



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL APPEAL NO 21 OF 2015**

**LUCY WAMBUI MUNYAKA.....APPELLANT**

**VERSUS**

**PETER NJENGA WAWERU.....RESPONDENT**

*(Being an Appeal from the ruling of Hon. E. Michieka Senior Resident Magistrate in SPMCC No 3 of 2009 at Kikuyu)*

**JUDGEMENT**

1. This appeal arises from the ruling of Honourable E. Michieka (Senior Resident Magistrate) delivered on 23<sup>rd</sup> March 2015 in Kikuyu SPMCC No 3 of 2009. The Honourable Learned Trial Magistrate made the following orders:-

*“1. That the restriction lodged on 5<sup>th</sup> March 2009 be removed.*

*2. That costs be to the Applicant.*

*3. That 30 days stay of execution be and is hereby granted”.*

2. The Appellant being dissatisfied with the said ruling filed an appeal to this court dated 8<sup>th</sup> April 2015, on the following grounds:-

*1. The learned Magistrate erred in law and fact by holding that the court has the capacity to deal with the matter or removal of restrictions contrary to the Land Registered Act 2012 which preserves jurisdiction of High Court under the Environment and Land Court and pursuant to Article 162(2) of the Constitution of Kenya.*

*2. The Learned Magistrate erred in law and fact by holding that the main and only issue before the court for determination was whether the court was seized of jurisdiction, whereas there were other several issues for determination which the court ignored.*

*3. The Learned Magistrate erred in law and fact by holding that the dispute was transferred to the court from now the defunct Land Dispute Tribunal when indeed there was no such transfer.*

*4. The Learned Magistrate erred in law and fact by failing to take note that the restriction was imposed pending the hearing and determination of Appeal No 4 of 2009 and no JRELC No 2009.*

*5. The Learned magistrate erred in law by not applying the law on the removal of restriction.*

*6. The Learned Magistrate erred in law and fact by not taking into account all the submissions made by the Appellant.*

3. It proposed to ask:-

*1. That this appeal be allowed and the ruling of 23<sup>rd</sup> March, 2015 be set aside with costs to the Appellant.*

4. On the 17<sup>th</sup> November 2020, the court with the consent of the parties directed that the Appeal be canvassed by way of written submissions.

**The Appellant's Submissions**

5. They are dated 12<sup>th</sup> February 2021. The restriction was registered on 5<sup>th</sup> May 2019 prohibiting any dealings in the Title No Muguga/Kanyariri/T.104 pending hearing and determination of Appeal Number 4 of 2009 dated 26<sup>th</sup> February 2009. In the Replying Affidavit sworn on 11<sup>th</sup> December 2004 (page 10) the Appellant had demonstrated that Appeal Number 4 of 2009 has not been heard and determined. The same had been transferred to Environment and Land Court and is pending hearing and determination as per the directions in the Gazette Notice No 105 by the Chief Justice.
6. The Respondent in his Notice of Motion dated 13<sup>th</sup> October 2014 (page 3) simply applied for removal of the restriction since land case No 3 of 2009 had been finalized and judgment delivered. However, in his own admission, he confirmed the restriction (page 7) was imposed pending hearing and determination of Appeal Number 4 of 2009.
7. The Honourable trial Magistrate in his ruling (page 45) erred in fact and in law by making a finding that since Kikuyu Land Case Number 3 of 2009 had been finalized and a decree issued on 13<sup>th</sup> June 2004, the restriction was to be removed. The trial court failed to consider that the restriction was not based on formalization of Land Case Number 3 of 2009 but Appeal No 4 of 2009 which is still pending.
8. The issue of restriction was matter before the Environment and Land Court hence the respondent ought to have filed the Notice of Motion before the Environment and Land Court as the Lower court was *functus officio* in the matter and had no jurisdiction to deal.
9. She has relied on Section 76 of the Land Registration Act, 2012. The Lower Court erred in law by ordering the removal of the restriction since Appeal 4 of 2009 is still pending. The Lower Court had no power to remove a restriction upon an application. The court in Section 78 (2) of the Land Registration Act, 2012 is the Environment and Land Court. There is no evidence to suggest that the trial magistrate was gazetted a to deal with land matters.
10. The dispute in the tribunal was not transferred to the Lower Court but adopted as the judgment of the court being an Award. A decree was issued and the matter was closed. There was nothing pending before the Lower Court. The court was therefore *functus officio* and hence no jurisdiction to hear the matter. She prays that the appeal be allowed.

#### **The Respondent's Submissions**

11. They are dated 14<sup>th</sup> April 2021. The Appellant has not shown any orders staying the issuance of the decree on the subsequent lifting of the restriction placed on the subject parcel of land. A mere filing of the Appeals does not operate as a stay to orders issued by a court. Indeed, one would have to move the court in order to obtain such order. The pending of a Judicial Review Application does not operate as a stay unless a judgment is issued to this effect.
12. The Appellant has failed to move the court with regards to hearing of the Appeal filed at the Nyeri Provincial Appeals Tribunal which in effect would form the basis upon which the court may infer an Appeal following the dissolution of the Land Tribunals Disputes. The court had jurisdiction to entertain this matter and the application before it.
13. The Appellant has not shown any orders to maintain the status quo as alluded to in their submissions and as such there was nothing barring the subordinate court from lifting the restriction. He has relied on Section 76 (2) and 78(2) of the Land Registration Act, 2012.
14. Upon the dissolution of the Land Disputes Tribunals by operation of law coupled with the Appellant's failure to set the Appeal for hearing since the year 2009, the subordinate court acted rightfully to remove the restriction placed on the parcel of land. He prays that the Appeal be dismissed with costs and the ruling of the subordinate court be upheld.
15. I have considered the grounds of the appeal and the written submissions filed on behalf of the parties. It appears to me that the only issue for determination is whether the Honourable Learned Trial Magistrate erred in law and in fact by lifting of the restriction.
16. In her Replying Affidavit to the Notice of Motion dated 13<sup>th</sup> October 2014, the Appellant herein in paragraph 13 states:-

***“That it is not true therefore that this matter has been finalized since it has to await hearing of Appeal No 4 of 2009. See L-6”.***

17. I have gone through the Record of Appeal (page 22). There is a letter dated 16<sup>th</sup> February 2009 from the Provincial Commissioner Central Province to the District Commissioner Kiambu West District confirming that the Appellant had preferred an Appeal. It also requested that: ***“status quo be maintained until the appeal is heard and determined by the Provincial Land Disputes Appeals Committee.”***

I note that this letter was copied to the Senior Resident Magistrate Kikuyu, the Appellant, the Respondent and the Land Registration, Kiambu.

18. On page 7 of the Record of Appeal there is a certificate of search in respect of Muguga/Kanyariri/T.104. It shows that on 5<sup>th</sup> March 2009 a restriction was placed. No dealings vide Land Appeal Case No 4 of 2009 is heard and determined.

19. **Section 76** of the Land Registration Act, 2012 provides 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 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.*

Section 78 of the Act, 2012 provides that:-

(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.*

It is not disputed that Appeal No 3 of 2009 is still pending. It is also not in doubt that under the Environment Land Court Act, "the court" means the Environment Land Court Act No 19 of 2011.

20. I agree with counsel for the Appellant that the issue of restriction was pending before the Environment Land Court hence the Respondent ought to have approached that court to have the restriction lifted.

21. I also agree with the Appellant's submissions that the Lower Court adopted the Award from the Tribunal as the judgment of the court. After it adopted the said Award, the Lower Court became *functus officio* and had no jurisdiction to entertain the Notice of Motion dated 13<sup>th</sup> October 2014.

22. The Restriction placed was specific. That it was to subsist until the Appeal No 3 of 2019 was heard and determined. The Respondent states that the Appellant failed to prosecute the said Appeal. There is nothing to show that the respondent took any steps to have the Appeal dismissed. There is no evidence that he attempted to move the Provincial Appeals Committee to hear the appeal before he sought to have the restriction lifted.

23. In the case of **Nyaga Nderi vs James Nyaga Kinyua [2012] eKLR** it was stated:-

*"13. It is pertinent also to bear in mind the purpose meant to be served by the restriction. In this regard, I understand the restriction is raisin d'etre to be preservation of the disputed land until the pending issues are resolved. The respondent filed a suit in the lower court and lost. But he is not done yet. He has filed an appeal. The applicant would have us believe that there is no appeal but his reasons for such a stand seems weak and unhelpful. What the respondent is being faulted for regarding the appeal is not fatal and can easily be rectified. It appears clear to me that there is still need to preserve the disputed land until all the legal processes a head are exhausted".*

I am guided by the above authority in finding that the Honourable Learned Trial Magistrate erred in law and in fact by failing to take note that the restriction was imposed pending the hearing and determination of appeal No 4 of 2009.

24. I find merit in this appeal and the same is allowed. Consequently, the ruling of 23<sup>rd</sup> march 2013 is hereby set aside. The appellant shall have costs of this appeal

It is so ordered.

**Dated, signed and delivered in Nairobi on this 29<sup>th</sup> day of July 2021.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. J. Nyakiangana for the Appellant

Mr. Kamau for the Respondent

