



REPUBLIC OF KENYA



KENYA LAW
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**Muniu v Muniu (Environment and Land Appeal E009 of 2022)
[2025] KEELC 1290 (KLR) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E009 OF 2022
CA OCHIENG, J
MARCH 18, 2025**

BETWEEN

JEREMIAH MANYARA MUNIU APPELLANT

AND

DAVID KIGENYI MUNIU RESPONDENT

*(Being an Appeal of the judgment delivered on 10th March, 2022
by the Honourable E. W. Wambugu (SRM) in Kithimani PMC ELC
No. 35 of 2019: Jeremiah Manyara Muniu v David Kigenyi Muniu)*

JUDGMENT

1. Through a Memorandum of Appeal which was filed on 8th April, 2022, the Appellant appealed against the Judgment delivered by Hon. E. W. Wambugu. The genesis of this appeal is the Judgment in the Principal Magistrate's Court at Kithimani in ELC No. 35 of 2019 by the Hon. E. W. Wambugu (SRM), delivered on 10th March, 2022 where the trial court dismissed the Appellant's suit.
2. The Appellant being dissatisfied with the whole of the said Judgment filed his Memorandum of Appeal, which is premised on the following grounds:
 - a. That the Learned Magistrate fell in error by analyzing the defence and documents of the Defendant when there was no evidence to support the allegation in the defence.
 - b. That the Learned Magistrate misapprehended the law when she ruled that it is the Registrar who had placed the restriction and that he was the right party to sue and not the Defendant.
 - c. That the Learned Magistrate erred when she found that the restriction could only be removed after succession is completed and not by court order.



- d. That the Learned Magistrate erred when she deliberately failed to consider and analyze the evidence of the Appellant which was not challenged at all.
 - e. That the Learned Magistrate misapplied the law and facts when she failed to find that the issue of removal of restriction had been conclusively settled and reduced into agreements by parties.
 - f. That the Learned Magistrate misapprehended the law and dismissed the Plaintiff's undefended suit with costs to the Defendant who never even appeared to defend the case during trial.
 - g. That the Learned Magistrate erred when she left the seat of being a neutral arbiter but instead aided a case of an absentee party.
 - h. The Learned Magistrate misconceived the law and the fact by addressing the issue of validity of the title of the Appellant, an issue that was not before the court notwithstanding that the said title has never been challenged in any court of law.
 - i. That the Learned Magistrate erred when she asked herself wrong questions and as a result arrived at wrong answers/decision.
 - j. That the Learned Magistrate erred when she purported to argue and defend the case of the Respondent to the prejudice of the Appellant.
3. The appeal was canvassed by way of written submissions.

Submissions

4. The Appellant submitted that this court has unfettered jurisdiction to remove a caution /restriction as per provisions of Section 73(1) of the *Land Registration Act*. He further submitted that he had established that the Respondent who had moved the Registrar to lodge the caution/restriction on the suit title had no interest in maintaining it as he had been compensated as per agreements dated the 25th August 2024 and 29th January, 2018. Further, he had even filled a form for removal of caution on 31st October 2014 but failed to register /lodge it, with the Land Registrar.
5. The Appellant argued that the Learned Magistrate was swayed by the Respondent's witness statement dated the 12th December 2019 where he alleged that the Land Registrar put a restriction on the suit title because the Appellant had transferred the suit land to himself from his deceased mother; one Loice Wangui Muniu, without filing for succession. He faulted the Learned Magistrate for allegedly relying on statements not provided in evidence as the Respondent (Defendant), did not call a witness.
6. The Respondent in his submissions provided a background of the dispute herein and submitted that his defence at the subordinate court was that, the Appellant ought to have called the Land Registrar who placed the restriction on the title to the suit land as it is his duty as per Sections 76, 77 and 78 of the *Land Registration Act*. He further submitted that even in his absence, the Appellant had the burden to prove his case but he did not discharge it, in accordance with the provisions of Section 107 of the *Evidence Act* as he failed to demonstrate, who placed the restriction and whether it was wrongly placed. To buttress his averments, he relied on the following decisions: *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR; *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR; and *Hellen Wangari Wangechi v Caramera Muthini Gathua* [2005] eKLR.



Analysis and Determination

7. Upon consideration of the Memorandum of Appeal, Record of Appeal and rivalling submissions, the only issue for determination is whether the restriction placed on Ndalani/ Mavoloni/ 422 (suit land), should be lifted and if the Appeal is merited.
8. It is not in dispute that the Appellant and the Respondent are brothers. It is further not in dispute that a restriction is subsisting over the suit land as indicative in the Certificate of Official Search dated the 27th August 2014.
9. In the lower court suit, vide a Complaint dated the 8th May, 2018, the Appellant as Plaintiff had sought for the following Orders:
 1. An order that a Caution registered on title No. Ndalani/ Mavoloni/ 422 be removed forthwith.
 2. Costs of this suit.
10. The Respondent as the Defendant filed his Statement of Defence dated the 23rd May, 2018 where he denied the averments in the Complaint. He contended that the Appellant fraudulently got registered as proprietor of the suit land, which belonged to their late mother Loise Wangari Muni, who died on 12th December, 1997. He denied placing a caution on the suit land and contended that it is the Land Registrar who had placed a restriction thereon so that there were no dealings with the said land, until succession cause over the estate of the late Loise Wangari Muniu is determined. He sought for the following Orders:
 - a. This Honourable Court to order for cancellation of title deed No. Ndalani/ Mavoloni /422 hence the same be reverted back to the original owner Loise Wangari Muniu to enable filing of the succession cause in respect to her estate.
 - b. Costs of the suit.
11. The Lower Court matter proceeded for hearing but it is only the Appellant (Plaintiff) who testified and called a witness. After the hearing, the trial Magistrate proceeded to dismiss the Plaintiff's suit with costs. This hence forms the fulcrum of the Appeal.
12. On perusal of the proceedings in the lower court, I note the Appellant as PW1 stated that he sold the suit land to Vuvuzela Self Help Group and received part of the purchase price, which he shared with the Respondent. It was his testimony that the Respondent received most of the purchase price and promised to remove the caution. He argued that there was no basis for the caution and succession as the suit land was already sold and was in the names of a person who is alive. He however did not deny that he transferred the suit land, which belonged to the estate of their late mother Loise Wangari Muniu, to himself despite not having taken out Letters of Administration Intestate, in respect to the said estate. The Appellant has castigated the trial Magistrate for dismissing his suit and contended that this was an error because the Respondent did not tender viva voce evidence to prove his claim.
13. In the case of Charterhouse Bank Limited (Under Statutory Management v Frank N. Kamau [2016] eKLR, it was held that:

“We would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the Defendant's failure to call evidence, the court must be satisfied that the Plaintiff has adduced



some credible and believable evidence, which can stand in the absence of rebuttal evidence by the Defendant....”

14. It is trite that section 107 of the *Evidence Act*, places the burden of proof upon a party who alleges to prove his claim. This in essence means that a claimant is expected to prove his claim irrespective of whether the same is defended or not.
15. I note the fulcrum of the dispute in the lower court case had revolved around registration of a caution/ restriction over the suit land. On perusal of a copy of the Certificate of Official Search, I note that on the 21st May, 2014, the Land Registrar entered a restriction as entry No. 7, on land parcel number Ndalani/ Mavoloni Block 1/422 (suit land) with remarks that: ‘no dealings until succession for Loise Wangari Muniu is followed through High Court, reported vide Death Certificate No. 468973’.
16. On registration and removal of restrictions, Section 76 of the *Land Registration Act* provides that:
 - “(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge. (2) A restriction may be expressed to endure - (a) for a particular period; (b) until the occurrence of a particular event; or (c) until a further order is made, (2) and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.’
17. While Section 78 (1) of the *Land Registration Act* provides that:
 - “The Registrar may, at anytime and on application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction. (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other orders as it deems fit, and may make an order as to costs.”
18. An interpretation of these requirements confirms that the Land Registrar has a wide discretion in the process of entry or removal of restriction. From perusal of Certificate of Official Search, it is evident that it is actually the Land Registrar who entered a restriction over the suit land. The Appellant admitted that the suit land which was registered in his name had already been sold to Vuvuzela Self Help Group. Further, the Appellant did not tender evidence in court to demonstrate the process he adhered to, to get registered as owner of suit land, which had belonged to a deceased estate, without first acquiring Letters of Administration Intestate. The Appellant failed to confirm to the Trial Magistrate if the succession cause in respect to their late mother’s estate had been concluded so as to enable the Magistrate lift the restriction.
19. In the case of David Macharia Kinyuru v District Land Registrar, Naivasha & Another [2017] eKLR, the Court held that:
 - “it will be noted from the above, that the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. 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. In our instance, I have seen that the applicant became the owner of the suit land on 25 March 2014. The restriction was placed on 22 July 2014. It states as follows: - " No dealings until the issue of ownership is determined.....If a Land Registrar has to place a restriction because the ownership of land is in issue, then it is advisable that such restriction be limited in time, to allow a reasonable period for the person claiming the land to lodge his case in court."

See also the decision of *Satnam Sing Chana & Another v Jutendra Trikamdas Swualy & Another* [2021] eKLR.

20. Based on the facts before me while relying on the legal provisions I have quoted including decisions cited, I find that it was legal for the Land Registrar to enter a restriction on suit land and decline to remove it as the land was irregularly transferred to the name of the Appellant. I opine that the Appellant failed to tender proof that the succession proceedings in respect to the estate of Loise Wangui Muniu had been concluded, to enable the trial court remove the restriction.
21. It is my considered view that even though a court can lift a restriction under Section 73 (1) of the *Land Registration Act*, such orders are not automatic. A party has to discharge the burden of proof, that the issue which culminated in the entry of the restriction had been determined. Further, I note the Land Registrar was not a party to this suit.
22. In the foregoing I find that the trial Magistrate did not fall into error by analyzing the defence and documents of the Respondent (Defendant) when there was no evidence to support the allegation in the defence. I find that the Learned Magistrate did not misapprehend the Law when she ruled that it is the land Registrar who had placed the restriction and that he was the right party to sue and not the Respondent. I find that the Learned Magistrate was correct when she found that the restriction could only be removed after succession is completed and not by court order. I opine that the Learned Magistrate considered and analyzed the evidence as presented and was correct to decline to accept that the issue of removal of restriction had been conclusively settled and reduced into agreements by parties. In my view, she did not leave her seat as a neutral arbiter as claimed because it was incumbent upon the Plaintiff to prove his case and was immaterial whether it was defended or not. Further, I find it was proper for the Learned Magistrate to consider the validity of the title since the Appellant had actually transferred the said title to himself unprocedurally as he had not acquired Letters of Administration Intestate.
23. In the circumstances, I find that the Appeal is not merited and will dismiss it but make no order as to costs since the Appellant and Respondent are brothers.
24. I so order.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18th DAY OF MARCH 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

David Kigenyi Muniu the Respondent



Court Assistant: Joan

