



**Awiti (Suing as the Administrator of the estate of Esau Onyango
Awiti) v Onyango & another (Environment & Land Miscellaneous Case
2 of 2022) [2022] KEELC 12740 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12740 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND MISCELLANEOUS CASE 2 OF 2022
E ASATI, J
SEPTEMBER 29, 2022**

BETWEEN

**JAMES RIO AWITI PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF ESAU ONYANGO
AWITI**

AND

**TERESA OBALA ONYANGO 1ST DEFENDANT
LAND REGISTRAR VIHIGA LAND REGISTRY 2ND DEFENDANT**

RULING

Introduction

1. This matter was originally filed at the Environment and Land Court (ELC) at Kisumu as Kisumu Elc Misc Application No 1 of 2020 vide the notice of motion dated January 13, 2020 (herein called the application). The application was brought pursuant to the provisions of section 78 of the [Land Registration Act](#), order 51 rule 1 of the [Civil Procedure Rules](#) and sections 1A and 3A of the [Civil Procedure Act](#). It sought for orders that:
 - a. The restriction restricting dealings in land parcel No West Bunyore/Ekwanda/2061 lodged on December 24, 2014 by Teresa Obala Onyango the 1st respondent, be lifted.
 - b. The costs of the application be provided for.
2. The application was based on the grounds contained in the notice of motion and the supporting affidavit sworn by James Rio Awiti, the applicant, on January 13, 2020.



3. The 1st respondent in response to the application raised a preliminary objection vide notice of preliminary objection dated October 6, 2020.
4. When the application came up for hearing before the ELC Judge at Kisumu on February 11, 2021, an order was made transferring the matter to the ELC Vihiga. The file was subsequently placed before the ELC Judge at Kakamega as Vihiga ELC had not been opened and all environment and land matters arising from Vihiga were within the jurisdiction of Environment and Land Court at Kakamega. It was registered as Kakamega Elc Misc Application No 2 of 2021.
5. On 17/3/2021 an order was made that the preliminary objection be canvassed by way of written submissions. When the matter came up for mention before the ELC Judge at Kakamega on 9/12/2021 an order was made for transfer of the matter to Vihiga ELC Court which had by then become operational.
6. On 14/7/2022 when the matter came up for hearing before the ELC Judge at Vihiga parties agreed and an order was made that the application dated 13/1/2020 be canvassed by way of written submissions.

The Applicant's Case

7. The applicant's case as contained in the notice of motion and supporting affidavit is that land parcel known as West Bunyore/Ekwanda/2061 (the suit land) originally belonged to Esau Onyango Awiti (the deceased) herein. That upon the death of the deceased, succession to his estate was undertaken by the applicant herein vide Kisumu HCC Succ Cause No 288 of 2014- In the matter of the Estate of the late Esau Onyango Awiti. However, on December 24, 2014 the 1st respondent lodged a restriction on the suit land claiming beneficiary interest. That although the grant of letters of administration in respect of the estate of the deceased was confirmed on November 13, 2015 and the suit land distributed to one Phoebe Awiti Onyango, it had become impossible for the applicant to commence the transfer process of the suit land to the said Phoebe Awiti Onyango because of the restriction. That the 1st respondent has no interest whatsoever on the suit land and her actions are a violation of the interest of the beneficiary of the property. That it is in the interest of justice that the restriction be removed.

The Respondent's Case.

8. Only the 1st respondent responded to the application and her case as contained in the notice of preliminary objection dated October 6, 2020 is that the court lacks jurisdiction to hear and determine the application. That the court should be a last resort in regard to removal of restriction and /or caution. That the application is an abuse of the court process and it ought to be struck out. That the restriction and/or caution is substantive in nature and should be addressed through a substantive suit and not a miscellaneous application.

Submissions.

9. The applicant filed written submissions dated 25/7/2022 in respect of the application through the law firm of Makokha Oaka & Co Advocates. Counsel submitted that the suit land has already been given to Phoebe Awiti Onyango through the succession process and by placing a caution on land which she has no interest in, the 1st respondent's action is ill-advised and a violation of the rights and interest of the beneficiary of the suit property. That there are no good reasons given why the restriction should stay.
10. The respondent did not file any submissions.



Issues for determination.

11. From the application, the notice of preliminary objection filed and the submissions made, the following emerge as the issues for determination
 - a. Whether or not the court has jurisdiction to entertain the application.
 - b. Whether or not the procedure adopted in presenting the claim to court is correct
 - c. Whether or not the application has merit.
 - d. Who pays the costs of the application?

Analysis and Determination

12. By way of the preliminary objection, the 1st respondent claims that the court has no jurisdiction to entertain the application. The locus classicus on jurisdiction is the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 wherein the Court of Appeal (Nyarangi, JA) held and stated that:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction.”

13. As jurisdiction is a threshold matter, I will consider it first. The 1st respondent contended through the notice of preliminary objection that the court lacks jurisdiction to hear and determine the application. The applicant submitted that there is no reason why the restriction should remain in place. The application is brought under section 78 of the *Land Registration Act*. Section 78 of the *Land Registration Act* which deals with removal and variation of restriction provides that; -

"78(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 the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by the 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"

Under s 78(2), the court has power to make orders for removal or variation of restrictions upon an application by a proprietor affected by the restriction

14. On whether or not the applicant adopted the correct procedure in initiating the action, the action herein was commenced vide a miscellaneous civil application stated to be brought, *inter alia*, pursuant to the provisions of section 78 of the *Land Registration Act*, order 51 rule 1 of the *Civil Procedure Rules*, section 1A and 3A of the *Civil Procedure Act*.

Section 78(2) of the *Land Registration Act* 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 other order as it deems fit and may make an order as to costs.”



Order 51 provides for the procedure of making applications and provides that;-

“All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.”

Section 1A of the Civil Procedure Act contains the objective of the Act and the Rules made thereunder. It provides that:

- (1) “The overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious proportionate and affordable resolution of the civil disputes governed by the Act”
- (2) The court shall in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub- section (1)
- (3) A party to civil proceeding or an advocate for such a party is under a duty to assist the court to further the overriding objectives of the Act and to that effect to participate in the process of the court and to comply with the direction and orders of the court”

Section 3A Civil Procedure Rules provides for the inherent powers of the court as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

15. From the above quoted provisions of the law, it is clear that the court will be approached by way of an application. The Civil Procedure Act and the Rules provide for the procedure of making applications. It is also clear from the above-quoted provision of the law that the court is enjoined to give effect to the overriding objective of Civil Procedure which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.
16. In view of the above- mentioned provisions of the law, I find that the procedure adopted by the applicant to bring the matter before court is correct. No party is exposed to any prejudice by the procedure adopted as the respondent has a chance to ventilate his/her case by replying to the application.
17. On whether or not the application has merit, the applicant states in the supporting affidavit that the suit land belonged to the deceased. That succession to the estate of the deceased is complete, the grant confirmed and the suit property distributed to one Phoebe Awiti Onyango. That the applicant is unable to transmit the property to the said beneficiary because of the existence of the restriction. From annexure JRA 2, the suit land is registered in the name of one James Rio Awiti. Annexure JRA 3 which is a certificate of confirmation of grant in Kisumu HC Succ Cause No 288 of 2014, shows that James Onyango Awiti, the applicant herein was the personal representative of Esau Onyango Awiti, deceased whose estate was the subject of the succession cause. The said annexure also shows that the whole of the suit land was distributed or awarded to one Phoebe Awiti Onyango.

Annexure JRA2, the certificate of official search, further shows that the restriction was placed by the 1st respondent on December 24, 2014 in terms that:

“No dealing to be registered on the title without the consent of Teresa Obala Onyango ID No 8084315 Box 189 maseno, claiming beneficiary interest.”

18. There is no evidence that the 1st respondent has taken any step to assert her interest, if any, either in the succession cause or otherwise since 2014 when the restriction was placed. Under section 76 of the



Land Registration Act, a restriction is a temporary measure placed on the register of land so as to secure certain rights /interests pending substantive action. It provides:

- "(1) For the prevention of any fraud or improper dealing or for 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 (herein referred to as a restriction prohibiting or restricting dealing 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;
 - (c) Until further order is made, and may prohibit or restrict all dealing or only or the dealing that do not comply with specific conditions and the restrictions shall be registered in the appropriate register..."

19. Restriction on land register cannot exist indefinitely. In the case of David Macharia Kinyuru v District Land Registrar, Naivasha & another (Nakuru ELC Misc Appl No 331 of 2016 the court held that:-

"The purpose of a restriction is aimed essentially at stemming fraud or improper dealing over land. The Land Registrar may also place a restriction where there is other sufficient cause for a particular time, until the occurrence of an event, or the making of a further order. It is not the purpose of this part of the law to have the restriction 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....."

20. In the present case, the restriction has been in place for about eight (8) years. In the meantime, the applicant is unable to complete his duty as an administrator of the estate of the deceased by transmitting the land to the beneficiary. The beneficiary is yet to be registered as owner of the suit land as ordered in the succession cause. How long more should the restriction be allowed to be in place? My view is that the continued existence of the restriction is an injustice to both the applicant and the beneficiary. I find no reason to sustain the restriction.

Conclusion

21. This court has determined that it has jurisdiction to entertain this matter. Secondly that the procedure adopted in bringing the matter to court was correct and in accordance with the provisions of section 78(2) of the Land Registration Act and order 51 of the Civil Procedure Rules 2010. Thirdly that the applicant has demonstrated that there is no reason for the restriction to remain in place.
22. In the premises, I find that the applicant's notice of motion application dated 1 January 3, 2020 is merited. I allow it and make orders that; -
- (i) The restriction placed on land parcel No West Bunyore/Ekwanda/2061 registered as entry No 3 and lodged on December 24, 2014 by Teresa Obala Onyango, the 1st respondent herein be removed.
 - (ii) Each party to bear own costs.

RULING READ, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 29TH DAY OF SEPTEMBER, 2022.



E. ASATI

JUDGE

In the presence of:

Juma: Court Assistant.

Mudavadi Advocate holding brief for Oyagi for the Applicant.

Indimuli Advocate for the Respondent.

E. ASATI

JUDGE.

