



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION CASE NO. 982 OF 2012

JACOB MWANTO WANGORA.....PLAINTIFF/RESPONDENTS

=VERSUS=

GEDION M. WANGORA1ST DEFENDANT/RESPONDENT

JONATHAN K KIRORIO2ND DEFENDANT/RESPONDENT

SAMWEL S KIRORIO.....3RD DEFENDANT/RESPONDENT

LENANA KIRORIO.....4TH DEFENDANT/RESPONDENT

RULING:

The Applicant herein Jacob Mwanto Wangora has brought this Notice of Motion dated 6th December, 2012 under ***Order 40 Rule 1 & 2 of the Civil Procedure Rules and Section 1b & 3(a) of the Civil Procedure Act and Section 78(2) of the Land Registration Act 2012*** and has sought for various orders:-

- a. That pending the hearing and determination of this suit, the Court be pleased to grant a temporary injunction restraining the Defendants/Respondents or their servants /agents and/ or licensee from interfering with the peaceful enjoyment of the plaintiffs property known as ***Ngong/Ngong 2141***.
- b. That the Court to order the Respondent to withdraw a restriction placed on the title number ***Ngong/Ngong 2141*** on 25th September, 2012 failure to which the land Registrar Ngong be directed to remove it.
- c. That the OCS Ngong be directed to offer security.
- d. Cost of the application be provided for.

The application was supported by the grounds on the face of the application and by the Affidavit of ***Jacob Mwanto Wangora*** . These grounds were that the Plaintiff is the registered proprietor of all that parcel of land known as ***Ngong/Ngong 2141*** since 1974. That further the Respondents have put a restriction on the property and yet they have no claim whatsoever over the property.

That the Respondents have restrained the applicant from enjoying his property and that has caused his mental pain and torture. That the Respondents would not suffer any prejudice as this is the applicants' property.

The applicant in his supporting affidavit averred that, he bought a parcel of land in 1974 from one ***John Olaata Ole Roimen***. The original parcel of land was Ngong/Ngong/1291 which was later subdivided to

create two parcels i.e **Ngong/Ngong/2140** and **Ngong/Ngong/2141**. Applicant contended that he was registered as a proprietor of **Ngong/Ngong/2141** on 4/2/1974 and issued with Land Certificate now marked JMWI. He further alleged that he has been utilizing the land and has occupied it since then.

However, the Respondents laid claim to his parcel of land since 1992. They also instigated the person who sold land to him, **John Olaata Ole Roimen**, to file a claim against him. The two matters were decided against the applicants by the District land Dispute Tribunal and later the Provincial Land Dispute Appeal Committee (Rift Valley). However, the High Court later ruled in favour of the application **HCCA No. 312 of 2002** and **HCCA 486/2001** as evidenced by **JMWO2** and **JMWO3**.

Applicant further contended that, the Respondents further instigated criminal case No. 1202 /205 against him. The criminal court did not make a finding against his title. The Respondents have nevertheless put a restriction on his parcel of land on 25/9/2012 until criminal case No. /202/2005 and Appeal no. 468/2009 have been finalized as evidenced by JMW6. He averred that he bought the land in 1974 and Respondents have no claim over the same. That the restriction has no basis on law and it is therefore illegal.

Applicants therefore, prayed to court to remove the restriction and or order an injunction restraining the Defendants from harassing him.

The application was opposed. The Respondents through **Gideon Wangora Kiror** filed a replying affidavit and denied the allegations made by the applicant. The Respondents averred that he is not the one who has put a restriction on the LR. NO. 2141 but the land Registrar Ngong, in conjunction with the late **John Olaata Roimen's** son, **Henry Saloan Roimen** as evidenced by **GWK2**.

He further alleged that applicant has not fully disclosed the matter:- that he was convicted in criminal case no. 1202/2005 for obtaining registration by false registration of **Ngong/Ngong 2139 and 2141**. Respondent further contended that applicant had filed **Civil Case No. 687/2004** at the Chief Magistrate's Court claiming **LR.No. Ngong/Ngong/2141** against the Respondents but the same was struck out as per **GWK5**.

That the issue of boundary dispute in **Ngong/Ngong/2141** has never been determined by the Court. He further averred that applicant has come to Court with unclean hands and the orders sought should not be granted. The applicant filed a further affidavit and stated that the Replying Affidavit was sworn by a stranger and the people who also gave him authority were strangers to the suit. Thus, the respondents have no **Locus Standi**.

Applicant asked the Court to strike out the Replying Affidavit and the *authority to act*. He further contended that the *Restriction* on **LR No. Ngong/Ngong/2141** was by **Samuel Shena Kirorio** and **Gideon Wangora Kirorio** under letter dated 25/9/2012 and not through the caution by **Henry Salaon Roimen**.

The parties herein canvassed the application through written submissions. I have now considered the notice of motion dated 6/12/2012 and the annexures thereon. I have also considered the written submission and the relevant Law and i make the following findings. The applicant herein is seeking for Injunctive orders and also for removal of restriction. The applicant had a duty to demonstrate that he has a prima facie case with high probability of success. He also needed to demonstrate that he will suffer irreparable loss and injury which cannot be compensated by way of damages and if the Court is in doubt to decide on the balance of convenience.

The applicant also needed to prove that the restriction on **LR No. Ngong/Ngong/2141** was illegal and not justifiable. I have considered JMW1, Land Certificate issued on 4/2/1974. The same is in the names of the applicant herein Jacob Mwanto Wangora.

I have also considered **HCCA No.486/2001** and **HCC No. 312/2002**. The two Appeals we decided in favour of the applicant herein. The applicant is the registered owner of **Ngong/Ngong/2141** and he is

entitled to interest conferred by section 27(a) of the Registered Land Act (now repealed). The same position is repeated in section 24(a) of the land Registration Act which states. “ ***The Registration of a person as the proprietor of land shall vest in all that person the absolute ownership of that land together with all rights and privilege belonging to or appurtenant thereto***”

Through there is evidence that the applicant herein was convicted in **CR.No.1202/2005**, his title **No. Ngong/Ngong/2141** was never cancelled. He is still the registered owner and that is a prima facie evidence that he is the absolute and indefeasible proprietor or owner of that parcel of land. Though applicant herein was convicted, the court did not make an order for restriction as provided for by section 80(a) of the Land Registration Act which reads “ ***The Court may order the restriction of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake***”

Applicant alleged that, whenever he attempts to enter into his parcel of land, the Respondents do accost him and he has thus been harassed and intimidated by the Respondents. Respondent **Gideon Wangora Kirorio** did admit that when applicant appeared on the suit land, he approached him with an AP Policeman and applicant was asked to keep away until cases were settled. Which where these cases? Criminal case No. 1202/2005 had been decided and so is Appeal No. 468/2009.

In both cases, the applicant was never deprived off his Title **LR No. Ngong/Ngong/2141**. The applicant has demonstrated that he has a title to this parcel of land and thus he has a prima facie case with high probability of success (refer to case of **Giella Vs Cassman Brown Co.Ltd, 1973 (EA) 358**).

Due to the numerous cases that have been brought to Court by Respondents, the applicants has not been enjoying quiet possession of this parcel of land. He has also not been using the same. The applicant has therefore suffered loss which cannot be compensated by way of damage.

The lease certificate is in the names of the applicant. At no time has the said lease certificate been in the name of the Respondents herein. The balance of convenience tilts in favour of the Applicant herein.

On the second prayer of removal of restriction, I have considered the lease certificate and certificate of official search JMW6. There is no doubt that on 25/9/2012, a restriction was placed on **LR No. Ngong/Ngong 2141** stating that “*no dealing to be registered until criminal case no 1202/2005 and Appeal no 468/2009 are finalized*”. The same was placed on the strength a letter dated 25/9/2012 by **Samuel Shena and Gideon Kirorio**.

Section 76 of the Land Registration gives the Registrar power to put a restriction on any particular land or lease. However, the said section states that the registrar has to direct that inquiries be made and notices to be served and hearing such a person before making an Order for Restriction. The Land Registration Act came into effect on 2/3/2012 . The Restriction herein was placed on 25/9/2012 . There was no evidence that the Registrar made any inquiries, issued notices and heard the persons.

The Registrar only relied on the letter dated 25/9/2012 . The Registrar therefore did not follow the right procedure in placing the restriction as the person concerned was not heard. Section 76(2) provides that a restriction may be expressed to endure

- a. *For a particular period.*
- b. *Until the occurrence of a particular event or*
- c. *Until the making of a further order.*

In the instant case, the restriction was to endure until the finalization of Criminal Case No. 1202/2005 and Appeal No. 468/2009.

I have perused the Judgement in criminal case No. 1202/2005 GWK3 and I note the case was finalized on 16/10/2009. Again criminal appeal No. 408/2009 GWK was finalized on 27/9/2011. The restriction was pegged on the finalization of these two cases. However, by 25/9/2012 when the restriction was placed on

Ngong/Ngong/2141, the two cases had been finalized. The Respondents were therefore not honest in seeking to place a restriction on the suit land. The restriction was not tenable or justifiable.

Section 78(2) of the Land Registration Act, gives the Court power to order removal or vacation of the restriction on a parcel of land.

The Court finds that in the instant case, proper procedure was not followed in placing the restriction on the parcel of land as provided by section 76 of the Land Registration Act 2012. The Restriction was pegged on an event that has already passed. The Restriction was not justifiable and therefore it is illegal.

This Court will not hesitate to order for its removal.

This Court now having considered the applicant's application dated 6/10/2012 finds that the same is merited. *Consequently, the Court allows the applicants' prayers in terms No.3, 4 and 5.*

- The applicant is also entitled to costs of this application.
- It is so ordered.

Dated, Signed and delivered this **14th day of June 2013.**

L.N. GACHERU

In the Presence of:-

None Attendance for the Plaintiff/ Applicant

Abongo holding brief **Maranga** for the Defendant

Anne: Court Clerk

L.N. GACHERU