



REPUBLIC OF KENYA



**Waitiki & 4 others v Mungai & 3 others (Environment & Land Case
12 of 2009) [2022] KEELC 14706 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14706 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 12 OF 2009
A NYUKURI, J
NOVEMBER 9, 2022**

BETWEEN

**ALICE NJOKI WAITIKI 1ST PLAINTIFF
JOSEPH NG'ANG'A WAITIKI 2ND PLAINTIFF
JAMES KAHIA KAGIMBI 3RD PLAINTIFF
FRACIA WANGARI KAHIA 4TH PLAINTIFF
GEOFFREY NG'ANG'A MBATIA 5TH PLAINTIFF**

AND

**MOSES NDUNGU MUNGAI 1ST DEFENDANT
OKOA DEVELOPMENT CO.LTD 2ND DEFENDANT
GIDRAPH NGUGI GITUNDU 3RD DEFENDANT
DANSON MWORIA NJIHIA 4TH DEFENDANT**

RULING

1. In the application dated July 28, 2021, the Plaintiffs/Applicants sought the following orders;
 1. Spent
 2. That all injunctions, restrictions, cautions, caveats, or inhibitions of whatever nature registered in Machakos land registry against land parcel No Mavoko Town/Block 2/9246 except the decree of this court dated September 21, 2018 be removed and/or deregistered.
 3. That the Machakos Land Registrar be restrained from accepting, approving or registering any injunctions, restrictions, cautions, charges, caveats, inhibitions or any other encumbrances of



whatever nature against land parcel number Mavoko Town/Block 2/9246 until the decree of this court dated September 21, 2018 is fully executed.

4. That the court do issue summons directed to the Officer in charge of Directorate of Criminal Investigations and the 3rd and 4th to attend court and show cause why contempt of court proceedings should not be taken out against them.
 5. The Officer in charge of Directorate of Criminal Investigations Machakos and the 3rd and 4th Defendants be cited for contempt of court and be committed to Civil Jail for six months and/or be punished as the court may deem just for being in contempt of this court's orders embodied in its decree dated September 21, 2018.
 6. That costs of this Application be provided for.
2. The application is supported by the affidavit of Alice Njoki Waitiki, the 1st Plaintiff/Applicant sworn on July 28, 2021. She deposed that there is judgment on record in favour of the Plaintiff, which has never been appealed against. She averred that the said judgment decreed inter alia that 10 plots measuring 40 feet by 80 feet be excised from land parcel number Mavoko/Town Block 2/9246 (suit property) and that the same be registered in the Plaintiffs' names.
 3. She further averred that execution of the said decree has been hampered by a restriction on the suit properties placed by the 3rd and 4th Defendants through the Director of Criminal Investigations, Machakos (DCI Machakos). She deposed that the two Defendants were well aware of the judgement of the court yet went ahead and caused the registration of the restriction.
 4. It was also the Applicants' case that the DCI together with the 3rd and 4th Defendants had acted in contempt of a court decree by placing a restriction on the suit property. They also stated that through their advocates, they had written a letter to the Land Registrar at Machakos and the DCI demanding that the restriction be removed but there was no response even after service of the letter. They stated that the Applicants were prejudiced by the restriction and that they could not enjoy the fruits of their judgment.
 5. The 1st and 2nd Defendant did not file any response or grounds of opposition but filed written submissions in support of the application.
 6. The Application was opposed by the 3rd and 4th Defendant vide their grounds of opposition filed on September 29, 2021. They stated that they had nothing to do with the subject restriction and that they are not the authors of the letter referenced DCI/13/CF14/2/3/11 VOL 14 which led to the registration of the subject restriction.
 7. The 3rd and 4th Defendants stated that the application did not meet the threshold for grant of the orders sought. Their position was that the 3rd and 4th Defendants had nothing to do with the parcel of land known as Mavoko Town Block 2/9247 as they have no claim whatsoever over it. They denied being authors of the letter referenced DCI/13/CF14/2/3/11 VOL 14 or causing the same to be written, and leading to the registration of the restriction in issue.
 8. The application was canvassed by way of written submissions. On record are the Applicants' submissions dated November 5, 2021, the 1st and 2nd Defendants' submissions dated January 18, 2022, the 3rd and 4th Defendants' submissions dated December 1, 2021.



Applicants' Submissions

9. Counsel for the Applicants reiterated the contents of their affidavit in support of the application and submitted that the provisions of Section 78 of the [Land Registration Act 2012](#), gave both the Land Registrar and the court powers to remove restrictions on land upon an application by an affected party.
10. They further submitted that though there was a previous injunction order on the suit property, the same was lifted vide a court order issued on November 15, 2018, and that both the order and the decree were served on the Land Registrar for execution. That However the 3rd and 4th Defendants through the DCI, Machakos placed a restriction on the suit property. It was their contention that the registration of the restriction was done after the court had delivered judgment and therefore that the existing restriction was a hindrance to execution of the court's decree and should be removed.
11. On whether the DCI together with the 3rd and 4th Defendant should be cited for contempt, they referred to the case of [Cecil Miller v Jackson Njeru](#) (2017) eKLR where the court quoted with approval Issue Paper "[Contempt in Modern New Zealand](#)" which sets out elements of civil contempt as follows;
 - a. That the terms of the order or injunction must be clear, unambiguous and binding on the Defendant;
 - b. That the Defendant had knowledge of or proper notice of the terms of the order,
 - c. That the Defendant acted in breach of the terms of the order,
 - d. That the Defendant's conduct was deliberate.
12. It was their argument that the terms of the decree were clear. They also contended that the 3rd and 4th Defendants were aware of the court orders since they were served with the decree and an affidavit of service filed. They further urged that the 3rd and 4th Defendants and the DCI had disobeyed the decree deliberately.
13. As regards the DCI, they argued that he did assist in the registration of the restriction without conducting proper investigations to find out the reason for the same or the existing court orders or that he was aware of the orders but defied the same.
14. In response to the grounds of opposition filed by the 3rd and 4th Defendant, the Applicants argued that the latter had sought to be joined to this suit vide an application dated October 5, 2009, on behalf of Kihururu Self Help Group seeking to enforce their rights over the suit property which they claimed were acquired vide suit No 11556 of 2003. They submitted further that the letter from the DCI which informed the registration of the subject restriction was written on the request and instruction of the 3rd and 4th Defendants.

The 1st and 2nd Defendants' Submissions

15. Counsel for the 1st and 2nd Defendants relied on the case of *Matoya vs Standard Chartered Bank (K) LTD & others* (2003) 1 EA 140 and submitted that the purpose of a restriction is to prevent fraud or improper dealings on land. They further argued that although the Land Registrar has power to restrict a title as provided for under Section 76 of the [Land Registration Act](#), in the instant case, the Land Registrar failed to notify the affected persons or conduct inquiry or a hearing upon receipt of the letter from the DCI.
16. Reliance was placed on the case of [Republic vs Registrar of Lands Kiambu county](#) [2015] e KLR, for the proposition that the onus in such cases is on the Land Registrar to demonstrate that the provisions



of Section 76 of the [Land Registration Act](#) have been complied with. Counsel urged that the Plaintiffs right of proprietorship was protected under Section 24 of the [Land Registration Act](#).

The 3rd and 4th Defendants Submissions

17. Counsel for the 3rd and 4th Defendants submitted that although this court is empowered under Section 78 of the [Land Registration Act](#) to remove a restriction, the 3rd and 4th Defendants were not aware of the impugned restriction herein nor did they cause the registration of the same. They maintained that no evidence was produced by the Plaintiff to show that the restriction was placed on the titles by the 3rd and 4th Defendants.
18. It was also the 3rd and 4th Defendants' contention that they could not have placed a restriction on the suit property as they have no interest therein, because their interest is in the adjacent plot namely Mavoko Town Block 2/ 9247.
19. On the question of contempt, they submitted that the application was an abuse of court process as the said Defendants did not author the alleged letter referenced DCI/13/CF/14/2/3/11 VOL 14 which led to the registration of the restriction. They maintained that the Applicants had failed to demonstrate how the 3rd and 4th Defendants acted in breach of the orders of the court. They argued that they cannot be cited for contempt for actions which they know nothing about and neither are they agents of the DCI. They concluded by arguing that the application is misconceived, frivolous and vexatious hence ought to be dismissed.

Analysis and Determination

20. I have carefully considered the application, the response thereto and the submissions by the parties. The issues before court are;
 - a. Whether the 3rd and 4th Defendants placed a restriction on the suit property through the DCI Machakos, and
 - b. Whether the alleged contemnors are in contempt of court.
21. The power of the court to remove a restriction is provided for in Section 78 of the [Land Registration Act](#) No 3 of 2012 which provides;

Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction be removed, varied, or other order as it deems fit, and may make an order as to costs.
22. The Applicants have alleged that the 3rd and 4th Defendants have through the DCI Machakos placed a restriction on the suit property. The 3rd and 4th Defendants have responded that they are not aware of the restriction and have not instructed the DCI to restrict the property. I have perused the application and I note that there is no search certificate or any evidence that the suit property has been restricted by the DCI or by any other person. Even the letter referred to as referenced DCI/13/CF14/2/3/1/ VOL 14 is not attached to the application. The evidence produced by the Applicants are the decree, the order of November 15, 2018, and a demand letter to the DCI Nairobi.
23. In view of the fact that there is no evidence that there is a restriction on the suit property or that a restriction was placed thereon by the 3rd and 4th Defendants and the DCI, the application herein is merely speculative, baseless and premised on nothing substantive. The Applicant cannot ask the court to remove a restriction which he does not attempt to prove it exists. That is not only an abuse of the court process, but also a waste of courts precious time. No attempt was made to establish basic facts as



to whether there exists a letter from the DCI to the Land Registrar, the details of the alleged restriction as to when, by whom and why the restriction was registered.

24. The court cannot remove a non-existent restriction, charges, caveats, cautions and inhibitions as sought by the Applicants. In the absence of evidence of the existence of a restriction, then there is no basis for orders for contempt. Therefore, that prayer is premised on quick sand and the same must fail.
25. In the premises, I find and hold that the application dated July 28, 2021 is unmeritorious, and the same is hereby dismissed with costs to the 3rd and 4th defendants.
26. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM
A. NYUKURI**

JUDGE

In the presence of;

Mr. Njiru for the 1st and 2nd Defendants.

Mr. Ngugi for the 3rd and 4th Defendants.

Mr. Musyoki for the Plaintiffs.

Court Assistant - Josephine

