



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 13 OF 2020

LILLIAN WAKIYA MWAURA.....1ST APPELLANT

PETER NGIRI MWAURA.....2ND APPELLANT

ROSE NDUTA MWAURA.....3RD APPELLANT

VERSUS

THE CHIEF LAND REGISTRAR.....RESPONDENT

(Being An Appeal from the Ruling of the Court delivered on 22nd August 2019, by the Senior Principal Magistrate Court at Limuru, - Honourable E.Olwande , Senior Principal Magistrate)

IN

THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT LIMURU

LIMURU LAW COURTS

ELC MISC NO. 7 OF 2019

LILLIAN WAKIYA MWAURA.....1ST PLAINTIFF

PETER NGIRI MWAURA.....2ND PLAINTIFF

ROSE NDUTA MWAURA.....3RD PLAINTIFF

VERSUS

THE CHIEF LAND REGISTRAR.....DEFENDANT

JUDGMENT

The Appellants herein were the Plaintiffs in ELC Misc 7 of 2019, and the **Chief Land Registrar**, was the Defendant thereon. By a Notice of Motion Application dated 15th April 2019, the Appellants sought for orders that;-

1. The Respondent be ordered to lift the restriction on Title Numbers Nguirubi/Thigio/1566, Nguirubi/Thigio/ 1567 and Nguirubi/Thigio/1568.

2. Costs of this Application be provided for.

The Application was premised on the grounds that the (Plaintiffs) Appellants were the legal and rightful owners of the suit properties. That searches on the suit titles reveal that a restriction had been registered against each of the titles. That the Appellants rights under the Constitution had been denied and interfered with and if the orders sought are not granted they stand to suffer irreparable harm.

In their Supporting Affidavit the Plaintiffs (Appellants) averred that when they conducted searches on the suit properties, it was revealed that a restriction was registered against each of the titles on **October 2005** which restriction states that "**no dealings until boundary**

dispute is sorted out and determined.”

That no notices were served on the Plaintiffs (Appellants) with regard to placement of the restrictions as required by law. That there was no information in **Kiambu Land Registry** showing who placed the restrictions. That on **9th December 2018**, the 2nd and 3rd Applicants (Appellants) applied for removal of the restriction, which was however not done. Further that the 1st Applicant wrote to the Kiambu Land Registrar on **5th December 2018**, requesting for the removal of the restriction but her request has not been acted upon.

That in **February 2019**, the 1st Applicant met the Kiambu Land Registrar, who advised her to apply for the removal of the restrictions. That they are not aware of the alleged boundary dispute and whoever placed the restrictions has not taken any actions on the matter. That as a consequence thereof, they are unable to dispose and/or develop their parcels of land economically. That the restrictions are a violation of their Constitutional right as lawfully registered proprietors of the properties. Further that inaction is an expression of lack of interest and probable cause and the same is utterly unconscionable and inequitable as they continue to be subjected to unrelenting restrictions for 13 years. They urged the Court to allow their Application.

The Application was served upon the Land Registrar, who did not **Enter Appearance** and the Application was thus not opposed.

On **22nd August 2019**, the Court delivered its Ruling and stated;

‘However, the person who had the restriction registered against the title is not involved in this matter and is obviously unaware of the same. The Applicants allege that they do not know who had lodged the restriction and there are no records in the lands office showing who had lodged the restriction. All the same the fact that a restriction was placed on the parcel is an indication that someone else out there has an interest in the suit lands which interest he felt was worth protecting. It would therefore be unfair and contrary to the rules of natural justice to make a decision concerning the restriction without according the person or persons an opportunity to be heard. In that regard I direct as follows.....’

The Court went ahead to give certain directions that the Appellants were to adhere to and further gave a mention date for confirmation. The directions included that the Appellants, advertise on the local newspaper of national wide circulation their intention to remove the restrictions and the said intention to be placed on the suit lands amongst other directions.

The Appellants were aggrieved by the above determination of the Court and Orders thereon and they have sought to challenge the said Ruling through the **Memorandum of Appeal dated 17th October 2019** The Appellants sought for orders that;

1. The Appeal be allowed.

2. The Honourable Court make an order for removal of the restrictions against title number Nguirubi/Thigio/1566, Nguirubi/Thigio/1567, Nguirubi/Thigio/1568 by the Kiambu Land Registrar.

The grounds in support of the Appeal are:-

1. The Learned trial Magistrate erred in law and in fact in disregarding the appellants evidence contained in their sworn affidavits that there was no record in the Kiambu Land Registry showing the person who had applied to the Land Registrar to place a restriction against the land parcels Title Numbers Nguirubi /Thigio/ 1566, Nguirubi/ Thigio/ 1567, Nguirubi/Thigio/1568 in October 2005 without any notification of such restriction to the Appellants.

2. Consequently, the Learned trial Magistrate erred in law and fact by ordering the Appellants to incur an extra large amount for placing the notice of their Application and intention to remove the restrictions on the suit lands in a local Newspaper of nationwide Circulation while the Land Registrar, the Respondent had already been served through the office of the Attorney General and failed/Ignored/ refused to enter appearance.

3. The Learned Trial Magistrate erred in Law and fact by ordering that the intention to apply for lifting of the restrictions be placed on the suit lands by the Land Registrar through serving the Appellants Notices and Application to the area Chief who would have the Application translated in Kikuyu Version and placed on the Chief's Notice Board and other conspicuous places.

4. The learned magistrate erred in Law and in fact in finding that the fact that a restriction was placed on the suit land is an indication that someone unknown out there has an interest in the suit lands.

5. The Learned trial Magistrate erred in law and in fact in holding that it would be unfair to make a decision concerning the restriction without the aforesaid person with an interest being accorded an opportunity to be heard whereas all parties involved had been served.

6. The Learned Magistrate erred in Law and in fact in failing to recognize that the Land Registrar was sued by the Appellants because he is the one who had registered the restriction as per the law.

7. The Learned trial Magistrate erred in law and in fact in failing to evaluate and take into consideration that the restriction was placed on the suitlands 13 years ago on October 2005 and no action has been taken ever since.

8. *That Learned Magistrate erred in Law and in fact by holding that an unknown persons interests must be protected and totally disregarding the interests of the Appellants and the detrimental consequences of the said restriction suffered by eth Appellants for the last 13 years.*

9. *The Learned trial Magistrate erred in law and fact by inferring that a restriction was placed in a piece of property by an individual interested party whereas a restriction is placed due the Land Registrar own Motion on which fact service of the Application for removal of the restriction is wholly dependent on.*

10. *The Learned magistrate erred in both Law and fact in failing to finds that the Appellants had fully discharged their responsibility of service of the Application*

The Appeal was canvassed by way of written submissions and the Appellants through the **Law Firm of K. Mwaura & Company Advocates** filed their written submissions on **12th November 2020**, and submitted that the proprietors of the suit properties herein have suffered the most prejudice by the inordinately long period of time that the suit properties have been encumbered. That the lethargic approach by the alleged adversary is a clear expression of lack of interest in the said properties.

It was further submitted that restrictions fall within the precincts of equitable rights and that **“equity aids the vigilant and not the indolent”** and allowing the restriction to endure long disturbs the fundamental principle. It was further submitted that the Appellants followed due process in lifting the restrictions as they first applied before the Land Registrar before seeking the Court’s intervention.

The Appellants relied on various provisions of law and the case of **David Macharia Kinyuru....Vs...District Land Registrar Naivasha & Anor (2017) eklr** where the Court held that;

Restrictions are to endure for a particular time, or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance, as the underlying issue leading to the restriction is being resolved, since a restriction by itself does not solve a dispute.

It is now close to 3 years since the said restriction was lodged and no suit over ownership of the land has been lodged. It is apparent therefore that the rights of the applicant as proprietor are being curtailed on an alleged interest which remains unknown and undetermined to date. If indeed the 2nd respondent, who instigated the registration of the restriction was serious, he would by this time have presented his case in court and given reasons why he feels entitled to ownership of the suit land. None has been filed and on my part, I do not see why the applicant should be unduly restricted.”

The Court was therefore urged to allow the Appeal.

The Court has considered the **proceedings** before the trial Court, the **Ruling** of the said Court, the **Memorandum of Appeal** and the written submissions. The issue for determination is **whether the Appeal is merited.**

As this is a first Appeal, it is the Court’s duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. Also see the case of **SelleVs... Associated Motor Boat Co. [1968] EA 123** where the Court held that;

*“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270**).*

The Court has carefully considered the evidence before the subordinate Court and finds as follows:-

The Appellants had sought for the removal of restrictions in the suit properties. It is not in doubt that the Appellants are the registered proprietors of the respective suit properties. It is also not in doubt that on **4th June 2005**, a restriction was entered as against each of the title to the suit properties stating **“no dealings until boundary disputed is sorted out and determined.”**

The Appellants have averred that they made inquiries at the Kiambu Land Registry and they even wrote to the Land Registrar seeking to have the restrictions removed. However, the Land Registrar did not to heed their requests. That as per the records at the Kiambu Land Registry, there is no information as to who was the person that placed the restriction. It is also not in doubt that the Land Registrar was served with the suit papers. However, the Land Registrar did not enter appearance and therefore the Application was unopposed and uncontroverted. Therefore, the evidence by the Appellants remained uncontroverted and the same was not challenged by either the Land Registrar or the person who placed the restriction.

In her Ruling, the trial Magistrate held that it would be prejudicial to make a decision concerning the restrictions without the person who may have placed the restriction being heard.

The provisions of the law with regards to restrictions are to be found in the Land Registration Act, specifically **Section 76, 77 and 78** which provides;

76. Restrictions (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 the making 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.

(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.

77. Notice and effect of restriction (1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.

(2) An instrument that is inconsistent with it shall not be registered while the restriction is still registered except by order of the court or of the Registrar

78. Removal and variation of restrictions (1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

From the above provisions of law, it is clear that the Land Registrar is the person that registers a Restriction, that in registering the said restriction, the law mandates the Registrar to inform the person who is to be affected by the restriction.

In the instant case, it is not in doubt that as per the title deeds produced in evidence by the Appellants that their title deeds were issued in **1992**. Therefore, at the time the restrictions were being registered, the Appellants were the registered owners of the suit properties and therefore, they had a right to be informed of the registration of the restriction before it could be registered.

The Appellants have contended they were never informed, and there is no evidence to show that they were ever informed or alerted before the said restrictions were registered. In the Court's considered view, the Appellants rights at this point were violated and the Land Registrar did not follow the law as he failed to notify the owners of the suit properties before placing the restrictions.

It is also evident from the provisions of law that restrictions are not supposed to endure indefinitely on a title. The restriction on the title herein indicate that **'no dealings until boundary dispute is sorted out and determined.'**

The mandate to determine boundary disputes is placed at the doorstep of the Land Registrar as per **Section 18(2) of the Land Registration Act**. It is the Land Registrar who registered the restrictions. The Appellants filed an Application for removal of the restriction on **5th December 2018**. **Thirteen (13) years** later it cannot be said that the boundary dispute has not been resolved. Further the Land Registry itself does not have any information on who placed the restrictions or who has the contention over the boundary. It is the Court's considered view that to place the burden of finding the person who placed a restriction on their properties to the Appellants yet they were never informed before the same was registered is far-fetched.

Under **Section 78 of the Land Registration Act**, the Court has the powers to remove any restriction on a title to land upon **Notice** to the Registrar. Though the section further allows the Court the discretion to give any orders it deems fit, the Court finds that in this instant, the trial Court did not exercise its discretion judiciously as the obligations that have been placed on the Appellants are quiet enormous for parties who were not afforded an opportunity to be heard before the restrictions were placed on their parcels of land as required by law.

Therefore, this Court finds and holds that the Appellants' are entitled to the removal of the restrictions unconditionally as there are no reasons given as to why the said restrictions were placed without notifying them as the registered owners and why the said restrictions should endure after 13 years. Indeed restrictions cannot endure forever.

No reason have been tendered as to why the restrictions have endured for over a decade. The Appellants have discharged their responsibilities and served the Land Registrar and if there was any reason as to why the restrictions ought not to be removed, then the Land Registrar was the person to give such reasons.

In the absence of any satisfying reason as to why the restrictions should still be in place, the Court finds and holds that the Appellants have satisfactorily explained and demonstrated why this Court should exercise its discretion and interfere with the trial Court's ruling. Consequently, this Court proceed to interfere with the trial Court's ruling issued on **22nd August 2019** and wholly sets aside the said Ruling and the consequential orders thereto.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the **Memorandum of Appeal**, together with the written submissions, this Court finds that the trial Magistrate erred and arrived at a wrong decision.

For the above reasons, the Appellants' Appeal is found **merited** and consequently the said Appeal is **allowed entirely** and the Ruling and Orders of the trial court are hereby set aside. The Appellants have proved their case and therefore, the Court further orders forthwith **removal of restrictions** placed against the Appellants title numbers being **Nguirubi/ Thigio/1566, Nguirubi/Thigio/1567 and Nguirubi/ Thigio/1568** by the **Land Registrar Kiambu**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 25TH DAY OF MARCH 2021

L. GACHERU

JUDGE

25/3/2021

Court Assistant - Dominic

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgement** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Mwiti for the 1st Appellant

No appearance for the 2nd Appellant

No appearance for the 3rd Appellant

No appearance for the Respondent

L. GACHERU

JUDGE

25/3/2021