Thogota/1256 be removed and expunged from the proceedings of this Succession Cause.

4. THAT costs of this application be provided for.”

2. The application which was premised upon **Rules 49** and **73** of the **Probate and Administration Rule** and the inherent powers of the court was supported by the Affidavit of even date sworn by the Applicant.

3. Neither the Administrator of the estate of the Deceased nor the Objectors filed any reply to the application despite having been properly served with both the application as well as notice of the hearing date.

4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated **15th October 2021**.

BACKGROUND

5. This succession cause relates to the estate of **MIRIAM GATHONI MWATHI** (hereafter ‘the **Deceased**’) who died intestate on **22nd November 1996**. Following the demise of the Deceased one **Josephine Muthoni** who claimed to be the only surviving child of the Deceased

was issued with Grant of letters of Administration which Grant was subsequently confirmed.

6. On 3rd March 2010 the Objectors herein **MARY WAMBUI KARANJA, PRISCILLA NJERI, CLEMENT MWAURA GACHUNGA** and **LOISE NJERI KAMAU** filed a summons seeking revocation of the Grant issued to **Josephine Muthoni** alleging that said Grant was obtained fraudulently. That application for revocation is still pending determination.

7. Vide an order dated 10th May 2013 the High Court in Nairobi in response to an application dated 9th May 2013 filed by the Objectors issued orders placing a restriction on amongst others the property known as Title Number **Dagoretti/Thogoto/1256** (hereinafter '**the suit land**').

8. The Applicant claims that he is the registered proprietor of the suit land and holds absolute Title to the same. That he and his wife **DOROTHY WANJIRU MWATHI** acquired the suit land from the Deceased prior to her demise. The Applicant asserts that Title was transferred in their joint names and on such the suit land does **not** form part of the estate of the Deceased. The Applicant now prays that the restriction placed against the suit land be lifted. As stated earlier the application was not opposed.

ANALYSIS AND DETERMINATION

9. I have carefully considered the application before me as well as the written submissions filed by the Applicant.

10. The Applicant claims to be the registered proprietor of Title Number **Dagoretti/Thogoto/1256**. Annexed to the Supporting Affidavit dated 24th August 2021 is a copy of the Title Deed for the suit land (Annexure '**DKM'1**'). That Title clearly indicates the name of the Applicants **Daniel Kanyi** and his wife **Dorothy Wanjiru Mwathi** as the registered proprietors.

11. The names of the Applicant and his wife were entered on the Title on 18th November 1994. The said Title Deed was issued on November 1994 two (2) years before November 1996 when the Deceased passed away.

12. Section 26 of the Land Registration Act provides as follows:-

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

13. Therefore issuance of a Certificate of Title amounts to conclusive proof of ownership of a parcel of land. This title is indefeasible. In **VEKARIYA INVESTMENTS LIMITED – VS – KENYA AIRPORTS AUTHORITY & 2 OTHERS Hon Justice Majanja** stated as follows:-

(27)The petitioner being the holder of a title is entitled to rely on the indefeasibility conferred by statute to protect its right to property. This is the effect of section 23 of the Registration of Titles Act (Repealed) and its successor section 26(1) of the Land Registration Act, Act No. 3 of 2012. Section 23(1) of the Registration of Titles Act which reads as follows, “The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. (own emphasis)

14. There was no evidence to controvert the averments of the Applicants. It is therefore manifest that the Applicant is the registered proprietor of the suit land and holds valid title to the same.

15. The Restriction against the suit land was placed in the year 2013. To date no further action has been taken in this matter and the Objectors have not taken any steps to prosecute their application dated 9th November 2013 which gave rise to the order of restriction.

16. It is trite that a restriction cannot endure indefinitely or amount to a fetter over a proprietors right to property. In the case of **DAVID MACHARIA KINYURU vs DISTRICT LANDS REGISTRAR and another [2017] eKLR** the court held as follows:-

“Restrictions are to endure for a particular time, or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance, as the underlying issue leading to the restriction is being resolved, since a restriction by itself does not solve a dispute”.... (own emphasis)

17. After obtaining the orders of restriction the Objectors apparently went to sleep. They appeared to loss interest in this matter.

18. Based on the foregoing, I find merit in the present application. Accordingly, this court makes the following orders-

(1) The Registrar of Lands Kiambu is directed to remove the Restriction registered on Title Number Dagoretti/Thogoto/1256 on 17th January 2014.

(2) The property known as Title Number Dagoretti/Thogoto/1256 be and is hereby expunged from the proceedings of this Succession Cause.

(3) No orders on costs.

DATED IN NAIROBI THIS 18TH DAY OF FEBRUARY 2022.

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MAUREEN A. ODERO

JUDGE