



Nasca Housing Co-operative v Land Registrar Machakos & 4 others (Environment and Land Miscellaneous Application E018 of 2021) [2022] KEELC 3089 (KLR) (30 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3089 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E018 OF 2021
CA OCHIENG, J
MAY 30, 2022
IN THE MATTER OF AN APPLICATION UNDER SECTION 78(2),
18(2), 19 OF THE LAND REGISTRATION ACT NO.3 OF 2013

BETWEEN

NASCA HOUSING CO-OPERATIVE APPLICANT

AND

LAND REGISTRAR MACHAKOS 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RUNYANJARA INVESTMENT CO LTD 3RD RESPONDENT

PAMOJA TWaweza SELF HELP GROUP 4TH RESPONDENT

PETER KARANJA KAMAU 5TH RESPONDENT

JUDGMENT

1. What is before Court for determination is the Applicant's Originating Summons Application dated the 1st March 2021 seeking the following orders;
 - a. That restrictions placed on the parcel of land known as Donyo Sabuk/ Komarock Block 1/47826 be removed.
 - b. Costs of the Application.
2. The Application is premised on the grounds on the face of it and supported by the affidavit of one Aggrey Odhiambo Mukolwe. The same is opposed by the 1st and 2nd Respondents who filed Grounds of Opposition dated the 5th October 2021. The Applicants later filed an Application dated 25th October 2021 seeking to enjoin three other parties as Respondents to the suit namely Runyanjara Investment



Co. Ltd, Pamoja Twaweza Self Help Group and Peter Karanja Kamau. The Application for joinder was allowed and leave granted to serve the proposed parties by way of substituted service. The enjoined parties despite being duly served through East African Standard Newspaper dated the 13th November, 2021, failed to enter appearance nor file any response to the instant Application.

The Applicant's case

3. In their supporting affidavit sworn by one Aggrey Odhiambo Mukolwe who is its Chairman, the deponent averred to be the beneficial owner of all that land known as Title No. Donyo Sabuk/Komarock Block 1/47826 (hereinafter referred to as the 'suit land'). They annexed a copy of a Sale Agreement dated 7th May 2014 between themselves and one Mutinda Mutisya Kyule (vendor) who is the alleged registered owner, together with copies of executed consent to transfer form, valuation report, transfer, consent to charge and KRA Stamp Duty payment slips as well as receipt issued by the Department of Lands for payment of Transfer fees.
4. The Applicant claims to have issued Notices of Intention to remove caution within thirty days to the cautioners, which notice was served vide registered mail and has already lapsed. They did attach copies of the said notices all dated 10th March 2015 and addressed to the proposed 3rd, 4th and 5th Respondents respectively. They averred that no response has ever been received from the cautioners and that the 1st Respondent has remained adamant and refused to remove the cautions. It was the Applicant's contention that being the beneficial owners of the suit property, they are justified to seek for removal of the caution/restriction and any other order as the court may deem just. They claimed not to have been notified by the 1st Respondent before registration of the restrictions, which was in contravention of their constitutionally protected right to own and deal with the suit land.

The Respondents' case

5. The 1st and 2nd Respondents filed Grounds of Opposition to the instant Originating Summons. The proposed 3rd, 4th and 5th Respondents did not enter appearance nor file any response thereto. In the aforementioned Grounds of Opposition, the 1st and 2nd Respondents stated that they acted lawfully within the purview and duty under Section 76 of the [Land Registration Act](#), 2012. They deposed that the cautioners were not enjoined to the suit nor was there evidence of service to them. It was their contention that the Applicant had not tendered sufficient evidence as to why the caution should be removed.

The originating summons was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant Originating Summons including the supporting affidavit, annexures thereon, Grounds of Opposition, and rivalling submissions, the only issue for determination is whether the restriction placed on land parcel number Donyo Sabuk/Komarock Block 1/47826 should be lifted.
7. The Applicant in its submissions argued that the Respondents had not complied with the law in registering the restrictions as they did not adhere to the due process. Further, it reiterated that contrary to the provisions of Sections 76 and 77 of the [Land Registration Act](#), they were not issued with any notice or accorded a fair hearing prior to the registration of the restrictions. It insisted that the Respondents had violated its right to property under Article 40 of [the Constitution](#), by placing the restrictions and sought for the protection of the court as envisaged in Section 78 of the [Land Registration Act](#). It argued that the proposed 3rd, 4th and 5th Respondents had not filed any suit to



challenge the ownership of the suit land, for the court's determination. To buttress its averments, it relied on the following decisions: *Mukuria James Chacha & 2 Others vs Land Registrar Murang'a* (2019) eKLR; *David Macharia Kinyuru vs District Land Registrar, Naivasha & Another* (2017) eKLR and *Ericklyne Mbugua Omanwa & another vs Edward Peter Njoroge & 2 others*.

8. The 1st and 2nd Respondents in their submissions argued that Section 76 of the *Land Registration Act* mandated them to register restrictions for prevention of fraud or improper dealing or for any other sufficient reason with or without application of any person interested on the land. They further acknowledged that the provisions of Section 78 of the *Land Registration Act* mandated the court to make orders for lifting of such restrictions 'upon the application of a proprietor affected by a restriction as the court deems fit.' They further submitted that the Applicant had not provided any evidence as to why the restriction should be lifted. They concluded by invoking the provisions of Section 24 of the *Land Registration Act*, that the official searches did not indicate the Applicant as the registered owner of the suit land. To support their arguments, they relied on the following decisions: *John Kamau Kinyanjui v Thika District Registrar* (2017) eKLR and *Mwangi Rukwaro & another V Land Registrar, Nyeri* (2019) eKLR.
9. 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 the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.”

While Section 78(1) of the *Land Registration Act* provides that:

“The Registrar may, at any time 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.”

10. An interpretation of these requirements suggests that the Land Registrar has a wide discretion in this process. However, it is my considered view that the issuance of a notice to the owner or an Interested Party over the suit land where a restriction is placed is mandatory and not discretionary. The Act states expressly:-

“And after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit.”



11. In *Matoya Vs Standard Chartered Bank (K) Ltd & others* (2003) I EA 140, it was held that;

“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented.”
12. While 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 25th March 2014. The restriction was placed on 22nd July 2014. It states as follows:- “No dealings until the issue of ownership is determined. “An issue of ownership of land is a matter that is squarely determined by the courts. In the event that a person is of the view that he is entitled to certain land it is his duty to approach the courts for relief. 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. If such applicant does not present his case for determination, then the restriction ought to be lifted.”
13. See also the decision of *Satnam Sing Chana & another v Jutendra Trikamdas Swualy & another* [2021] eKLR.
14. In the instant case, the Applicant alleges that they were not issued with any notice before the restriction was registered. The 1st Respondent has not confirmed that they issued any notice before registering the restrictions as required by law, neither have they indicated to have heard any party or conducted any inquiries before registering the restrictions on the suit land. Notably, the Applicant also registered a caution on the suit land in 2015 claiming purchaser’s interest. From perusal of the documents annexed to the Supporting Affidavit, I note the Applicant has all the requisite documents for purposes of transfer of the suit land in its name including the consent to transfer from the vendor to the purchaser as well as payment of Stamp Duty including Transfer fees. Further, there is no evidence from the vendor where he had denied selling the suit land to the Applicant. From the correspondence annexed to the Supporting Affidavit, it seems the existence of the caution or restriction is what has hampered the transfer of the suit land to the Applicant’s name. Further, despite the other cautioners being served vide the East African Standard Newspaper dated the 13th November, 2021, they never opposed the instant originating summons.



15. Based on the facts as presented and the legal provisions I have cited as well as associating myself with the quoted decisions, since the cautioners and the vendor did not controvert the Applicant's averments, I opine that the restriction is serving no useful purpose and directs that the same be lifted forthwith.
16. It is against the foregoing that I find the Originating Summons dated the 1st March 2021 merited and will allow it.

Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF MAY, 2022

CHRISTINE OCHIENG

JUDGE

