

REPUBLIC OF KENYA

High Court at Kitale

Civil Case 44 of 2012

SAMUEL KOSKEI OTIENO.....PLAINTIFF

VERSUS

THE HON. A.G.

THE LAND REGISTRAR, TRANS NZOIA.....DEFENDANT.

J U D G M E N T

By a plaint dated 28th March, 2012 and filed in court on 29th March, 2012, the plaintiff Samuel Koskei Otiemo sued the defendants praying for an order that the restriction against his title No. Kitale Municipality Block 18/Bidii/145 registered by the 2nd defendant on the 25/1/2010 be removed forthwith. He also prayed for costs of the suit as well as interest thereon. The defendants duly filed defence through the Attorney General but at the hearing of the suit, there was no attendance from either the defendants' representatives or representation from the Attorney General. This was despite the fact that the hearing date had been taken by consent. The hearing therefore proceeded ex-parte.

During the hearing, the plaintiff testified that he is a resident of Kapsabet at a village called Kapkerer where his ancestral home is based. He testified that in 1998 he bought a piece of land at Kitale Municipality being land reference No. Kitale Municipality Block 18/Bidii/145. He produced title deed in respect of the property as exhibit 1. He further testified that he later sold the plot to one Joyce Njoki. As he was in the process of transferring the land to Joyce Njoki, he realised that a restriction had been registered against the land by the second defendant. He produced a green card which shows that a restriction had been registered against the title on 25/1/2010. The restriction had been placed against the title at the behest of the chief of Bidii location. He produced the green card as exhibit 2. He then wrote a letter to the Land Registrar asking him to remove the restriction. He produced a letter which was written by his lawyer as exhibit 3. On 17/2/2012 the land Registrar responded to his letter and stated that he registered a restriction against the title at the instance of the chief Bidii location who informed him that there was a family dispute regarding the land in issue. He went on to state in his evidence that as far as he was concerned, there was no dispute regarding the land in issue. He stated that there was a time on 14/10/2009 when his son caused a caution to be registered against the title but that the same son removed the caution on 30/12/2009.

The plaintiff gave a notice to the Attorney General on 2/2/2012. the Attorney General responded to the notice on 9/2/2012. The said restriction is in place todate and he now seeks to have a court order for removal of the restriction.

I have carefully gone through the evidence adduced by the plaintiff as well as the pleadings filed herein. The evidence as adduced by the plaintiff was not controverted. Though the law under which the suit was brought has since been repealed, the savings and transitional provisions of the new law that is the Land Registration Act No. 3 of 2012 provides that nothing in the Act shall affect the rights, liabilities etc registered under any repealed Act. The law under the Repealed Registered Land Act section 138 (2) provided as follows:-

“Upon the application of any proprietor affected by a restriction, and upon notice thereof to the Registrar, the court may order a restriction to be removed or varied or make such other order as it thinks fit and may make an order as to costs.”

This then brings me to the question whether the court should issue an order removing the restriction or not. As I have said in the judgment hereinabove, the evidence of the plaintiff was not controverted. The law requires that before an order for removal of a restriction is given, the court must be satisfied that the Registrar has been given notice thereof. In the instant case, the plaintiff who is affected by the restriction gave notice to the Registrar vide letter dated 22/12/2011. The Registrar on receipt of this notice wrote a letter dated 7/2/2012 to the chief of Bidii location at whose instance the restriction was registered intimating his intention to remove the restriction. The chief Bidii location wrote back to the Registrar indicating that the family dispute was still on and urged him not to remove the restriction. In the meantime, the plaintiff had through his lawyers M/s. Kiarie & Co. Advocates issued a notice of intention to sue the Attorney General on 2/2/2012. the Land Registrar wrote to M/s. Kiarie & Co. Advocates on 17/2/2012 indicating that the chief Bidii location had written to him informing him that the family dispute was still subsisting.

The restriction is still on the register. A copy of the green card produced as exhibit 2 shows that one Geoffrey Kibyegon Kosgei lodged a caution on the title on 14/10/2009. this same Geoffrey Kipyegon Kosgei removed the caution on 30/12/2009. This is the son of the plaintiff. The removal of the caution by the plaintiff's son is an indication that the family dispute which existed was resolved. This therefore means that the restriction registered by the Registrar on the title is not serving any useful purpose. If there was any necessity for the restriction to continue in existence, then there was need for the state to adduce evidence to support the continued existence of the restriction. The state did not adduce evidence to this end. I therefore find that the restriction registered against the plaintiff's title is no longer serving any purpose. A caution was lodged against the same title by Joyce Njoki Kihiko on 30/3/2010. This is the same lady who the plaintiff testified had purchased the land from him. The plaintiff is unable to transfer the land to her because of the restriction. I find that this is a clear case where the restriction should be removed. The plaintiff has proved his case on a balance of probabilities. I accordingly enter judgment for him as prayed in the plaint. The upshot of this is that the restriction registered against title Kitale Municipality Block 18/Bidii/145 is hereby ordered removed. The plaintiff shall have costs of the suit.

[Dated and delivered in open court at Kitale on this 24th day of January, 2013.]

E. OBAGA.

JUDGE.