



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 34 OF 2019

RUMBA KINUTHIA t/a .

RUMBA KINUTHIA & CO ADVOCATES.....PLAINTIFF/RESPONDENT

VS

NGIMU FARM CO LTD.....1ST DEFENDANT/RESPONDENT

MICHAEL M MUNA

MARTIN M NGURE

JOSEPH MATHENGE MUMBI

(Suing in their Capacities as Chairman

Secretary & Treasurer of MUYENGA

2040 SELF HELP GROUP.....2ND DEFENDANT/APPLICANT

THE DISTRICT LAND

REGISTRAR MURANGA.....3RD DEFENDANT/RESPONDENT

HON ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

RULING

1. The 2nd Defendant's Application dated 8/8/2019 seeks this Honorable Court's orders that the Land Registrar Murang'a County remove/vacate the Court Order registered against title for L.R NO. MAKUYU/KIMORORI BLOCK 1/1629.
2. The grounds on the face of the Application are that on 17/12/2013 the Honorable Court dismissed the Plaintiff's Application that was the basis of the impugned Order and there being no Appeal or stay of execution of the Court dismissal order, the 2nd Defendant is unable to enjoy the use of their land.
3. The Application is supported by the Affidavit of Michael N. Muna of even date in his capacity as the Secretary of the 2nd Defendant, the registered proprietors of the suit land who reiterated the contents of the Notice of Motion.
4. The Plaintiff opposed the Application vide a Replying Affidavit sworn by Rumba Kinuthia dated 4/10/2019 and averred that the Court Order issued on 17/12/2013 was to safeguard his interest in the suit property pending the determination of the main suit. He deponed that the gist of the suit is unpaid fees for legal services rendered to the 1st Defendant before the suit property was allegedly fraudulently transferred to the 2nd Defendants.
5. He further averred that the main suit is pending determination and that in any case there is a pending Appeal against the dismissal order lodged in December 2013 pending prosecution on account of lack of requisite documents as the file is missing. In his view, it is necessary to secure his interest in the suit property by pursuing the intended Appeal first instead of the main suit herein.

6. He adds that he is apprehensive that if the restriction is dislodged, the suit property maybe disposed of in a manner that would render his intended Appeal nugatory.

7. The Application was argued orally before this Honorable Court on 20/01/2021 in the absence of the 1st, 3rd and 4th Defendants despite service of the Application and hearing date.

8. Learned Counsel Mr. Mwaura reiterated the contents of the Notice of Motion and supporting Affidavit arguing that the existing restriction on the suit property was to remain in force until the hearing and determination of the Application dated 17/2/2012 that was dismissed on 17/12/2013. He conceded that after the dismissal, the Plaintiff lodged its notice of Appeal but insisted that there being no stay of execution of the Ruling of 17/12/2013 and taking into account the period of time since 2013 without prosecution of the said Appeal, he urged this Court to allow the Application in terms of prayer 2.

9. On the other hand, Learned Counsel Ms. Macharia relied on the Plaintiff's Replying Affidavit and admitted that they have only filed a notice of Appeal but could not confirm existence of the Appeal.

10. In a brief rejoinder, Mr. Mwaura referred to paragraphs 8 – 11 of the Replying Affidavit that indeed there is no Appeal in place. That a letter dated 16/10/2019 that the trial Court file had been transferred from Nairobi to this Court cannot be said to be an Appeal and that it was clear that the Plaintiff has no intention of seeking stay of execution of the Ruling of 17/12/2013.

11. In my view the main issue for determination by this Honorable Court is whether the Court should order the removal of the restriction on L.R NO. MAKUYU/KIMORORI BLOCK 1/1629 that was registered on 22/02/2012 pursuant to the Order of the Honorable Court pending hearing of the Plaintiff's Application that was dismissed on 17/12/2013.

12. The legal provisions for Restrictions and their removal are provided for under Sections 76 and 78 respectively of the Land Registration Act, 2012 which state; -

76. Restrictions

(1) For the purposes of compulsory acquisition 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.

78. Removal and variation of restrictions

(3) The Registrar may, at any time 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 the removal or variation of a restriction.

(4) 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.

13. In light of Section 76(2) (b) above, it is my view that the Restriction herein was to remain in force until the hearing of the Plaintiff's Application that was dismissed on 17/12/2013. I have not seen any evidence or record of stay of execution against the Court Ruling and therefore applying the above provision, the duration of the Restriction expired on 17/12/2013.

14. In the case of **Joyce Waithira Mwangi v Thika Land Registrar [2018] eKLR** the Court held that restrictions are not supposed to endure indefinitely on a title. Allowing a restriction for indefinite period of time has the effect of fettering the right to the enjoyment and ownership of property.

15. The Plaintiff has indicated that he filed a notice of Appeal against the Ruling but a notice of Appeal does not act as stay of execution of the Ruling pending determination of the intended Appeal.

16. From the forgoing, it is my finding that the application is merited and I proceed to allow it with no orders as to costs.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 4TH DAY OF MARCH 2021.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Applicant: Absent

Respondent: Absent

Ms Gachango HB for Mwaura for the 2nd Respondent

3rd and 4th Respondents: Absent

Court Assistants: Kuyiki & Njeri