



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 371 OF 2013**

**DINKAR KUMAR PATEL .....1<sup>ST</sup> PLAINTIFF**

**KAMAR KUMAR PATEL ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR KIRINYAGA DISTRICT ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiffs filed this suit against the defendants seeking the following reliefs as per their plaint dated 4<sup>th</sup> April 2011:-

- a. ***An order that the restriction placed against plot No. INOI/KERUGOYA/250/235 be removed and the order be served upon the Land Registrar, Kirinyaga District***
- b. ***Costs of this suit***
- c. ***Interest on (b) at Court rates***
- d. ***Any other relief that this Honourable Court may deem just to grant***

This case was premised on the pleadings that although the plaintiffs are the registered owners of the land parcel No. INOI/KERUGOYA/250/235 (hereinafter referred to as the suit land) having purchased the same on 28<sup>th</sup> February 1996 from Beatrice Wambui Mureithi and Violet Munyi Njoki and for which they pay the land and ground rent, the 2<sup>nd</sup> defendant directed the 3<sup>rd</sup> defendant to place a restriction against the suit land as a result of which the plaintiffs are un-able to develop the same. That is notwithstanding the fact that the plaintiffs have paid a sum of Ksh. 260,132/= following the approval of their construction plans.

The defendants defence is that the action of the 3<sup>rd</sup> defendant in placing the restriction was in furtherance to his Statutory duties and that the plaintiffs were the authors of their own misfortune.

When the matter came up for hearing on 2<sup>nd</sup> October 2013, there was no appearance by the Hon. Attorney General for the defendants though served.

The 2<sup>nd</sup> plaintiff KAMAR KUMAR PATEL gave evidence on behalf of the plaintiffs and produced a copy of the Certificates of lease in respect to the suit land (Exhibit 1) which shows that the same was

registered in the joint names of the plaintiffs on 9<sup>th</sup> June 1998 after they purchased the same from Violet Njoki and Beatrice Wambui (see agreement produced as Exhibit 2). Before purchasing the said suit land, the plaintiffs did due diligence and obtained the relevant consent from the Land Control Board (Exhibit 4). He denied the defendants defence that the land was irregularly obtained through fraudulent means adding that it was not until 30<sup>th</sup> May 2008 that they learnt that restrictions had been placed on the land on the allegation that the same was illegally obtained. He added that they were never summoned by the Land Registrar before the restriction was placed on the suit land thus necessitating this suit.

He produced the notice issued to the Attorney General before this suit was filed and the Attorney General's response (Exhibits 7A & 7B) as well as a letter written to the Land Registrar prior to this suit (Exhibit 8). He added that he has approved plans for the developments of the land for which he has paid

Ksh.260, 132/= (Exhibits 9 and 10). He also produced evidence that the plots adjacent to the suit land have no restrictions placed on them (Exhibit 11). He produced a valuation report to the effect that the suit land is worth Ksh.5.2 million.

The defendants did not lead any evidence and both Mr. Mugambi for the plaintiff and J.C. Koech for the Attorney General filed submissions.

I have considered the submissions by both sides together with the un-controverted evidence of the plaintiff.

It is not in dispute that the suit property is registered in the names of the plaintiffs and a restriction was placed on the same by the Land Registrar Kirinyaga District. The Certificate of lease (Exhibit 1) shows that the title was issued under the now repealed **Registered Land Act**.

**Section 136 (1) of the Registered Land Act** empowers the Land Registrar to make orders prohibiting or restricting dealings with any particular land, lease or charge. Looking at the submissions by the defendant, it is their case that the restriction was placed on the suit land because an issue of fraud had been raised in the manner in which the said land was acquired. The defendants submitted as follows:-

***“The Registrar was thus well within their mandate to place restriction on the land to prevent any further dealings with the said land given that the issue of fraud was raised in the manner (sic) was acquired”.***

The defendants also make the following submissions:-

***“Further the Constitution in Article 40 (6) puts a limitation to protection accorded to private property to the effect that the rights under Article 40 shall not be applicable to property that has been found to be unlawfully acquired. This is the position here and the defendant acted in public interest of the people of Kenya”***

Finally, the defendants made the following submissions:-

***“It is the defendants' contention that the suit property was mentioned in the Report of the Commission of inquiry into the illegal/irregular allocation of public land Annexes Volume 1 (known as the Ndungu Report), at page 332 number 22”.***

As stated above, it is not in doubt that under the Registered Land Act, the Land Registrar can place a restriction on any land. **Section 136** of the Registered Land Act states as follows:-

***“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 after directing such enquiries to be made and notices to be served and hearing such persons as he thinks fit, make any order (hereinafter referred to as a restriction) prohibiting or restricting dealing with any particular land, lease or charge”***

**Section 76** of the new **Land Registration Act** has similar provisions to the above. It is clear from the provisions of **Section 76** of the new **Land Registration Act** and **Section 136** of the repealed **Registered Land Act** under which the suit land was registered that before placing any restriction on a parcel of land, the Land Registrar must **direct enquiries, serve notices** and **hear** the persons to be affected. That is the bare minimum required of the Land Registrar exercising his powers under the law. That is what natural justice is all about. A party whose rights are likely to be affected by the exercise of powers by the Land Registrar in restricting a parcel of land must be given an opportunity to be heard. In this case, the Land Registrar failed to do so.

Further, **Section 137 (1)** of the Registered Land Act under which the suit land was registered has the following mandatory provisions:-

***“The Registrar shall give notice in writing of a restriction to the proprietor affected thereby”***

**Section 77 (1)** of the new Land Registration Act also has a similar provisions as follows:-

***“The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction”***

No such notice was issued to the plaintiffs in this case and if there was, none was presented to Court. The un-controverted evidence of KAMAR PATEL (PW1) was that they were not at any time summoned by the Land Registrar before the restriction was placed on the suit land and that they only learnt of the same on 30<sup>th</sup> May 2008 when they wanted to develop it. That was clearly in violation of the law.

It is also the defendants submissions that the restriction was placed on the suit land because issues of fraud had been raised regarding the manner in which the suit land was obtained. No evidence of fraud against the plaintiff was led and all we have is a mere allegation. An imputation of fraud is a serious one which must be established to the required standard. It cannot be a matter for conjecture. Under **Section 107** of the Evidence Act, the burden was on the defendants to place evidence before the Court as proof of the allegation that the suit land was obtained through fraudulent means. Unfortunately, the defendants did not lead any evidence to that effect. That can only mean therefore that the plaintiffs’ rights over the suit land as protected by **Section 27 & 28** of the **Registered Land Act** remain un-defeated.

It was also submitted that the suits land forms part of those parcels of land identified in the Ndungu Report as having been illegally or irregularly acquired. Mr. Mugambi in his submissions urged me to hold that the said report is “**useless**”. I would not want to take that route for now. Perhaps that is a discussion for another day. Suffice it to state that no attempt was made to produce the said report as evidence in this Court and therefore I have no reason of making a finding that infact the suit land forms part of that report.

Having considered all the above, it is clear to me that the plaintiffs have established their case against the defendants as required in law. I accordingly enter judgment for the plaintiffs against the defendants as prayed in paragraph 15 (a) (b) and (c) of their plaint.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> JULY, 2014**

**18/7/2014**

**Before**

**B.N. Olao – Judge**

**Mwangi – CC**

**2<sup>nd</sup> Plaintiff – present**

**Attorney General for Defendant absent**

COURT:Judgment delivered in open Court this 18<sup>th</sup> day of July 2014.

2<sup>nd</sup> Plaintiff present

1<sup>st</sup> Plaintiff absent

Attorney General for Defendant – absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**18<sup>TH</sup> JULY, 2014**