



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT MERU

Misc Application 152 of 2006

SUSAN MURUGA M'RIMBIRIA.....APPLICANT

V E R S U S

DOMINIC KIRAMUNYA KABURUNG'A.....1<sup>ST</sup> RESPONDENT

DOUGLAS NTARANGWI M'MURITHI.....2<sup>ND</sup> RESPONDENT

AYUB M'IBIRI ALIAS M'IBIRI M'MWITARI.....1<sup>ST</sup> INTERESTED PARTY

HELLEN KARIMI M'TUERANDU.....2<sup>ND</sup> INTERESTED PARTY

FREDRICK GITUMA M'RUTERE.....3<sup>RD</sup> INTERESTED PARTY

JOHN MURITHUI M'TUERANDU.....4<sup>TH</sup> INTERESTED PARTY

STELLA KARAMBU M'TUERANDU.....5<sup>TH</sup> INTERESTED PARTY

R U L I N G

1. The Applicant, Susan Muruga M'Rimberia, acting in person, instituted the present Miscellaneous Application under "**Section 3(3) of the Laws of Contract Act and section 6(1) a of the Land Control Act**". The simple prayer in the Application is that "**the inhibition order and restrictions received at High Court in Nairobi on 12<sup>th</sup> January 1981 which file went missing be removed by this Hon. Court to allow the 1<sup>st</sup> Respondent to vest sub-division and transfer of land Title No. Kiirua/Ruiri/878.**"
2. I have read the Affidavit in support sworn on 31.8.2006 and the gist of the Applicant's case is that on 23.10.1976, she entered into a Sale Agreement with the 1<sup>st</sup> Respondent, Dominic Kiramunya M'Rimberia and a copy of it is annexed to the Affidavit but it is not very comprehensible though it at least shows that the Applicant was purchasing 3 acres out of the 11 acres comprised in the land title aforesaid.
3. Apparently, the 2<sup>nd</sup> Respondent instituted **H.C. Misc. Civil Application No. 449/1981** in Nairobi and obtained orders of inhibition and restriction over the suit land on an unclear date and the transfer to the Applicant was thereby impeded although she had taken possession and developed the 3 acres that she had purchased. She now wants the inhibition and restriction to be removed so that she can have her lawfully purchased land transferred to her.
4. In the course of proceedings, one Ayub M'Ibiri was enjoined as an interested party as were Hellen

M'Tuerandu, Fredrick Rutere, John M'Tuerandu and Stella M'Tuerandu wife and children of the 1<sup>st</sup> Respondent respectively.

5. In response to the instant Application, the 1<sup>st</sup> Respondent admits that he was the registered proprietor of the suit land and had been frustrated by the inhibition placed against his title and he was therefore in support of the Applicant's case.
6. The 2<sup>nd</sup> Respondent, Douglas Ntaragwi M'Murithi in his Replying Affidavit sworn on 8.12.2006 denied that the Applicant had any interest in the suit land and stated further that the 1<sup>st</sup> Respondent is not the registered proprietor of the suit land. That the registered proprietor, who is not named, had long died and only after selling 5 acres to the 2<sup>nd</sup> Respondent.
7. In an affidavit sworn on 14.9.2007 however, the 2<sup>nd</sup> Respondent admits that the 1<sup>st</sup> Respondent indeed sold part of the suit land to him in 1976 (4.5 acres thereof) and that he has been in occupation of the land since then.
8. Ayub M'Ibiri M'Mwitari in his Affidavit sworn on 15.1.2007 deponed that in 1980, the 1<sup>st</sup> Respondent sold him 5 acres out of the suit land and when no transfer was made, he instituted **RMCC 382/1980** (Meru) and judgment for transfer of that land was made to him as was also made for another 5 acres to the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent then filed **HC. Misc. 449/1981** (Nai) and in the Judgment by Cockar J. the decision in **RMCC 382/1980** was quashed and set aside on 27.4.1988. That thereafter the file containing **Misc. 449/1981** got lost and on 17.5.2005, the 2<sup>nd</sup> Respondent's counsel and the advocate for M'Ibiri agreed before Sitati J. that the said file be transferred to Meru for purposes of enforcing the decree. By letter dated 21.7.2004, the Deputy Registrar asked for the file to be transferred to Meru which has not been done to date. He sees mischief in the present Application.
9. I have heard all the arguments made but my mind is very clear that I cannot issue the orders sought by the Applicant for the following reasons;
10. Firstly, I note that in a certificate of official search dated 24.7.2006 and exhibited as "DKMI" to the affidavit of the 1<sup>st</sup> Respondent sworn on 11.1.2007, the restriction sought to be removed was registered pursuant to an order made within **H.C. Misc 449/1981**. I have seen the judgment of Cockar J. in that matter and at page 8 thereof he rendered himself thus:-

**"This Judgment [in RMCC 382/1980] therefore must be quashed so that the parties may prepare a fresh mutation form reflecting the true intentions of the vendor Kaburunga and the two purchasers whereby the applicant gets 5/11<sup>th</sup> and Mwitari gets 46/110<sup>th</sup> of plot 878 leaving a small portion for the vendor himself. In view of the above findings I do not propose to go into the question of the effect of lack of Land Control Board's consent on the judgment entered by consent in the said suit No. 382/80. Keeping in mind the views I hold about the applicant I intend to make no order as to costs. The judgment in Meru Resident Magistrate's court No. 382/80 is now set aside with no order as to costs."**

11. The judgment is clear as to who should get what portion of the disputed land and to remove the restriction without first enforcing that judgment would be prejudicial to all parties involved.

12. Secondly, the 1<sup>st</sup> Respondent has also admitted that he applied to the Buuri Land Control Board for consent to sub-divide the suit land into two portions and he has annexed exhibit "DKM II" to his affidavit aforesaid showing the Application to the Land Control Board and the same is dated 20.6.2006. The Application does not take into account the judgment in **HC. Misc. 449/1981** or the Applicant's claim. If the restrictions are lifted, the confusion reigning over the suit land would be perpetuated.

13. Thirdly, there is no way that this court can on the application of a non registered proprietor order the removal of a restriction. I say so because s.138(2) of the Registered Land Act, Cap. 300 provides as follows:-

**"(2) Upon the application of any proprietor affected by a restriction, and upon notice thereof to the Registrar, the court may order a restriction to be removed or varied, or make such other order as it thinks fit and may make an order as to costs."**(emphasis added)

14. The Act gives the court discretion only if the proprietor makes the Application. On the other hand s.138(1) which empowers the Registrar to remove or vary a restriction provides as follows:-

**“The Registrar may at any time, upon application by any person interested or of his own motion, and after giving the parties affected thereby an opportunity of being heard, order the removal or variation of a restriction.”**(emphasis added)

15. The proper authority to which the Applicant who is an interested party should by law address her complaint is the Registrar and not the court.

16. Lastly, all the problems now faced by the Applicant, the 1<sup>st</sup> Respondent’s family, the 2<sup>nd</sup> Respondent and Ayub M’Ibiri are a creation of the 1<sup>st</sup> Respondent and the proper approach to finalize this old dispute is to recreate the proceedings in **HC. Misc App. No. 449/1981** if indeed the file is lost or file separate proceedings where all the interests of all the parties in this Application can be addressed. This court cannot do so vide a simple application to remove a restriction.

I have deliberately refused to delve into the technical question whether in fact the Application instituted by summons is properly before the court because I thought it fit to address the more fundamental issues arising.

17. In the end, the Application dated 31.8.2006 must with much sympathy to the applicant be dismissed.

18. In view of the issues noted above, no party should be laden with costs.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 23<sup>RD</sup> DAY OF OCTOBER 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In the presence of

The Applicant present in person

Mr. C. Kariuki holding brief for Mr. B.G. Kariuki for Interested Party.

Mr. Rimita Advocate for the 2<sup>nd</sup> – 5<sup>th</sup> Interested Parties.

1<sup>st</sup> Respondent present in person.

ISAAC LENAOLA

JUDGE