



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**MISC CIVIL APPLICATION NO. 5 OF 2020**

**ERICKLYNE MBUGUA OMANWA.....1<sup>ST</sup> APPLICANT**

**JACKLINE MAMTHEI KOMENA akaPROSISTER MAMTHEI KOMENDA**

**( Suing on her own behalf and on behalf of the estate ofFESTUS KOMENDA**

**OGATO (DECEASED).....2<sup>ND</sup> APPLICANT**

**VERSUS**

**EDWARD PETER NJOROGI.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

What is before Court for determination is the Applicants' Notice of Motion application dated the 9<sup>th</sup> January, 2020 where they seek the following orders:

1. That this Honourable Court do issue an order declaring that a restriction filed by the 2<sup>nd</sup> Respondent's employees, servants and/or agents against land parcels No. KJD/ KITENGELA/ 19747 and KJD/ KITENGELA/ 19746 on 2<sup>nd</sup> July, 2019 is illegal and amounts to interference with legally binding court orders.
2. That having so declared as prayed above, this Honourable Court further be pleased to issue an order directing the Land Registrar, Kajiado to immediately and unconditionally remove the said restrictions.
3. That an order do issue directing the Director of Criminal Investigations (DCI) to investigate the activities of the office of the DCIO, Rongai Police Station with a view to establishing circumstances in which titles NO. KJD/ KITENGELA/ 19747 and KJD/ KITENGELA/ 19746 were restricted in the face of clear and express court orders and take appropriate disciplinary action to anyone found culpable.
4. The costs of this application be provided for.

The application is premised on the grounds on the face of it and the joint supporting affidavit of ERICKLYNE OMANWA and JACKLINE KUMENDA. They confirm that ERICKLYNE OMANWA is the registered proprietor of land parcel number KJD/ KITENGELA/ 19747 while JACKLINE KUMENDA jointly with her late husband FESTUS KUMENDA jointly own KJD/ KITENGELA/ 19746 respectively. They explain that they purchased the suit lands when they were vacant but in 2006 when they returned to it, they found the 1<sup>st</sup> Respondent thereon and attempts to make him vacate failed. They instituted ELC Case No. 76 of 2019 (formerly Machakos ELC No. 183 of 2011) which was determined in their favour on 26<sup>th</sup> February, 2018 but despite the Decree therefrom, the 1<sup>st</sup> Respondent has declined to vacate the suit lands. Further, despite waiving costs from the said suit, in order for the 1<sup>st</sup> Respondent to vacate, he has failed to do so. They claim the 2<sup>nd</sup> Respondent's employee or servants from Rongai CID office has since registered a restriction against the suit lands. They state that the 1<sup>st</sup> Applicant has severally been summoned by the Rongai Police Station and despite referring to the aforementioned judgement, they insist they will investigate until 1<sup>st</sup> Respondent got his land.

The 1<sup>st</sup> Respondent opposed the application by filing a replying affidavit where he deposes that around 1996, he bought 10 acres from one Mr. Ibrahim Iee Sondai at agreed purchase price of Kshs. 200,000 and after completing payment, he was allowed by the vendor to occupy as well as develop the land. He contends that since 1996, he has stayed on the parcel of land without any interruption whatsoever and all his family live thereon. He confirms instituting a case against Lei Sondai in Machakas Chief Magistrates Court where judgement was granted in his favour. He contends that the Director of Criminal Investigation restricted the land pending the investigation of obtaining money by false pretences by the said Ibrahim Lei Sondai. Further, the portion claimed by the Applicants is part of the larger ten (10) acres that was sold to him. He is opposing the removal of the restriction as this would most likely extinguish his claim as against the said Ibrahim Sondai. He reiterates that the Applicants are not being candid with the court as he had settled on the suit land for eight (8) years before their alleged purchase of the same. He denies having a relative working with the Directorate of Criminal Investigation.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the application and filed a replying affidavit sworn by GODFREY GICHOHI, the Investigating Officer who deposes that the 1<sup>st</sup> Respondent filed a complaint dated 4<sup>th</sup> June, 2019, through the Directorate of Criminal Investigations which was assigned to him. He explains that the 1<sup>st</sup> Respondent had entered into a Sale Agreement for land parcel number KAJIADO/ KITENGELA/ 13577 measuring 10 acres with one Ibrahim LEI ELE Sondai for Kshs. 200,000 which he paid in full in 1996. Further, the said vendor never submitted transfer documents to the 1<sup>st</sup> Respondent, who took possession of the said land in 1998 and constructed a permanent house as well as undertook developments thereon. He avers that Ibrahim LEI ELE Sondai was charged at the Kibera Law Courts vide Court file No. 5137 of 2010 for the offence of obtaining money by false pretense but acquitted under section 210 of the Criminal Procedure Code. Further, the 1<sup>st</sup> Respondent filed Machakos Civil Suit No. 583 of 2012 against the said vendor. Further, based on search done at the registry land parcel number KAJIADO/ KITENGELA/ 13577 was closed on subdivision which gave rise to KAJIADO/ KITENGELA/19376. He states that Ibrahim LEI ELE Sondai subdivided Land Parcel Number KAJIADO/ KITENGELA/ 19376 into 19745, 19746 and 19747 respectively. Further, he proceeded to sell KAJIADO/ KITENGELA/19746 and KAJIADO/ KITENGELA/19747 to the 1<sup>st</sup> and 2<sup>nd</sup> Applicants as well as transfer KAJIADO/ KITENGELA/19745 to his son Jeremiah Mainko Kidienye. He reiterates that the office of the DCI Ongata Rongai placed a restriction on KAJIADO/ KITENGELA/ 19745, 19746, 19747 for purposes of preserving the suit lands pending investigations in order for the registered owner to appear and record statement to aid in the said investigations. He highlights how the investigation has changed hands and insists the Applicants do not state any act of ultra vires and the matter is still under investigation hence the application has been filed in bad faith, misconceived as well as an abuse of the court process.

The Applicants filed a further affidavit where they reiterated their claim and insist the 1<sup>st</sup> Respondent is unable to implement the judgement delivered in Machakos CM C No. 583 of 2012 as he obtained the same by misleading the court. Further, that they are not parties to the investigations.

The application was canvassed by way of written submissions.

#### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 9<sup>th</sup> January, 2020 including the rivaling affidavits and submissions, the only issue for determination is whether the restriction placed on land parcel numbers KAJIADO/ KITENGELA/ 19746 and 19747 should be lifted.

The Applicants in their submissions reiterated their claim and relied on case of **the Commissioner of Police & Anor V Kenya Commercial Bank Limited & 4 Others (2013) eKLR** to support their arguments.

The 1<sup>st</sup> Respondent in his submissions reiterated his claim and insists he has been on the suit land. He confirmed filing a complaint against Ibrahim Lei Ele Sondai after the judgement was delivered in ELC Case No. 76 of 2017. To buttress his averments, he relied on the case of **Martha Chelal & Another V Elijah Kipkemoi Boiywo & 2 Others (2019) eKLR and John Muthusi Mweke Vs Mosoi P. Parkut (2020) eKLR**.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their submissions contend that they properly adhered to the legal procedures to enter a restriction on the suit lands. To buttress their averments, they relied on the following decisions: **Republic Vs Kenya Revenue Authority Ex Parte Yaya Towers Limited (2008) eKLR; and Joyce Cherop Kaspany & 609 Others Vs Kenya Power & Lighting Company ( 2019) eKLR**.

Before I proceed to deal with the aforementioned issue, I wish to provide an excerpt of the final Judgement in Kajiado ELC Case No. 76 of 2017 between the Applicants (Plaintiffs) and 1<sup>st</sup> Respondent (Defendant) where the Court Ordered as follows:

**a. The Plaintiffs be and are hereby declared the absolute proprietors of land parcels number KAJIADO/KITENGELA/19747 and KAJIADO/KITENGELA/19746 respectively.**

**b. The Defendant be and is hereby evicted from Land parcels number KAJIADO/KITENGELA/19747 and KAJIADO/KITENGELA/19746 respectively.**

**c. Permanent injunction be and is hereby issued restraining the Defendant by himself or through his agents and/or servants from in any way whatsoever interfering with land parcels numbers KAJIADO /KITENGELA /19747 and KAJIADO /KITENGELA /19746 respectively.**

**d. The costs of the suit are awarded to the Plaintiffs**

I note this Judgement was delivered on 25<sup>th</sup> February, 2018 and the 1<sup>st</sup> Respondent lodged a fresh complaint to the DCI in 2019. Further, the 1<sup>st</sup> Respondent has not indicated whether he lodged an appeal or sought to review the said Judgement.

Be that at it may, I will proceed to highlight the legal provisions governing registration and removal of restrictions. Section 76 of the Land Registration Act stipulates 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.**

While Section 78 of the Land Registration Act makes provisions on Removal and variation of restrictions by stating thus:’ **(1) 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. (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.’**

The parameters on registration and removal of restrictions is well described in the legal provisions I have cited above.

*I note the Applicants were declared the absolute proprietors of the suit lands while the 1<sup>st</sup> Respondent declared a trespasser therein in the aforementioned Civil Suit. Further, the 2<sup>nd</sup> Respondent confirms the 1<sup>st</sup> Respondent lodged a complaint dated 4<sup>th</sup> June, 2019, through the Directorate of Criminal Investigations in respect to the suit lands. I note in the Machakos Court, the Court actually observed that the 1<sup>st</sup> Respondent failed to inform court that the land he was claiming from Ibrahim ELE Sondai had already been subdivided by the time he filed the said suit. Further, the 1<sup>st</sup> Respondent confirmed filing a complaint against Ibrahim Ele Sondai after the judgement was delivered in Kajiado ELC Case No. 76 of 2017.*

Based on the facts as presented while relying on the legal provisions cited above, and having held in Kajiado ELC Case No. 76 of 2017 that the Applicants were the proprietors of the suit lands, this Court has discretion to remove any restriction placed on the suit lands. From the said legal provisions cited above, it is evident that a restriction can only be entered against a parcel of land upon contacting the owner. Further, restriction cannot subsist indefinitely and a Court is mandated to remove it. Further, this Court finds that in accordance with Sections 3A and 63(e) of the Civil Procedure Act, it has powers to make necessary orders for end of justice to be met. By directing for the lifting of a restriction herein, this Court will be exercising its discretion by granting necessary orders which will ensure that the end of justice is met. To my mind, I do not see any reason why the restriction should subsist and will direct for its removal. I beg to disagree with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that they properly adhered to the legal procedures to enter a restriction on the suit lands. Further, I find that the authorities the Respondents have cited to support their arguments are not relevant at this juncture as a court of competent jurisdiction already made a determination that the Applicants were absolute proprietors of their land. *I opine that investigation by a Police Officer cannot supersede an order of the Court where the said Court has already made a determination over ownership of the said land.*

It is against the foregoing that I find the application dated the 9<sup>th</sup> January, 2020 merited and will allow it with costs to be borne by the Respondents. I will proceed to make the following final orders:

- a. That a declaration be and is hereby made that a restriction filed by the 2<sup>nd</sup> Respondent’s employees, servants and/or agents against land parcels No. KJD/ KITENGELA/ 19747 and KJD/ KITENGELA/ 19746 on 2<sup>nd</sup> July, 2019 is illegal and amounts to interference with legally binding court orders
- b. An order be and is hereby issued directing the Land Registrar, Kajiado to immediately and unconditionally remove the restrictions on land parcel Nos. KJD/ KITENGELA/ 19747 and KJD/ KITENGELA/ 19746.
- c. The Costs of the application is awarded to the Applicants.

**DATED    SIGNED    AND    DELIVERED    VIRTUALLY    AT    KAJIADO    THIS    15<sup>TH</sup>    DAY    OF    JUNE,    2021**

**CHRISTINE OCHIENG**

**JUDGE**