



Njara v Nyahururu Land Registrar (Environment & Land Miscellaneous Case E010 of 2021) [2022] KEELC 3374 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3374 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND MISCELLANEOUS CASE E010 OF 2021**

YM ANGIMA, J

JUNE 9, 2022

BETWEEN

SAMUEL GITAU NJARA APPLICANT

AND

NYAHURURU LAND REGISTRAR RESPONDENT

RULING

1. By a notice of motion dated September 24, 2021 brought under Section 3A of the *Civil Procedure Act* (Cap.21), Order 2 rule 15, Order 51 rule 1 of the *Civil Procedure Rules* 2010, and all other enabling provisions of the law, the Applicant sought the following orders:
 - a. The Honorable Court be pleased to lift the restrictions registered against Nyandarua/Turasha/714, 715, 716, 717, 718.
 - b. The Honorable Court be pleased to issue raising orders to order removal of restriction against Nyandarua/Turasha/714, 715, 716, 717, 718 by the Nyahururu Lands Registrar.
 - c. The Honorable Court be pleased to grant any other relief it may deem fit and just to grant.
 - d. The costs of this application be provided for.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant on September 24, 2021 and the exhibits thereto. The Applicant contended that he was the registered proprietor of the suit properties which the Respondent had unjustifiably restricted for several years. He contended that he had requested the Respondent to remove the restrictions on the suit properties but the latter had declined to do so without any lawful justification or excuse. He further contended that the previous dispute over the suit properties had been resolved in his favour in Nyahururu ELC No.56 of 2017 – Samuel Muchiri Mwangi v Samuel Gitau Njara & 2 Others hence there was no valid reason for maintenance of the said encumbrances.



3. In response to the application, the Respondent filed a notice of preliminary objection dated January 28, 2022. The Respondent contended that the instant application was premature as the Applicant had not “followed up” with the land registrar to ensure compliance with the provisions of Section 73(2)(3) and (4) of the *Land Registration Act*, 2012. The court was consequently urged to dismiss the application with costs. The court has noted, however, that the section deals with removal of cautions as opposed to restrictions.
4. The Applicant filed a supplementary affidavit sworn on March 11, 2022 in response to the preliminary objection. The Applicant reiterated the contents of the sworn affidavit and exhibited copies of certificates of official search for the suit properties to demonstrate his interest therein. He stated that the restrictions had been registered at the instance on one Stephen Muchiri Mwangi who was deceased. The Applicant annexed a copy of his death certificate. It was the Applicant’s case that the Respondent had insisted on having a court order for removal of the restrictions.
5. When the application was listed for inter-partes it was directed that it shall be canvassed through written submissions. It was further directed that the Respondent shall argue his preliminary objection in opposition to the application. The parties were consequently granted timelines within which to file and exchange their respective submissions on both the application and the preliminary objection. The record shows that the Applicant’s submissions were filed on March 14, 2022 whereas the Respondent’s submissions were filed on February 23, 2022.
6. The court has considered the notice of motion dated September 24, 2021, the Respondent’s notice of preliminary objection, the supplementary affidavit as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the Respondent’s preliminary objection is merited.
 - b. Whether the Applicant is entitled to the orders sought.
7. The court has considered the material and submissions on record on the preliminary objection. The court has noted that the Respondent did not file any replying affidavit to dispute the factual basis of the application. Moreover, there appears to be a dispute between the parties as to whether or not the Applicant ever applied for the lifting of the restrictions registered against the suit properties. As was held in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696, a preliminary objection should consist of a pure point of law and it ought not to be raised where some facts have to be ascertained.
8. In the said case, Sir Charles Newbold P made the following remarks on a preliminary objection.

“The first relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs, and on occasion, confuse the issues. This improper practice should stop.”
9. The court is thus of the opinion that the Respondent’s notice of preliminary objection does not constitute a proper preliminary objection as known to law. It raises matters which ought to have been argued in the normal manner upon being raised through a replying affidavit. In any event, there is some documentary evidence on record to demonstrate that the Applicant had applied for removal



of restrictions prior to the filing of the instant application. Accordingly, the Respondent's notice of preliminary objection must fail.

10. The court has considered the submissions and material on record on the second issue. The material on record shows that the restrictions on the suit properties were registered way back in 1994 pending resolution of a boundary dispute. The uncontroverted evidence on record is that the said dispute was resolved in Nyahururu ELC No.56 of 2017 by dismissal of the claimant's suit for want of prosecution on April 3, 2017. The Applicant appears to have applied for removal of the restrictions on August 18, 2021 but there is no official response thereto on record.
11. The relevant provisions of Section 78 of the Land Registration Act, 2012 stipulate as follows:
 1. 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 order as it deems fit, and may make an order as to costs.
12. It is apparent from the provisions of Section 78(1) that the land registrar is required to take certain steps upon receipt of an application for removal of a restriction. There is no indication on record that he took such steps despite having entered the restriction for a particular purpose, namely, the resolution of a boundary dispute. The material on record shows that the dispute was presented before a judicial forum which dismissed the same in 2017, about 5 years ago. There is no affidavit on record to explain why the restrictions entered in 1994 should be maintained in the land register. As submitted by the Applicant, a restriction is not an end in itself but a means of preserving the property in dispute pending the resolution of a dispute involving it. Accordingly, the court is satisfied that the Applicant is entitled to the orders sought for removal of restrictions registered against the various suit properties.
13. The upshot of the foregoing is that the court finds no merit in the Respondent's preliminary objection whereas it finds merit in the Applicant's application. Accordingly, the court makes the following orders for disposal of the matter:
 - a. The Respondent's notice of preliminary objection dated January 28, 2022 is hereby overruled.
 - b. The Applicant's notice of motion dated September 24, 2021 is hereby allowed in terms of order No.1 thereof.
 - c. Each party shall bear his own costs.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 9TH DAY OF JUNE, 2022.

In the presence of:

Ms. Ndungu for the Applicant

N/A for the Respondent

C/A - Carol

.....

Y. M. ANGIMA

JUDGE

