



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC OS. NO. 5 OF 2019**

**PETER NZESYA MAITHYA.....APPLICANT**

**VERSUS**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, MAKUENI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this Court for determination is the Applicant's Originating Summons dated 16<sup>th</sup> February, 2019 and filed on 18<sup>th</sup> February, 2019. It is supported by the supporting and supplementary affidavits of Peter Nzesya Maithya, the Applicant herein, sworn on 16<sup>th</sup> February 2019 and 15<sup>th</sup> January 2021 respectively. He prays for the following orders against the Respondents that:

**1. Spent**

**2. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents be ordered by this Honourable Court to remove the restriction that was registered against the parcel of land known as Makueni/Kivani/1000 since there is no basis for keeping the restriction that was entered against the Registrar;**

**3. The Court do order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to remove the restriction and in default be punished by the Court for contempt of Court;**

**4. The Respondents do pay the costs of this application.**

2. The Applicant has deposed that he is the registered owner of land parcel known as Makueni/Kivani/1000, that there existed a land dispute between him and Philip Kilonzo Moki, Wallace Mutungwa Matolo, Isika Matolo and Kivanga Matolo (hereinafter referred to as the objectors) before the Minister of Lands and Settlement, that the said dispute was filed as Objection No. 342 of 1989 and subsequently decided by the Land Adjudication Officer on 18<sup>th</sup> April 1989, that the objectors applied to the Minister for consent to file a suit against the said decision which was granted, that the said decision of the Land Adjudication Officer was upheld by the High Court in Miscellaneous Case No. 11 of 1990 vide ruling dated 15<sup>th</sup> December, 1994, that there exists no other objection and or appeal either the Minister or a court of law in respect of the suit property and hence there is no basis for the pending restriction registered against the suit property by the Respondents.

3. In response, the 2<sup>nd</sup> Respondent filed a replying affidavit sworn by Caren Nyakundi; the Land Registrar Makueni, on 13<sup>th</sup> November, 2020. She deposed that there exists a pending Minister's Appeal No. 87 of 1995 which is yet to be determined and hence the reason for the pending restriction dated 9<sup>th</sup> November, 2012.

4. Both parties filed their respective submissions in compliance with the directions issued on 24<sup>th</sup> November, 2020.

5. The Applicant reiterated in his submissions dated 15<sup>th</sup> January, 2021 that he is unaware of the existence of any Appeal before the Minister touching on the suit property since the objectors had failed to appeal against the decision of the Land Adjudication Officer in Objection No. 342 of 1989. He placed reliance on the findings of J.L.A Otieno, J in High Court Miscellaneous Case No. 11 of 1990.

6. In their submissions, the Respondents stated that the Land Registrar, Makueni acted within the law as provided under Section 28 of the Land Adjudication Act in registering the restriction on the suit property. They have further defended the retention of the restriction arguing

that since the Land Adjudication and Settlement Office which advised the Chief Land Registrar to register the restriction has not been enjoined to these proceedings, then an adverse order would amount to condemning a party without a hearing. The Respondents rely on **National Gender & Equality Commission (NGEC) v Independent Electoral & Boundaries Commission (IEBC) & 3 Others [2018] eKLR**

7. I have perused exhibit PNMIV in the Applicant's supplementary affidavit which is the ruling of J.L.A Osiemo, J. In the said ruling, the High Court upheld decision of the Land Adjudication Officer having discerned a lapse by the objectors to file an appeal against the decision of the Land Adjudication Officer within 60 days of its delivery in accordance with the Land Adjudication Act, Cap 284 Laws of Kenya. Instead, the objectors had chosen to file a suit without exhausting the procedure they had submitted themselves to under the Land Adjudication Act. From the evidence before me, that ruling was never appealed.

8. I have also perused Exhibit CN6 in the replying affidavit. From the contents of the letter dated 18<sup>th</sup> September, 1995, I find it unconvincing that for a land dispute which occurred in 1989, an objection filed, heard and a decision accordingly rendered, that 6 years down the line, Appeal Case. 87 of 1995 could be filed before the Minister.

9. The provisions of Section 29 of the Land Adjudication Act outline that an Appeal to the Minister ought to be filed within 60 days of determination of such an objection. In this case, the appeal was filed six years later. Exhibit CN6 does not specify in respect of which objection the Appeal relates. It is, therefore, safe to surmise that even if such an appeal exists, the same had been dormant until 10 years later on or about 30<sup>th</sup> June, 2005 when the Green Card was opened in the Applicant's name and a Title Deed issued.

10. I have seen no evidence of an ongoing appeal before the Minister. Had there been any, by now it ought to have been concluded. There must be an end to the 30-year charade that has kept the Applicant in and out of court as well as the lands offices in an attempt to secure justice. I see no reason why I ought not to exert the discretion granted under Section 78(2) of the Land Registration Act.

10. On a balance of probabilities, I find in favour of the Applicant. The application dated 16<sup>th</sup> February, 2019 is allowed in terms prayers 2 and 4.

Signed, dated and delivered at Makueni via email this 2<sup>nd</sup> day of **March, 2021**.

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**MBOGO C.G.**

**JUDGE**

**Court Assistant: Mr. Kwemboi**