



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC. APPLICATION NO. 17 OF 2018

WILFRED MBINGIRITU NJIRU.....APPLICANT

VERSUS

TABITHA CIORUI KAMUCERE.....RESPONDENT

RULING

1. On 18th November, 2019, the Applicant herein filed the application vide a Notice of Motion dated 18th November, 2019 whereby he seeks the following orders:

a. Spent

b. That this Honourable Court be pleased to lift the prohibitory orders placed on land parcel Mutira/Kathare/119 placed in the High Court at Nyeri Civil Suit No. 107/1981 and registered on the 21/11/1985.

c. Costs be in cause

2. The said application was brought under *Section 1A, 1B, 3A of the Civil Procedure Act, Section 70 (d) of the Land Registration Act, and Article 159 (d) of the Constitution.*

APPLICANT'S CASE

3. The application is supported by the Supporting Affidavit of the Applicant and premised on the following grounds:-

a. The applicant has been in occupation of the land since 1/12/1977.

b. The court file in respect to Nyeri No. 107 of 1981 has been missing in the High Court Registry even after several requests being made.

c. No court paper has ever been served upon the applicant since the prohibitory orders were filed in the land registry.

d. The applicant prays that the prohibitory orders be lifted since it is over 41 years since they were registered.

e. The applicant has been suffering irreparably as he is not able to deal with the land as he wants to share out the property to his family.

4. In his supporting affidavit the applicant stated that he was the registered owner of Land Parcel No. Mutira/Kathare/119 which has a prohibitory order placed in Nyeri High Court Civil Suit No. 107 of 1981 41 years ago.

5. He stated that he has since never been served with any document in the said matter. He had severally requested for the court file to no avail.

6. He therefore prayed that the said prohibitory order be lifted so that he can be able to deal with the land.

RESPONDENT'S CASE

7. The respondent opposed the application by way of a replying affidavit sworn on 4th March, 2021 whereby she stated as follows: -

8. That the respondent is undeserving of the orders sought as he had failed to attach the Order and Proceedings in respect of the said Nyeri High Court Civil Suit No. 107 of 1981.
9. That she was an octogenarian and was not aware of the said suit and further had failed to demonstrate that she was a party to the said suit.
10. That the applicant's allegation that he had been looking for the court file of the said suit to no avail was baseless as he had not annexed copies of duly acknowledged letters written to court requesting for the said court file.
11. That the applicant's application was not meritorious as he had not availed enough material on record to assist this Honourable Court in determining the issues.

SUBMISSIONS

12. On 19th May, 2021 when the said application came up for hearing the parties herein through their advocates on record entered into a consent that the same be canvassed by way of written submissions.
13. The applicant filed his submissions on 16th June, 2021, however, the Respondent didn't file any.
14. The applicant submitted that he had never had a case with any other person save for the Respondent herein over the subject matter and that he has grown old and wanted to give away his Parcel of land to his family. However, the prohibitory order was preventing him from doing so.
15. He also submitted that the court registry in Nyeri does not receive letters but has a record where they note the same. However, he stated that he has made several requests for the same to no avail.
16. He submitted that the Land Registry required an order for the removal of the prohibitory orders lodged and that the Respondent will not be prejudiced if the orders are granted.
17. He further submitted that this Honorable Court has powers to remove the prohibitory orders since they have been in force for over 12 years. That court orders are meant to be in force for a specific period and not forever.
18. He submitted that since no action had been taken in the said case, it is the inherent power of the court to take action and remove the same since the applicant has been in quiet possession of the suit land and even subdivided it on the ground without any one raising any eyebrows.

ANALYSIS

19. I have considered the application, supporting affidavit, annexures, Replying affidavit and submissions of the parties herein. I find that the only issue for determination is whether the applicant has made out a case to qualify for the orders sought.
20. From the said pleadings I find that the ownership of the suit land is not contended. Further the occupation of the suit land by the applicant is not also contended.
21. I have perused the official search dated 6th October, 2008 which is annexed to the Applicants supporting affidavit as annexure "MNW1". Part B of the said search indicates that indeed the suit land has a prohibitory order issued in the High Court at Nyeri vide Civil Suit No. 107 of 1981 and registered on 21.11.85.
22. The respondent stated that the applicant had not attached the prohibitory order by the Nyeri Court. However, the applicant explained that his efforts to trace the said file at the Nyeri High Court Registry were futile.
23. I find that the said explanation offered by the applicant is satisfactory. In determining a similar application, the Honourable Judge in the case of **Wycliff Odhiambo Ombago & Another Vs Housing Finance Limited [2018] e KLR** stated that: -

"When the application came up for hearing, I pointed out to the applicants' advocate Ms. Waceke that I was hesitant to grant the orders sought in a miscellaneous application. I inquired from Ms. Waceke why the application was not brought in High Court Civil Case No. 7 of 1977 where the prohibitory order in question was issued. Ms. Waceke responded that due to the passage of time, the court file for High Court Civil Case No. 7 of 1977 could not be traced and it was not possible to reconstruct the file. That response which I found reasonable laid my concerns to rest.

Due to the foregoing, it is my finding that the application dated 8th October, 2018 has merit. The same is allowed in terms of prayer 1 thereof."

24. Since there is no contention as to the ownership of the suit land and the respondent did not state the prejudice she would suffer if the instant application is allowed, I find no reason as to why the applicant should be denied the enjoyment of his Constitutional rights to the suit land by virtue of the said prohibitory order.

CONCLUSION

25. I therefore find that the said application has merit and the same is hereby allowed as prayed. Each party to bear their own costs.

**RULING DATED, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT
KERUGOYA THIS 8TH DAY OF OCTOBER, 2021.**

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E.C. CHERONO

ELC JUDGE

IN THE PRESENCE OF:-

1. MR. IGATI MWAI FOR THE APPLICANT

2. RESPONDENT/ADVOCATE – ABSENT

3. KABUTA, COURT CLERK – PRESENT.