



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC. APPLICATION NO. 432 OF 2009**

**KINARO KIMAIGA NDUBI.....APPLICANT/  
RESPONDENT**

**VERSUS**

**THE CHIEF LAND**

**REGISTRAR.....RESPONDENT**

**TITUS KIRAGU.....INTERESTED  
PARTY/APPLICANT**

**RULING**

By the Chamber Summons dated 15/1/2010, Titus Kiragu prays to be joined to these proceedings as an Interested Party. The Chamber Summons is predicated on grounds found the face of the application and the supporting affidavit of the Interested Party dated 5/9/2010. The application was opposed by the original applicant/respondent Kinaro Kimaiga Ndubi who filed a replying affidavit dated 5/10/2010.

The reason why the Interested party seeks to be joined to these proceedings is that the subject matter herein is LR Nakuru Municipality Block 18/59 which belongs to him but that the same was fraudulently obtained by one Lawrence Maina Mwangi who then sold it to Kinaro Ndubi. The Interested Party discovered that a normally and placed a restriction on the said land but that this application was filed against the Chief Land Registrar without his knowledge and it is therefore necessary to enjoin the Interested Party to these proceedings to enable the court efficiently determine the issues herein. The Interested Party deposed that he was allocated the suit land vide letter dated 14/10/1985 and the lease was issued on 12/4/06 – TK1 is a copy of the lease. He was invited by the Registrar to go and sign his lease on 16/10/07 (TK2). In 2007, he discovered that the Registrar had issued another title in relation to the same parcel of land and he moved and put a restriction on the said land which was registered in the names of Lawrence Maina Mwangi. He exhibited the official search as (TK3). On 1/7/2010 he checked on the position of the land and found that the restriction had been removed. Search is TK4 dated 6/7/2010. That the land had been sold off to the respondent/applicant who in turn filed this application to remove the restriction. He contends that he was not served with the application seeking to remove the restriction. Mr. Simiyu, counsel for the applicant, urged that due process was not followed. That instead of serving the Chief Land Registrar, only the District Land Registrar was served and the Interest Party was not. He urged that the court's order made in this matter removing the restriction has prejudiced the Interested Party and he needs to be joined to these proceedings so that he can challenge the said order.

In opposing the application, Kinaro deposed that he commenced these proceedings against the Chief land Registrar in November 2009 as the beneficial owner of the suit land having bought it from the registered owner, Lawrence Maina as per sale agreement (KKN2) on 22/8/2006 and that the restriction was placed on the land on 25/10/07, a year after the sale. He depones to have done two searches on the land on

22/8/06 and 5/2/07 and found that it belonged to the seller (KKN) He learnt of the restriction when he wanted to have the land registered in his name. The court heard the application inter partes on 7/12/09 and allowed it having been satisfied that it was appropriate. It is on the basis of the court order that the land Registrar removed the restriction and that it was now 10 months since the removal. It is the respondent's contention that even if the order had not been made, the Interested Party has no proprietary interest in the suit land and that his acquisition of the land was not fraudulent and can not be challenged. According to the respondent, this application is an after thought as the Interested Party was always aware of the sale transaction and these proceedings.

It was further urged that this land could not have been allocated to the Interested Party on 14/10/1985 when it had already been allocated to Lawrence Maina Mwangi on 1/7/1984 as per lease certificate (KKN4). That the Commissioner could not have required the Interested Party to go and sign the lease vide letter of 16/10/07 when it had been registered in the name of Lawrence Maina 15 months earlier.

It is not in dispute that there seem to exist two title deeds in respect of the suit land, Nakuru Municipality Block 18/59. According to the Interested Party he was allocated the land on 1/9/ 1985 and the lease issued on 20/4/2006 and the lease collected on 5/11/07 (see TK1 & 2). Another lease in respect of the same land was issued to Lawrence Maina on 7/4/06 having been allocated to him on 1/7/1984. There is no evidence that either of the lease has been cancelled and this court cannot tell whether or not both are authentic. Even with the sale of the said land to the applicant that does not invalidate the title deed issued to the Interested Party. It is only the Commissioner of Lands or Chief Land Registrar who can tell the court which of the two is authentic.

I have seen the affidavit of service filed in court by the applicant as evidence of service when the application for removal of the restriction was heard. It is not disputed that it is the Interested Party who had placed the restriction. It is noteworthy that he was not named as a party to this application. The affidavit of service also clearly indicates that he was never served though he placed it. It was one of the applicant's complaints that the restriction had been filed without notice to him and it was oppressive to him. It is therefore questionable whether because the restriction had been placed in the title irregularly, there was then no need to serve the Interested Party. In my view, by placing the restriction on the title, the Interested Party was registering his interest in the suit land and whether or not it had been irregularly registered, he should have been served with the application to remove it. Two wrongs cannot make a right. **Section 138(2) of Registered Land Act** allows the application by any proprietor affected by a restriction, upon notice thereof to the Registrar, to have it removed. Though the provision does not specifically provide that the one who has placed the restriction on a title be served, the rules of natural justice and fair play would require that the person be notified of such application. This is an issue relating to land. It is common knowledge that such issues are very sensitive and have to be handled with utmost care so that justice is done to all the parties. Since the Applicant/Interested Party was not notified of the application to remove the restriction from a land in which he is a person interested, it is only fair that he is allowed to be joined to these proceedings so that he can be able to challenge the court's decision, if he so wishes.

For all the above reasons, I grant prayer 1 of the Chamber Summons dated 15/9/2010. The costs to be in the cause.

**DATED and DELIVERED this 10<sup>th</sup> day of November, 2010.**

**R.P.V. WENDOH**

**JUDGE**