



REPUBLIC OF KENYA



**WNN v PWN & another (Environment and Land Miscellaneous Application
E11 of 2022) [2022] KEELC 13680 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13680 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E11 OF 2022
A OMBWAYO, J
OCTOBER 19, 2022**

BETWEEN

WNN APPLICANT

AND

PWN 1ST RESPONDENT

NAKURU COUNTY LAND REGISTRAR 2ND RESPONDENT

RULING

1. WNN (hereinafter referred to as the applicant) has come to court against PWN and the Nakuru County land registrar (hereinafter referred to as the respondents) with an application dated June 8, 2022 seeking orders that this honourable court do issue an order to the land registrar, Nakuru to remove the restriction registered on LR Bahati/Engorusha Black 3/XXX on the August 23, 2016 by the respondent herein and that the order for its removal be served upon the county land registrar, Nakuru for compliance. That costs of this application be provided for.
2. The application is based on grounds that the applicant is the registered proprietor of all the parcel of land known as Bahati/Engorusha Black 3/XXX.
3. The applicant states that by the application of the first respondent, the second respondent registered a restriction on the suit land. He laments that he is now of ill health and requires constant medical supervision and treatment but does not have the funds to cater for the same. That the applicant has made an application to the second respondent for the removal of the restriction but he has failed and/or refused to do so. That in the foregoing it is clear that the applicant has exhausted mechanisms provided under section 78 of the *Land Registration Act*. That this honorable court has the power to remove the restriction registered on the suit land. That applicant has the right to sell his property in order to secure funds for his treatment.



4. According to the applicant no reasons have been offered by the land registrar for refusing to remove the restriction from the applicant's property. That the second respondent has failed to remove the restriction after expiry of the stipulated period as provided for in the provisions of the law. That no prejudice will be occasioned upon the respondents herein if the orders granted are sought.
5. In the supporting affidavit the applicant states that he is the registered proprietor of all parcel of land known as Bahati/Engorusha Block 3/XXX having acquired the said property from Fannita Commercial Agencies. The respondent used to be his wife before they separated sometimes in the year 2020.
6. That by the application of the first respondent, the second respondent registered a restriction on the suit land. He is now of ill health and require constant medical supervision and treatment. That he was therefore unable to dispose of the said property in order to acquire funds for treatment.
7. In the replying affidavit PWN states that she is married to the applicant herein under Kikuyu customary law, and that they have been married since 1994.
8. That together they were blessed with 4 children who are adults now. That the applicant herein is the registered proprietor of all that parcel of land known as Bahati/Engorusha Block1/XXX. That they bought the property together despite not being registered as con-proprietor for the home.
9. That the property however is the matrimonial home and thus to dispose the same will render their children and herself homeless. That she registered the restriction as an interested party and as a spouse to ensure they were not rendered homeless. The restriction was placed in the year 2016 when the applicant wanted to dispose of the property without her consent. The same was long before he suffered the stroke in the year 2020. That the application has not demonstrated how he intends to settle his family after disposing of the property.
10. That in the event the application herein is allowed and the property disposed, we are bound to suffer irreparable loss since we have known the property to be our home for over 20 years. That it is the interest of justice that this honorable court does protect our family from being rendered homeless and does dismiss the application herein.
11. The applicant submitted that in the instant case, the restriction has been in place since August 23, 2016 and it is not indicated how long it would be in place contrary to provision of section 76 of the [Land Registration Act](#) 2012. The applicant contends that the respondent have not offered any explanation why the restriction was registered. The land registrar did not comply with the law hence the restriction should be removed. The applicant concludes by stating that it is unfair for a man to suffer and yet he has property that he owns.
12. The respondent submits that the property herein is matrimonial property hence the applicant is not entitled to the orders sought. The respondent submits that her relationship with the applicant is of husband and wife though they are separated they have four children who are adults now. To sell the land would render the family homeless. The respondent submits she contributed in buying the property. The 1st respondent submitted that she registered the restriction to pre-empt the applicant from disposing of the property.

Analysis and determination

13. This application revolves on a dispute in respect of alleged matrimonial property, between an alleged estranged husband and wife. There is evidence that the two have three adult children. The issue as to whether the property is matrimonial or not can't be determined vide an application but by hearing a



main suit by this court. There is no suit pending in this court to determine whether the property is matrimonial or not.

Section 76 of the [Land Registration Act](#) 2012 provides: -

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

(2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.

(3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.

14. In the case of [Republic Vs Registrar of Lands, Kiambu County \[2015\] eKLR](#) Odunga J (as he then was) held in a case where the land registrar did not oppose an application to remove a restriction, that the onus was upon the registrar to shed light on whether the provisions of section 76(1) were complied with. In the instant case the land registrar did not comply with the law. She did not exercise her discretion in accordance with the law.
15. Section 77(1) of the Act mandates the land registrar to give notice in writing of a restriction to the proprietor affected by the restriction. The registrar did not lead evidence that this step was taken despite the mandatory nature of its command.
16. Section 78(1) of the [Land Registration Act](#), 2012 provides for the removal of restrictions. The registrar may at any time and on application by any person interested or at his own motion and after giving the parties affected by the restriction an opportunity of being heard order the removal or variation of a restriction.
17. The court, on application of a party with notice to the registrar may order a restriction to be removed, varied or other order as it may deem fit to grant.
18. In this case the court is being asked to remove the restriction under section 78(2) of the [Land Registration Act](#), 2012.
19. This court is guided by the provision of section 24 of the [Land Registration Act](#) 2012 which provides as follows;

' The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto'.
20. Having considered all evidence on record and rival submissions, I do find that a restriction cannot be entertained in the record forever there must be an issue to be determined before court or land registrar in respect of the ownership of the land. In this case there is nothing before court for determination other than the application.



21. In the interest of justice, I do order that the restriction be removed after expiry of 30 days if the respondent would not have moved the court for a determination as to whether the suit land is matrimonial property. Each party to bear own costs as the dispute revolves on a family.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF OCTOBER, 2022.

A O OMBWAYO

JUDGE

