



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC PET NO 33 OF 2020**

**HEZEKIAH OMONDI ADALA.....PETITIONER**

**VERSUS**

**CHIEF LAND REGISTRAR.....RESPONDENT**

**JUDGMENT**

1. In the Petition dated 13<sup>th</sup> October, 2020 and supported by the affidavit of Hezekiah Omondi Adala, the Petitioner seeks the following reliefs:

**1. Declaration that the action of the Respondent, the Registrar of entering a Restriction upon the Petitioner's Land Reference Number 10121/1/MN without any notice to the Petitioner and/or according him a right to respond thereto is contrary to the provisions of Section 77 of the Land Registration Act, 2012, Section 4 (1) of the Fair Administrative Action Act, No. 4 of 2015 and invariably amounts to a violation of the Petitioner's fundamental rights protected by Articles 40 and 48 of the Constitution.**

**2. An order of Mandamus be and is hereby issued compelling the Respondent, the Registrar of Lands to remove/lift the restriction placed against the Land Reference Number 10121/1/MN.**

**3. A prohibitory order be and hereby issued prohibiting the Respondent, the Registrar of Lands from taking any adverse action and/or interfering in any way, whatsoever with the applicant's ownership, occupation enjoyment and exercise of his legal rights over Land Reference Number No.10121/1/MN.**

**4. General and exemplary damages for violation of the Petitioner's fundamental rights and freedoms.**

**5. Other/further orders this Honourable Court shall deem fit to grant for the ends of justice.**

**6. Costs of this petition.**

2. The Petitioner states that he is the registered proprietor and title holder of Land Reference Number 10121/1/MN having acquired and had the same registered in his name on 3<sup>rd</sup> May 2003 Original Certificate of Title being in his custody. A copy of the certificate of title has been annexed. The Petitioner states that he put up a residential house on the said property sometime in the year 2005 and have stayed therein until very recently. That he has also on several occasions offered the subject property as security for facilities from various banking institutions and the endorsement of the charges, further charge and discharges are on the certificate of title. That in all these instances the Respondent has never raised any issues over the Petitioner's said title or ownership and has always given a clean bill of health in terms of the certificate of search indicating that the Petitioner is the registered owner of the property subject only to the charges referred to above. A copy of the search certificate dated 11<sup>th</sup> May, 2019 has been annexed. The Petitioner avers that he has always relied on the said assurance of the Respondent and even before acquiring the said title, he had the expectation legitimately that the register as reflected by the Respondent is the true reference of the position regarding the subject property.

3. The Petitioner's case is that sometime in July 2020, out of an urgent need to secure capital for a tender project that he secured with the Kenya Ferry Services, the Petitioner decided to dispose of the subject property whereof he obtained the Discharge of charge and the original certificate of titles for purposes of effecting the discharge from SBM Bank (the successor in title of Chase Bank Limited). The Petitioner has exhibited a copy of a letter dated 26<sup>th</sup> June 2020 from SBM Bank releasing the original title and the discharge of Charge duly franked awaiting registration. The Petitioner states that he entered into an agreement with an intended buyer for the sale of the subject property and for purposes of acquiring capital to finance the tender project being undertaken. A copy of the sale agreement has been annexed.

4. The Petitioner states that his advocates duly lodged the Discharge of Charge and transfer for franking and registration together with the Original title deed after the purchaser had paid the necessary stamp duty. Copies of the stamp duty receipt and transfer documents duly franked are also annexed. The Petitioner states that the Respondent failed to effect the transfer, at first stating orally to the Petitioner's advocates that the subject file was missing without giving any definite explanation for the same. That upon the Petitioner's advocates insistence; the Respondent claimed that the subject property had a restriction. It is the Petitioner's contention that the said property had never had any restriction and the same has always been clean except for the charges duly placed at the Petitioner's instance. That the Petitioner through his advocates on 24<sup>th</sup> July 2020 wrote to the Respondent asking for the removal of the said restriction, which letter was not responded to nor the restriction lifted. That to date the Respondent has not lifted the restriction nor offered a plausible reason or basis upon which the said restriction was placed. A copy of the letter dated 24<sup>th</sup> July 2020 and a search conducted on 1<sup>st</sup> September, 2020 have been annexed.

5. It is the Petitioner's case that the Respondent's action is arbitrary and whimsically placing a restriction on the property is unlawful, capricious and unreasonable and goes against all known dictates of law and fair hearing. That the said restriction was placed on an unknown date and without any notice to the Petitioner or even an invitation to be heard before the said decision was made. That the same goes against the Petitioner's legitimate expectation and fair hearing as dictated by law.

6. The Petitioner states that what surprised him more was that upon taking back his documents previously lodged with the Respondent, the Respondent shamelessly and clandestinely endorsed the said entry of restriction into the Petitioner's original titled deed and backdated the same to 29.06.2016 without signing thereof. A copy of the title deed with the said entry of restriction has been annexed. The Petitioner avers that the said restriction could not have been there when all along the original title was with the bank until the same was released to the Petitioner who states that he has always been in full custody of the same. The Petitioner argues that the actions of the Respondent are reprehensible and does not reflect the integrity bestowed upon and required of the said public officer and the court ought to and has powers to issue remedy against such high handedness. That the Petitioner's rights as guaranteed by the constitution have been contravened by the Respondent through the action of placing a restriction on the Petitioner's property without hearing and amounts to arbitrarily taking away the Petitioner's property. That being a public officer, the Respondent is bound by the constitutional edicts on the national values and principles of governance captured by Article 10 of the Constitution which demands the exercise of the Rule of Law, human dignity, equity, social justice, human rights, transparency and accountability. It is the Petitioner's case that the Respondent's actions fail the requirement of transparency and accountability and expressly outside the rule of law. The Petitioner states that he stands to suffer irreparable loss that cannot be remedied in any way since he intended to channel the proceeds of the transaction towards a project tender construction he was engaged to do.

7. In their written submission filed on 13<sup>th</sup> February, 2021, the Petitioner's advocates, Messrs.' Musa Boaz & Thomas Advocates submitted that Article 40 of the Constitution protects every person's proprietary rights under the law. That the Petitioner's title was issued under Registered Land Act (repealed) and the same has not been challenged in any court of law, and therefore the Respondent cannot assert a right inconsistent with the title without following due process. They cited Articles 40 and 47 of the Constitution and relied on the case of **Multiple Hauliers East Africa Limited –v- The Attorney General & 10 Others (2013) eKLR** where it was reiterated that "private property is protected and may not be taken arbitrarily without due process." The Petitioner's advocates further cited the provisions of Section 3, and 4 of the Fair Administrative Action Act, Sections 24, 25, 76 and 77 of the Land Registration Act and relied on the case of **Bamburi Cement Limited –v- Chief Registrar (2018)eKLR**. Regarding the doctrine of legitimate expectation and the relief sought, the Petitioner relied on the case of **Communication Commission of Kenya & 5 Others –v- Royal Media Services Ltd & 5 Others (2014) eKLR**; **R-v-Chief Immigration Officer (1976)3 AER 843** as quoted in **Peter Andera Masakhalia –v- County Government of Kakamega (2019)eKLR**; **Susan Sambai Choge & 4 Others –v- Land Registrar & Another (2016)eKLR**; **Republic –v- Kenya National Examinations Council Ex Parte Gathenji & 8 Others (1997)eKLR**. It was submitted that the Petitioner was entitled to notice by virtue of Articles 47 and 50 (10) of the Constitution and Section 76 of the Land Registration Act. They relied on the case of **Itrade Company Limited –v- Jane Mukami Mwangi & Another (2015)eKLR** where a caveat placed on a property without notice to the registered owner was removed by the court, the court noting that under Section 78 (2) of the Land Registration Act, it is empowered to intervene and either remove or vary the restriction or issue any other appropriate order. The Petitioner also relied on the case of the **Republic –v- Chief Registrar & Another Ex-Parte Patrick Mbau Malika & 6 Others (2017) eKLR**. The Petitioner submitted that he has demonstrated that the restriction affected him and is entitled to a high general damages of Kshs.2,500,000/=. The Petitioner relied on the case of **Geoffrey Kirimi Itania –v- Chief Land Registrar & 3 Others (2018)eKLR** and **Multiple Hauliers East Africa Limited (supra)** and urged the court to allow the petition with costs.

8. The Respondent opposed the petition and filed a replying affidavit sworn by Josephine Rama, the Land Registrar, Mombasa on 15<sup>th</sup> December, 2020. The Respondent's case is that as per the records at the Land office, the suit property, Land Reference Number 10121/1/MN; CR 32130 is registered in the name of Hezekiah Omondi Adala, the Petitioner herein. That the Land Registrar on 2<sup>nd</sup> Decembers, 2019 received a letter dated same day from Coast Water Works Development Agency Containing a list of various parcels of land situated within Mombasa County. That the letter requested the Land Registrar to place restrictions and/or caveats on the listed parcels of land which included the suit property herein. A copy of the letter has been annexed. That the letter clearly indicated that the Agency, Coast Water Works Development Agency which inherited land from the National Water and Pipeline Corporation conducted searches on the land in or about the years 2017 and the revelation from the searches was that the aforementioned land had been grabbed, subdivided and transferred to 3<sup>rd</sup> parties to create an impression of bona fide purchasers for value without notice. This includes the Petitioner herein. That the Land Registrar under Sections 76 of the Land Registration Act has discretionary power to place a restriction once he receives a request and/or an application to do so and he/she finds it appropriate and necessary in the circumstances. That having received the same application from the Government Agency, namely Coast Water Development Agency, the Land Registrar was mandated to do so to ensure the preservation of the suit property. That it is not clear whether the Petitioner has officially made an application to remove the restriction which will prompt the Registrar to call both parties alleging ownership for a hearing at the lands office to enable him/her to either remove or not to remove the restriction depending on the findings of the hearing of both parties. That the Coast Water Works Development Agency is in a better position to explain further on the suit property. The Respondent states that as the registrar, he only acted on the application brought as per his mandate and that he has the discretion as set out under Section 76 of the Land Registration Act for purposes of preserving the property after receiving a request accordingly. The Respondent prayed that the petition be dismissed as he did nothing wrong or out of his set out mandate. The Respondent's counsel, Mrs. Waswa for the Attorney General did not file any written submissions and relied entirely on the replying affidavit.

9. Having considered the pleadings and submissions, the issue for determination is whether the petition is merited and whether the orders sought herein should be granted or not.

10. It is not in dispute that Land Reference Number 10121/1/MN CR 32130 is registered in the name of Hezekiah Omondi Adala, the Petitioner herein. The Petitioner's claim is that the Respondent placed a restriction on the land without notifying the Petitioner and without inviting him for a hearing. On his part, the Respondent avers that the restriction was placed pursuant to a letter dated 2<sup>nd</sup> December, 2019 from Coast Water Development Agency. It is not denied that the Petitioner was not notified or given an opportunity to be heard before the restriction was placed. The Respondent has merely stated that it is not clear whether the Petitioner herein has officially made an application to remove the restriction. The Petitioner has however stated under oath that he wrote to the Respondent but his letter did not receive any response nor was the restriction lifted, hence this suit.

11. In the case of **Susan Sambai Chone & 4 Others –v- Land Registrar & Another (supra)**, Ombwayo J stated as follows:

*“This court finds that the right to be heard is so cardinal that it cannot be wished away and that it is not proper in law to make a decision and to purport to hear the parties thereafter. Section 136 of the Registered Land Act (repealed) envisaged all parties interested in the outcome of the decision to place restriction on the parcel of land to be heard before the making of the said decision. This Section provided that 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, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge. Subsection (2) provides that a restriction may be expressed to endure for a particular period; or until occurrence of a particular event; or until the making of a further order, and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions and restrictions shall be registered in the appropriate register.*

*Section 76(1) of the Land Registration Act No.3 of 2012 which is a replica of Section 136 of the Registered Land Act provides that the foregoing provision envisage the hearing of the persons interested before making a decision but not making a decision to place a restriction on the title before hearing the parties. I do find that the decision by the 1<sup>st</sup> defendant is tainted with procedural impropriety as it was made without affording the plaintiffs a hearing and therefore illegal.”*

12. In the case of **Multiple Hauliers East Africa Limited –v-Attorney General & 10 Others (supra)**, Mumbi Ngugi J. stated thus:

*“40. This court has on several occasions emphasized the need for administrative actions to be carried out procedurally. Where a public authority's actions are likely to deprive individuals of their fundamental rights and freedoms, it is crucial that such actions be carried out through due process and in respect to the rules of natural justice.....”*

13. I am persuaded by the above decisions. The Petitioner has alleged violation of the right to legitimate expectation. He urged the court to find that he had a legitimate expectation on the free enjoyment of the suit property, since May 2003. In the case of **Council of Civil Service Unions and others –v- Minister for the Civil Service (1985) AC 374 (408 – 409)**, it was observed that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The petitioner averred that he wanted to dispose of the property out of an urgent need to raise capital for a tender project, and that the actions by the Respondent's and the failure to remove the restriction has affected him which thus calls for this court's action. I note however that the value of the alleged tender project has not been given to guide the court in determining the appropriate damages to award. No doubt the Petitioner is entitled to general damages for violation of his right to fair administrative action. A more troubling issue is that whereas the Respondent contends that he acted pursuant to a letter dated and received on 2<sup>nd</sup> December, 2019 from Coast Water Works Development Agency, surprisingly, the copy of title exhibited indicates that the registration of the impugned restriction was back dated to read 29<sup>th</sup> May, 2016. The court without hesitation, agrees with the Petitioner that the said restriction could not have been there when all along the original title was with the banks. There was no explanation from the Respondent in that respect. It is evident that the Respondent took a route meant to mislead and to frustrate the Petitioner without following the procedure laid down by law.

14. The upshot is that the court finds that the petition dated 13.10.2020 is merited and grants the following prayers:

**a. A declaration is hereby issued that the restriction imposed on Land Reference Number 10121/1/MN is oppressive, unjustified and unlawful and the same is hereby removed.**

**b. A prohibitory order is hereby issued prohibiting the Respondent from taking any adverse action and/or interfering in any way whatsoever with the Petitioner's ownership, occupation, enjoyment and exercise of his legal rights over the said parcel of land without due process of law.**

**c. Kshs.1,000,000.00 general damages.**

**d. The Petitioner shall also have the costs of this petition against the Respondent.**

15. Orders accordingly.

**DATED, SIGNED and DELIVERED virtually at MOMBASA this 24<sup>th</sup> day of May, 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**