



REPUBLIC OF KENYA



**Kiragu (Suing on Behalf of Jonathan Kiambati alias Jonathan Njuguna Wanjiru,
David Chege & Mercy Emily Wanjiru as Donors) v District Land Registrar
Kiambu & 2 others (Environment and Land Miscellaneous Application
E012 of 2023) [2023] KEELC 22043 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22043 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E012 OF 2023

EK WABWOTO, J

NOVEMBER 30, 2023

BETWEEN

**JOHN THUO KIRAGU APPLICANT
SUING ON BEHALF OF JONATHAN KIAMBATI ALIAS JONATHAN
NJUGUNA WANJIRU, DAVID CHEGE & MERCY EMILY WANJIRU AS
DONORS**

AND

**DISTRICT LAND REGISTRAR KIAMBU 1ST RESPONDENT
DEPUTY COUNTY COMMISSIONER, LIMURU SUB-COUNTY 2ND
RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT**

RULING

1. By a Notice of motion dated 7th July 2023 brought under Sections 78 (2) & 70 (d) of the [Land Registration Act](#) (Cap 300) Laws of Kenya, Sections 3 and 3A of the Civil Procedure, the Applicants sought the following orders:
 - i. ...Spent...
 - ii. That this Honourable Court be pleased to issue an order directing the District Land Registrar, Kiambu to remove the prohibitory order registered against Limuru/Kamirithu/380.
 - iii. That this Honourable be pleased to issue an order directing the District Land Registrar, Kiambu to remove the restriction registered by the Deputy County Commissioner Limuru against Limuru/Kamirithu/380.



- iv. That this Honourable Court be pleased to lift the orders prohibiting any dealings over Limuru/Kamirithu/380 issued in Milimani ELC Case No. 588 of 2014.
 - v. That the costs of this Application be borne by the Respondents
2. The application was accompanied by a Supporting affidavit sworn by John Thuo Kiragu on 7th July 2023 outlining the following grounds:
 - a. That the Applicants herein Jonathan Kiambati, David Chege And Emily Wanjiru are the beneficial owners of land parcel number Limuru/Kamirithu/380 which parcel devolved to them from their deceased father Joseph Mbaria Kiambati and the same having been held in trust for them by their deceased mother Doris Wanjiru Chege.
 - b. That there exist the following encumbrances registered against the title: (i) Prohibitory order issued through Nairobi High Court Divorce Cause No. 67 of 1972 (ii) Restriction registered vide a letter by Limuru Deputy County Commissioner. (iii) An order of no dealing vide court order in Milimani ELC NO. 588 of 2014.
 - c. That Nairobi High Court Divorce Cause No. 67 of 1972 was long concluded and the parties to the said cause are now deceased yet the prohibition thereof still encumbers the title.
 - d. That the restriction registered against the title was registered unlawfully and serves no purpose other than infringing with the Applicants' right and quiet enjoyment of the property. Furthermore, it is not disclosed the person who instructed the Deputy County Commissioner or what dealings are restricted over the parcel and the reasons for the restriction.
 - e. That Milimani ELC NO. 588 of 2014 was concluded and a judgment delivered in favour of the Applicants and the following orders issued: (i) A permanent injunction against the Defendants, his agents/servants restraining them from interfering with the Applicants' quiet enjoyment of Limuru/Kamirithu/380. (ii) A restraining order against the defendant, his agents and/or servant from continued acts of trespass on Limuru/Kamirithu/380 and from interfering with the Applicants' use of the property. (iii) General damages of Kshs. 100,000 in favour of the Applicants herein. (iv) Costs of the suit.
 - f. That although the said Milimani ELC NO. 588 of 2014 was concluded and a judgment delivered in favour of the Applicants.
 3. Pursuant to the directions issued by this court on 29th September 2023, the application was canvassed by way of written submissions.
 4. The Applicants filed submissions dated 23rd October 2023 in which it was submitted that Nairobi High Court Divorce Cause Number 67 of 1972 was long concluded and the Parties to the said Divorce Cause have since passed on. Nairobi Environment and Land Court Civil Suit Number 588 of 2014 was also concluded and a judgment delivered in favour of the Applicants. Relying on Article 40 of *the Constitution*, it was argued that right to ownership and quiet enjoyment of the property is being infringed and is likely to continue being infringed if the encumbrances continue to exist on the register. Relying on the cases of *Julia Muthoni Mburu v Sammy Muiruri Gitau & another* [2021] eKLR and *David Macharia Kinyuru v District Land Registrar, Naivasha & another* [2017], it was reiterated that an encumbrances on land should not be held in perpetuity.
 5. The 3rd Respondent filed grounds of opposition dated 18th September 2023 in which it was outlined that:



- a. It is only the Court that issued the prohibitory orders that has powers to lift the same that the application ought to have been filed in Nairobi ELC 588 of 2014.
 - b. A substantive prayer for removal of a prohibitory order on land parcel No Limuru/Kamirithu 380 cannot be granted by way of Notice of Motion as the prayers sought in prayer(1) thereof can only be granted through a substantive suit by way of plaint.
 - c. The application as filed is frivolous, vexatious and an abuse of due process of the Court.
6. Having considered the rival positions and supporting documents, this court is of the view that the only issue for determination herein is whether the application seeking an order for the removal of the existing inhibitions is merited?
7. In *Julius Nturibi Rukaria v Mary Ncekei Kirianki & another* [2021] eKLR, Justice Nzili determined a similar application brought under a miscellaneous application as follows:
- “... Section 70 of the *Land Registration Act* provides an inhibition shall not be cancelled except on the expiration of the time stated in the inhibition or by a consequent order of the court. In the instant case, both spelt out in the inhibition has expired and a consequent order of dismissal of the suit made. All what remains is to bring to the attention of the Land Registrar the said developments. There is no indication that the Land Registrar Meru has been supplied with a certified copy of the decree in the aforesaid suit and declined to remove the inhibition. This court is not convinced that applicants has made any efforts to take the appropriate action. That notwithstanding and guided by Section 1A, 1B and 3A of the *Civil Procedure Act*, it is in the interest of justice to lift the inhibition order due to effluxion of time and settlement of the suit as submitted.”
8. A perusal of the judgement delivered in Nairobi ELC 588 of 2014 by Lady Justice Komingoi on 28th October 2021 confirmed the proprietary interest of the Applicants (being Plaintiffs in ELC 588 of 2014). Paragraph 32 states:
- “...It is not in doubt that the donors are the registered proprietors of the suit property...”
9. As for the 3rd Respondent’s assertions that the form of the application is wrong, I have considered the provision of order 51 rule 1 of the *Civil Procedure Rules* which states that:
- “All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.”
10. My interpretation of the rule is that the word “motion” is used in a general sense and therefore immense latitude is afforded to the Court to determine applications based on their substance rather than the form. I must also reiterate that as a matter of normative practise, similar applications have been determined in form of miscellaneous applications as well as by way of plaint.
11. With regards to the issue of costs, it is a well-established principle that costs should follow the event, albeit within the discretion of the court. In this instance, I have considered that this application is preceded by a long history of litigation and therefore it would be prudent to ensure litigation comes to an end. In the circumstances the appropriate relief that commenced itself is that each party to bear own costs of the application.
12. In view of the foregoing, I hereby find that the Notice of Motion application dated 7th July 2023 is merited and the same is allowed in the following terms:



- a. The Land Registrar, Kiambu is hereby ordered to remove all prohibitory orders and inhibitions registered against Limuru/Kamirithu/380.
- b. Each party to bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Njoroge for the Applicants.

Ms. Njuguna for the Respondents.

Court Assistant; Caroline Nafuna.

