



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 256 OF 2013

TERESIA MABUTI NJAGARA.....PLAINTIFF/APPLICANT

VERSUS

NJAGARA NGURE.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated 08th February 2021 and supported by an affidavit of even date, the Applicant herein approached the Court seeking the following orders:

- i. That the Land Registrar Siakago do remove all restrictions/cautions placed against land parcel No. LR Nthawa/Riandu/1834 forthwith;**
- ii. That the Land Registrar Siakago do dispense with the production of the original title deed for land parcel No. LR Nthawa/Riandu/1834;**
- iii. That the costs of the application be provided for in any event.**

2. The Applicant's prayers are grounded on the following premises:

- a. That the suit herein was determined on 20th April 2015;
- b. The decree was issued for the parties to share in equal portions the matrimonial properties;
- c. The Respondent has now filed a restriction on LR Nthawa/Riandu/1834 alleging that the original title deed is lost/ cannot be found;
- d. The parcel of land has been surveyed but the Land Registrar Mbeere South Siakago has not been able to register and issue the respective titles due to the non-availability of the original title deed and the restriction placed by the Respondent;
- e. It is imperative that the said orders be granted in order to give effect to the decree in the suit.

3. The Applicant's application is unopposed. Vide an affidavit of service filed on 09th March 2021 Fiona Wangechi Kimata, an advocate of the High Court avers that copies of the Applicant's notice of motion were duly served on Respondent's firm of advocates, R. Muthike Makworo & Co Advocates, on 3rd March 2021. Having been served, the Respondent has not filed any affidavit in opposition to the Applicant's application.

4. The court has considered the notice of motion application and the supporting affidavit thereto. Indeed, judgement was entered in this suit in favour of the Plaintiff/Applicant on 20th April 2015. The court made the following orders therein:

- a. That LR No Gatari/Githimu/1235 be surveyed and subdivided into two equal portions to be given to each of the parties. Survey and other necessary fees to be shared equally;
- b. That LR Nthawa/Riandu/1834 to be surveyed and subdivided into equal portions to be given to each of the Parties. Survey and other necessary fees to be shared equally;

c. That in the alternative, the properties to be valued and sold and each party to get half of the proceeds with the option of either party buying off the other party's share of the valued property with a view to retaining the land. Valuation and other necessary fees to be shared equally.

5. The Applicant avers that she has faced difficulty in executing the decree. That the Respondent first refused to sign the transfer documents necessitating the court to issue orders on 9th May 2019 authorizing the Deputy Registrar to execute the necessary transfer documents. On 25th January 2021, mutation forms were lodged with the Land Registrar Siakago who declined to process the respective title deeds on account of the restriction placed by the Respondent against the LR Nthawa/Riandu/1834 on 28th January 2021 curtailing dealings on the land without the physical presence of the owner, ostensibly on account of a lost title deed.

6. The power to lift restrictions placed on land is donated by **Section 78 of the Land Registration Act, No. 3 of 2012**. The Section provides as follows:

‘78. Removal and variation of restrictions

(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 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.’ (Underline, mine)

7. A reading of the Section demonstrates two ways in which a restriction can be removed. First, by the Registrar on application of any interested person, subject to the notification and granting opportunity of the affected parties to be heard. Secondly, by the Court, upon the application of a proprietor affected by the restriction and subject to the notification of the Registrar.

8. It is evident that the Court has power to remove a restriction only where such application is made by a proprietor of the land upon which the restriction is placed. **Section 2 of the Land Registration Act, No. 3 of 2012** defines a proprietor as a person named in the register of land or lease as the proprietor.

9. Since the suit land herein is registered in the names of the Respondent only, it appears that the court-led removal of the restriction is unavailable to the Applicant. The Applicant, not being a proprietor, is limited to the route provided under by **Section 78(1) of the Land Registration Act, No. 3 of 2012**. It is therefore inaccurate for the Applicant or for the Land Registrar Siakago to deem that the office of the Land Registrar's hands are tied.

10. Again, on the question of dispensing with the production of the original title deed, **Section 31 of the Land Registration Act, No. 3 of 2012** is instructive. The section reads thus:

‘31. Production of certificate

(1) If a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease.

(2) Where the disposition is a transfer, the certificate shall, when produced, be cancelled, and in that case a new certificate may be issued to the new proprietor.

(3) Where the disposition is a charge, the certificate shall be delivered to the charge.’ (Underline, mine).

11. Numerous decisions have underscored the fact that the discretion to dispense with the production of an original title deed lies with the Registrar and that a court order is not necessary to permit the land registrar to exercise this discretion. See the decision in:

In re Estate of Phillip KiogoTunga (Deceased) [2020] e KLR, where the court pronounced itself as follows:

“Be that as it may, I am aware that production of the original title deed is the general requirement in registration of transfer of land. Nonetheless, I have lamented times without number in this jurisdiction about failure by registrars to exercise discretion provided in law to dispense with production of original title deed in appropriate cases...The import of the above provision is that the Land Registrar has power to dispense with the production of the original title. There is no requirement that exercise of the power is dependent upon a Court order to do so...I will couple the power in section 31 with the power of the Land Registrar under section 14 of the Land Registration Act to require any person to produce any instrument certificate or other document or plan relating the land , lease or charge in question, and that person shall produce the same; summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation... Land Registrars should exercise the discretion and power given to them by statute. Failure thereto may become a subject of mandamus proceedings- something I think is not desirable to be in the file of a public officer.’

12. A reading of **Section 31 of the Land Registration Act** reveals that the Land Registrar is vested with the discretion to dispense with the production of an original title deed. The correct procedure then, where a party desires the exercise of this discretion in its favour, is to request

the Land registrar in writing citing reasons for why they ought to be allowed not to produce the original title deed. Only where the registrar refuses to exercise that discretion should the party move to court if aggrieved by the registrar's decision.

13. See also the decision in *Bethwel Mwangi Githinji & 2 others v Harrison Wachira Wanjohi & another [2019] e KLR*:

“I have perused the copies of the documents in support of the application to wit the transfer of land, land control board application, application for registration form dated the 6/10/18, letter of consent and the valuation of requisition of stamp duty. It is the Applicants case that the Land Registrar has refused to register the documents. There is no evidence that the Land Registrar refused to register the transfer until the original titles are produced. This would have been in form of an endorsement of rejection on the registration or booking form which would give reasons for the rejection or in other communication from the Land Registrar indicating that the rejection of the transfers and calling for the production of the old titles. Further the Applicant has not demonstrated that he demanded for the old titles from the Respondents at all...This in my view is not a clear case that requires the intervention of the Court. The application is struck out with costs in favour of the Respondents.”

14. In my opinion, the upshot of the foregoing analysis is that the Land Registrar Siakago ought to be directed to exercise the powers provided under **Section 78(1) of the Land Registration Act, No. 3 of 2012** and **Section 31(1) of the Land Registration Act, No. 3 of 2012**. It is my view that costs ought to be borne by the Applicant which I hereby direct.

RULING READ, SIGNED AND DELIVERED PHYSICALLY AT KERUGOYA THIS 23RD DAY OF JULY, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of :-

1. Ms Ndungu holding brief for Mrs. Makworo
2. Mr. Asimwe holding brief for Ombachi
3. Kabuta – Court clerk.