



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NO. 225 OF 1997**

**MBURU ITOTIA ..... PLAINTIFF**

**VERSUS**

**ITOTIA KING'ANG'A ..... DEFENDANT**

**RULING**

The application before me is brought under ORDER L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In it the applicant seeks an order of the court directed at the Commissioner of Lands requiring him to remove a caveat registered against L.R. No. LIMURU/BIBIRIONI/1260 with costs being in the cause. The main ground in support of the application is that the conditions for which the restriction was placed against the property have been fulfilled as per the applicants' affidavit sworn on 3rd October 2003 and filed in this court on 6th October 2003. This is the ground urged before me by the Applicant's Counsel Mrs Rawal when she appeared before me on 9th February 2004.

I have perused the copy of the certificate of official search annexed to the Applicant's Affidavit and have noted that the restriction complained of was registered on 16th March 1997 and was to remain so registered until a Civil Suit namely H.C.C.C. No. 225 of 1997 was disposed of. The affidavit avers to the fact that this suit was concluded and a final judgment delivered on 3rd August 1981. However evidencing this fact, annexure marked TWG II is a copy of a Judgment delivered on 17th February 1981. It is this judgment that set out the conditions to be met in satisfaction and conclusion of that suit. I take it therefore that this Judgment did bring H.C.C.C. No. 225 of 1997 to an end thus disposing of the same. I am satisfied therefore that the restriction ought not be in place.

However, I am of the view that although the Applicant has the right to move the court in the circumstances, this application is somehow premature there being nothing on the record to show that the applicant has approached the Land Registrar requiring him to remove the restriction. Section 138 (1) of the Registered Lands Act Cap 300 of the Laws of Kenya gives the Registrar the power to remove or vary a restriction either of his own motion or on application by any person. Section 138 (2) on the other hand empowers the court to order such removal or variation on the application of any proprietor affected by such restriction but only upon due notice of the application being issued to the Registrar. I have not been informed of any application presented to the Registrar herein. Nor have I been shown any evidence that this application has been served upon the Registrar as required under Section 138 (2). I am therefore unable to grant the orders sought, the applicant having not complied with the requisite provisions of the law. The application is hereby dismissed with no order as to costs.

Dated and Delivered at Nairobi this 24th of February 2004.

**M.G. Mugo,**

**Ag. Judge**

**24.02.2004**