



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC NO 32 OF 2019 (O.S)**

**IN THE MATTER OF SECTIONS 76, 77 & 78 OF THE LAND REGISTRATION ACT, 2012**

**SULTAN KHAN aka KHAN SULTAN ALI.....1<sup>ST</sup> PLAINTIFF**

**MUHAMMED ADIL.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ETHICS & ANTI-CORRUPTION COMMISSION.....1<sup>ST</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR-KISUMU.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiffs, **SULTAN ALI KHAN** and **MUHAMMED ADIL** have approached this Court by way of Originating Summons dated and filed on 12/09/2019 on the basis of sections 76,77 and 78 of the Land Registration Act and Order 37 Rule 7 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The application is in respect of **KISUMU/MUNICIPALITY BLOCK 11/145** (hereinafter ‘the suit property’) and the plaintiff prays for orders that the Ethics and Anti-Corruption Commission (the 1<sup>st</sup> defendant) to be ordered to cause to remove the restriction lodged by it against title to land parcels known as **KISUMU/ MUNICIPALITY BLOCK 11/145** on the 28<sup>th</sup> March 2017. That in the alternative, the County Land Registrar –Kisumu be ordered to remove the restrictions lodged by the 1<sup>st</sup> Respondent against titles to land parcel number **KISUMU/MUNICIPALITY BLOCK 11/145**. The costs of these proceeding be provided for.

In support of the application, the plaintiffs have raised grounds on the face of the application and the supporting affidavit of **SULTAN ALI KHAN** filed on 12/09/2019 that the plaintiffs purchased the suit property from M/s Hayer Bishan Singh & Sons Ltd for Ksh. 66,500,000/- vide the sale agreement dated 13<sup>th</sup> July 2016 and subsequently procured registration into their names. A copy of the sale agreement and certificate lease have been annexed and marked SAK-1 and SAK-2 respectively. That prior to the acquisition of the property, the plaintiffs conducted due diligence and confirmed that there were no encumbrances to the title.

After acquiring the said property, the plaintiffs secured a charge for Kshs. 90,000,000/- against the said parcel along with its neighbouring land **KISUMU/MUNICIPALITY/BLOCK 11/144** with a view to developing the same. A copy of the charge document and search certificate dated 13<sup>th</sup> August 2018 have been annexed and marked SAK-4 and SAK-5 respectively.

That by the 1<sup>st</sup> defendant’s letter dated 11<sup>th</sup> February 2016 addressed to the Kisumu County Land Registrar (annexed and marked SAK-6), the 2<sup>nd</sup> defendant acted on the same and registered a restriction on the suit property on the 28<sup>th</sup> March 2018.

As a result of the said restriction, the plaintiffs have been unable to develop the suit property in the manner they wanted and are consequently enduring immense hardship and the financial facility is accruing and continues to accrue immense interest and other charges to the plaintiffs’ detriment.

That the plaintiffs wrote a letter dated 20/05/2019 to the 1<sup>st</sup> defendant and copied to the 2<sup>nd</sup> defendant (annexed and marked SAK-7) requesting that the restrictions be removed but the same did not elicit any response. As a result, the plaintiffs did a further letter 17/07/2019 (annexed and marked SAK-8) reiterating the same demands but which letter did not also elicit any response.

That the plaintiffs carried out their own investigations on what would be the contentious issues arising from the said parcels and discovered that:

The suit parcel of land was allocated to Mrs. Mary Samoei on 3<sup>rd</sup> August 1994 (as per the green card attached and marked SAK-3) and who later transferred the parcel to Hayer Bishan Singh & Sons Limited.

On 13<sup>th</sup> February 2013, the ministry of housing wrote to the commissioner of lands seeking the authentication of the ownership of the suit property amongst other parcels of land. The said letter is annexed and marked SAK-.9. A response to the letter (annexed and marked SAK-10) confirmed that the title in respect to the suit property was authentic.

Investigations conducted by the National Land Commission on several properties amongst them being the title held by Hayer Bishan Singh & Son Ltd in respect of KISUMU /MUNICIPALITY/BLOCK 11/145 (the suit property herein) confirmed and declared that the title was procedurally and regularly acquired and hence clean as per the National Land Commission's letter annexed and marked SAK-11.

Subsequently, the National Land Commission caused a Gazette Notice No. 2406 dated 10/04/2015 (annexed and marked SAK-12) to be published for removal of any restriction and/or name or on the list of irregularly acquired parcels.

Subsequently, a letter was issued by the Director of Housing-Kisumu County confirming that the title was clean and the caveat thereon be removed and the Land Registrar did remove the caution against the suit property on 17/10/2013 as per the green card annexed and marked SAK-3.

That the office of the Director of Public Prosecutions has equally looked into the title to the suit land and vide its letter dated 3<sup>rd</sup> May 2019 (annexed and marked SAK-14) addressed to the Regional Criminal Investigation Officer affirmed that the title held by the plaintiffs and initially owned by M/s Hayer Bishan Singh & Sons are authentic and that the property was legally and procedurally acquired by M/s Hayer Bishan Singh & Sons prior to selling it to the Plaintiffs.

In light of the above investigations and clearance by the National Land Commission as well as authentication of documents in respect of the suit property, it is wrong and illegal for the 1<sup>st</sup> defendant to continue insisting on the restriction remaining thereon.

That taking into account the letter through which the 1<sup>st</sup> defendant caused the restriction to be lodged on the premises of undertaking an investigation cannot be infinite and there is absolutely no reason for the restriction to continue remaining in force.

That having sought an explanation from the 1<sup>st</sup> defendant on its insistence on the continued restriction and no explanation having been received, coupled by overwhelming evidence that the suit property was legally and procedurally acquired and failure on the part of the 2<sup>nd</sup> defendant to remove the restriction having been given adequate notice, the plaintiffs pray that they be granted the orders sought by directing the 2<sup>nd</sup> defendant to forthwith remove the restriction lodged on the title to their land.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants were duly served with the application. The 1<sup>st</sup> defendant entered appearance on 8/10/2019 whereas the 2<sup>nd</sup> defendant entered appearance on 14/10/2019. However, neither of them has filed a response to the application despite having enough time to do so.

When the matter came up before the deputy registrar on 11/6/2020, the defendants had not filed their responses and asked for more time to respond. When the matter came up for mention before me on 01/02/2021, the defendants were yet to file their responses. The Court directed that parties file and exchange submissions within fifteen (15) days. At the time of writing this judgement, there were no submissions on record for any of the three parties.

I have considered the issues raised and the affidavit in support of the application and the annexures thereto. The issue for determination is whether the restriction entered by the 2<sup>nd</sup> Defendant over the suit land should be removed.

There is no doubt that the suit property herein **KISUMU/MUNICIPALITY BLOCK 11/145**, is registered in the names of *Sultan Ali Khan and Muhammad Adil*, the plaintiffs/applicants herein as from 30<sup>th</sup> August 2016. There is also no doubt that as per the *official search* dated 13<sup>th</sup> August 2019 and the copy of green card there is in existence a *restriction* on the title of the suit property registered on 28<sup>th</sup> March 2017 wherein it is indicated that **'Restriction by Ethics & Anti-Corruption Commission vide letter dated 11/02/2016.'**

The placing of restrictions on any parcel of land is governed by **Section 76(1) of the Land Registration Act** which provides;

***'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.'***

I have looked at the letter by the 1<sup>st</sup> Defendant dated 11/02/2016 which was the basis for the placing of the restriction on the suit property. The said letter requested for placing of the restriction on the suit property and other properties within Kisumu County on the basis that the said were illegally acquired public land and that the commission was investigating with a view to recover the illegal alienation and acquisition by private individuals of the parcels of public land located within Kisumu County.

The applicants have annexed to their supporting affidavit a letter dated 26<sup>th</sup> March 2015 by the National Land Commission to the effect that the commission (NLC) had thoroughly scrutinized the documents in respect of the suit parcel and found that there were no irregularities in acquisition of the said parcel of land. The National Land Commission further recommended that the said parcel be removed from the list of illegal and irregularly acquired parcels of public land as contained in the Ndungu report of 2005/2006.

Subsequently vide Gazette Notice No. 2406 dated 10/04/2015, the suit property was published for removal on the list of irregularly acquired parcels.

On the above basis, I do find that the 1<sup>st</sup> defendant's reason for the placement of the restriction, being that the title to the suit property was illegally acquired does not hold water. No evidence has been brought before this Court to show that the National Land Commission's position with respect to the suit property as per the letter dated 26<sup>th</sup> March 2015 has changed. In any event, the 1<sup>st</sup> Defendant has not filed any response to the application to give a reason why the restriction should remain in place or to inform the Court of the status of the investigations mentioned in their letter dated 11/02/2016, if any.

**Section 78 of the Land Registration Act** is on removal and variation of restrictions and it provides that;

**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 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**

**Section 78(1)** empowers the Land Registrar to remove and/or vary the restriction on his own motion or upon application by any person interested.

The Court has seen the applicants' letters dated 20<sup>th</sup> May 2019 (*annexure SAK-7*) and 17<sup>th</sup> July 2019 (*annexure SAK-8*), wherein the Applicants applied for the removal of the said restrictions under section 78 of the Land Registration Act. However, the Applicants have averred that the letters did not elicit any response from any of the two defendants. The Registrar in particular, has not appeared in court to defend his position.

**Section 78(2)** of the Land Registration Act gives the court discretion to grant an order for removal of restriction upon an application of a proprietor affected by a restriction. It is evident that the Applicants are the registered owners of the suit property having purchased the same from M/s Hayer Bishan Singh & Sons Ltd and they obtained their Certificate of Lease on 30<sup>th</sup> August 2016. The Applicants are therefore the proprietors of the suit property and have filed this application for removal of the restriction.

The Defendants/Respondents have not filed any response to the instant application to justify the placing of the said restriction. It is my finding that there are no reasons as to why the restriction placed on the suit property should remain. The Court is guided by the Court's holding in the case of *David Macharia Kinyuri v District Land Registrar Naivasha & Another (2017) eKLR* where the Court held that: -

***"I have already stated that the Respondents have not appeared before this court to explain why the restriction should continue being in the register. I have not seen any reason why such restriction should remain and I am persuaded that the Application must succeed. I therefore order the Land Registrar to remove the restriction registered on 22<sup>nd</sup> July 2014...."***

Based on the above, I do conclude that the application is merited and is hereby allowed as prayed. In accordance with Section 78 of the Land Registration Act, the Land Registrar Kisumu County be ordered to remove the restriction on land parcel number **KISUMU/MUNICIPALITY BLOCK 11/145.**

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 16<sup>th</sup> DAY OF JULY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

***This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.***

**ANTONY OMBWAYO**

**JUDGE**