



Kiogora & 5 others v The National Land Commission & another (Originating Summons E002 of 2022) [2022] KEELC 3401 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3401 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ORIGINATING SUMMONS E002 OF 2022**

CK NZILI, J

MAY 18, 2022

BETWEEN

HENRY KIOGORA 1ST APPLICANT
NATHAN MWENDA 2ND APPLICANT
SAMWEL KIRUNGURU 3RD APPLICANT
JULIUS MWORIA 4TH APPLICANT
PATRICK BUNDI 5TH APPLICANT
ERICK MWENDA MWIRIGI 6TH APPLICANT

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The court is asked to grant leave to the applicant to file a suit out of time against the respondents, seeking for the removal of an inhibition or restrictions on L.R No. Ntima/Igoki/5985, 5591, 5998, 5990 and 5995 respectively.
2. The application is supported by an affidavit sworn by Henry Kiogora on February 1, 2022. The reasons given are that the restrictions were placed in 2001, 2002 and 2005 but were only discovered in 2021. Whereas under the *Limitations of Actions Act* and the *Public Authorities Act* the limitation period is 12 years and 1 year respectively the said periods have since elapsed hence the reasons the applicants seek for leave to file a suit based on tort out of time. In support of the application the applicant has attached copies of search certificates indicating the applicants are the registered owners of the suit parcels of land as well as a demand letter seeking the respondents to remove the restrictions.



3. The application is opposed by the respondents through grounds of opposition dated February 21, 2022. The reasons given are that section 27 (1) of the [Limitation of Actions Act](#) lays down that in order to extend time to file a suit the action must be founded on tort which the applicant have failed to sufficiently demonstrate that material facts giving rise to their claim were not within their knowledge during the limitation period.
4. The respondents aver that the reasons given are untenable, grounds given are scanty; no demand was issued to the 2nd respondent's, delay of 17 years was inordinate and shows indolence on the part of the applicants; the applicants have failed to disclose material facts that they had filed Meru ELC No. 14 of 2021 and withdrew it once the issue of limitation was raised and lastly that the decision of the Chief Land Registrar have never been challenged.
5. The applicants have through written submissions filed in compliance with directions given on February 23, 2021 stated Order 37 Rule 6 [Civil Procedure Rules](#) as read together with section 27 and 28 (1) of the [Limitation of Actions Act](#) provides for an ex parte application and that they only discovered the restrictions in January 2021 which were allegedly imposed without due process being followed by way of a notification.
6. The applicants take the view that there was no fair hearing, the actions of the respondent were unlawful, and are based on both tort and breach of duty to notify and accord them a fair hearing and the restrictions infringe on their constitutional rights to property.
7. The applicants submitted that they have demonstrated the facts relating to the cause of action, had not conducted prior searches and only realized that there were restrictions while in the process of taking a loan.
8. Concerning the issue of resjudicata it was submitted that Meru ELC No. 14 of 2021 was not determined on merits hence the said principle was not applicable at all, and that they should not be driven out of the seat of justice on account of trivialities. Reliance was placed on [Julius Njuguna Mwangi \(suing on behalf of the estate of Mwangi Mura \(deceased\) vs Kariuki Kamau Mbiuki and 4 others](#) (2020) eKLR.
9. Section 76 of the [Land Registration Act](#) grants the land registrar powers with or without an application of any person interested in the land and upon inquiry or notices served and on hearing such person to make an order prohibiting or restricting dealings with any land for a particular period or occurrence of a particular event or until a further order for specified conditions. Under section 77 the registrar is mandated to give a notice in writing of a restriction to the proprietor of the land.
10. Regarding the removal or variation of a restriction Section 78 provides the registrar may at any time and on application by any person interested in the land or at its own motion and after giving parties affected by the restriction an opportunity of being heard, order for the removal or variation of a restriction.
11. (Section 78 sub rule (2) provides that 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 grant any order as it deems fit and may make such orders as to costs.
12. In this application there is no indication if the applicants formally wrote to the Chief Land Registrar of the Land Registrar for that matter in line with section 77 And 78 of the [Land Registration Act](#) seeking for the reasons for the restriction in the first instance without notice and secondly seeking for the vacation of the restrictions before coming to court.



13. Looking at the copy of the search certificates, the reasons given for the placement of the restriction, it is obvious because it the property was a public utility reserved for a public works camp.
14. In *David Macharia Kinyaru v District land registrar Naivasha & another* Nakuru ELC Misc. Application no. 331 of 2016 the court held restrictions are essentially aimed at stemming out fraud and improper dealings over land, and that it was not the purpose of the law to have indefinite restrictions but it only puts the property in abeyance as the underlying issue leading to the restriction is being resolved since the restriction by itself does not solve a dispute.
15. In this application no replying affidavit has been filed to explain the circumstances and the reasons for the restriction in the first instance and the justification why they should remain in operation to the detriment of the applicants. See *Joyce Waitihira Mwangi v Thika Land Registrar* (2018) eKLR.
16. In law the first priority is given to the land registrar to handle the matter before it is escalated to the court under section 78 (2) of the *Land Registration Act*.
17. In *Nyaga Nderi v James Nyaga Kinyua* (2021) eKLR the court held a necessary party must be enjoined before any decision is made otherwise he or she would be condemned unheard.
18. It is not clear why the applicants did not file the case against the Chief Land Registrar who is named as the entity which effected the restrictions. The National Land Commission was not a party to the restrictions since it did not exist in law in 2001.
19. In this application, the applicants are seeking leave to file a suit out of time averring that it is based on tort or breach of duty to fair hearing.
20. The affidavit in support is scanty as to the facts and hence the applicants have tried to bring in the facts through written submissions. Submissions however forceful and convincing cannot replace pleadings. See *Gideon Sitelu Konchella v Julius Lekany Ole Sunkuri & 2 others* (2018) eKLR. The principle document herein lacked basic facts, which could have formed the basis of the submissions. Therefore the facts brought about in the submissions have no legal effect.
21. The restrictions are still subsisting. In *Matoya v Standard chartered bank (K) Ltd & others* (2003) IEA 240, it was held a Land Registrar places a restriction in line with the law, but not by whim, caprice or influence but must be in the general good for public interest.
22. In *Republic v Registrar of land Kiambu County* (2015) eKLR, Odunga J held where the land registrar did not oppose an application to remove a restriction, the onus was upon the land registrar to shed light on whether the provisions of section 76 (1) thereof were complied with. See *Mukuria James Chacha and 2 others v Land Registrar Muranga* (2019) eKLR.
23. Given the procedure alluded above, the applicants' first port of call was the Land Registrar under Section 78 (1) of the *Land Registration Act* before invoking the court's jurisdiction. Consequently, I find the originating summons herein lacking merits. The same is dismissed with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 18TH DAY OF MAY, 2022

In presence of:

Mrs. Muthomi for applicant

Kieti for 2nd respondent



HON. C.K. NZILI
ELC JUDGE

