



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 38 OF 2020

SIMON WAIHARO CHEGE.....1ST PLAINTIFF

MARGARET NJAMBI CHEGE.....2ND PLAINTIFF

VERSUS

THE LAND REGISTRAR, NGONG.....DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 1st July, 2020 brought pursuant to section 78 (2) of the Land Registration Act, Sections 3A , 63 (e) of the Civil Procedure Act and Order 51 Rule (1) of the Civil Procedure Rules. The Plaintiffs seek the following orders:

1. Spent

2. That the Honourable Court be pleased to issue an order of mandatory injunction directed at the Defendant/Respondent, its servants, agents and/or employees to lift, remove and/or vacate the impugned restriction registered on the Plaintiffs/Applicants' suit properties known as KAJIADO/NTASHART/678 and KAJIADO/NTASHART/ 679 on the 11th March, 2018.

3. That costs for this application be awarded to the Plaintiffs/Applicants.

The application is premised on the grounds on the face of it and the supporting affidavit of DR. SIMON WAIHARO CHEGE where he deposes that sometime in 1988 together with his wife (2nd Plaintiff) they entered into a Sale Agreement with one Pingwa Ole Rosio for purchase of land parcel numbers KAJIADO/NTASHART/678 and KAJIADO/NTASHART/ 679 at a value of Kshs. 325,000/= which they paid in full. Further, Transfer of Land documents were duly executed on 2nd February, 1988 and 25th April, 1988 respectively by both parties and duly presented for registration. He confirms that title deeds for KAJIADO/NTASHART/678 and KAJIADO/NTASHART/ 679 were issued on 9th February, 1988 and 27th April, 1988 respectively. He explains that KAJIADO/NTASHART/678 and KAJIADO/NTASHART/ 679 emanated from KAJIADO/ NTASHART/ 57 which was subdivided into 678, 679 and 680 respectively. Further, that on 20th June, 1989, the local chief recognized them as the registered proprietors of the aforementioned parcels of land and they have utilized the same from 1988. He contends that they conducted a search of the properties on 10th July, 2019 and discovered that the Defendant had registered a restriction thereon on 11th March, 2018 on an application from the firm of Sagana Biriq & Company Advocates on account of the original title which was still in possession of Pingwa Ole Rosio. He avers that vide a letter dated the 16th September, 2019 his advocate wrote to the firm of Sagana Biriq & Company Advocates seeking clarification on the impugned restriction, which letter was never responded to. He states that he has severally sought for the removal of the restriction from the Defendant but his efforts have been fruitless. Further, they have also written to various institutions but the matter is yet to be resolved. He claims the Defendant seeks to reconstruct the mother title which ceased to exist in 1988 and referred to the gazette notice No. 2489 dated 15th March, 2019 relating to reopening of a register for KAJIADO/ NTASHART/ 57 since the Land Register is missing. He is aware Pingwa Ole Rosio was compensated for wayleave on the suit properties by KETRACO holding a fake title deed for KAJIADO/ NTASHART/ 57 which matter he raised with KETRACO and he was compensated. Further, that the family of Pingwa Ole Rosio have been occupying the suit property without his permission. He further claims that the Standard Gauge Railway Line passes through the suit property and he is yet to be compensated due to the existence of the restriction. He insists vide a report dated the 5th March, 2020 from the Director of National Registration, the fingerprints on the Sale Agreement including Transfer Documents belong to Pingwa Ole Rosio. He reiterates that the registration of the impugned restriction is illegal and was unlawfully registered as he has been ownership as well as possession of KAJIADO/NTASHART/678 and KAJIADO/NTASHART/ 679. Further, they are unable to enjoy their properties and there is no justifiable reason why the said restriction was registered on the land.

The Defendant opposed the application and filed Grounds of Opposition dated 2nd October, 2020.

The application was thereafter canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 1st July, 2020 including the supporting affidavit, Grounds of Opposition and rivaling submissions, the only issue for determination is whether a mandatory injunction should issue directing the Defendant to lift the restriction registered on land parcel numbers KAJIADO/NTASHART/678 and KAJIADO/NTASHART/679.

The Plaintiffs in their submissions reiterated their claim and contended that the Defendant did not comply with the procedural requirements set out in sections 76 and 77 of the Land Registration Act and relied on the decisions of **Republic V Chief Lands Registrar & 2 Others Ex parte K – Rep Bank Limited (2015) eKLR**; **Peter Gichia Nyanjui V Simon Kibe Muriithi & 3 Others (2016) eKLR** to support their averments. They submitted that the restriction ought to be lifted and presence of the party who stands to be affected if the orders sought are granted is not necessary. They relied on the cases of **Skov Estate Limited & 5 others V Agricultural Development Corporation & Another (2015) eKLR** and **Tom Onyango V Mimosa Investments Limited (2017) eKLR** to support their arguments.

The Defendant in his submissions insist that a mandatory injunction ought not to be granted at an interlocutory stage unless the Applicant demonstrates special circumstances. To support his averments, he relied on the case of **Robai Kadili Agufa & Another V Kenya Power & Lighting Co Ltd (2015) eKLR**. He insists the Plaintiffs should enjoin the estate of Pingwa Ole Rosio to this suit to enable the court make an informed determination of the dispute herein.

Section 76 of the Land Registration Act provides that:

“(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 or the 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.”

In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal provided parameters for granting a mandatory injunction and held that:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

In the current scenario, the Plaintiffs’ seek a mandatory injunction as against the Defendant its servants, agents and/or employees to lift, remove and/or vacate the impugned restriction registered on the Plaintiffs/Applicants’ suit properties known as KAJIADO/NTASHART/678 and KAJIADO/NTASHART/ 679 on the 11th March, 2018. From the evidence before Court, the Defendant proceeded to register a restriction on 11th March, 2018 based on an application from the firm of Sagana Biriq & Company Advocates on account of the original title still being in possession of Pingwa Ole Rosio who sold them the suit properties. They insist the said Pingwa Ole Rosio executed the Sale Agreement including Transfer of Land Documents and they paid him a sum of Kshs. 325,000 being purchase price, in 1988. Further, that they have been registered proprietors of the suit properties from 1988 to date. I note that the Plaintiffs’ did not enjoin the said Pingwa Ole Rosio to this suit to explain why he sought for a restriction to be registered against the suit properties yet he had disposed of the same. Further, to explain why he still had the original Certificate of Title for Kajiado/ Ntashart/ 57 which was supposed to have been subdivided to create the suit properties. It is further not clear why KETRACO proceeded to compensate the said Pingwa Ole Rosio for the wayleave. I opine that these are key issues and it would be pertinent for viva voce evidence to be adduced to enable the Court arrive at a proper determination of the dispute at hand. In associating myself with the decision cited above and based on the facts at hand as well as relying on the legal provisions cited above, I find that there are no special circumstances to warrant the granting of the mandatory injunction sought as there are pertinent issues which cannot be determined at once at this interlocutory stage.

It is against the foregoing that I find the application dated the 1st July, 2020 unmerited and will decline to grant it. Costs will be in the cause.

Dated Signed and Delivered Virtually at Kajiado this 20th Day of January, 2021.

CHRISTINE OCHIENG

JUDGE