



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

JUDICIAL REVIEW APPLICATION NO. 11 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION & MANADAMUS

AND

IN THE MATTER OF ARTICLE 2, 10, 19, 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 7 & 8 OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015

BETWEEN

JANE WANJIRU NYOTA.....1ST APPLICANT

VICTORIA WANGUI KIMANI.....2ND APPLICANT

MARY WAIRIMU NYOTA.....3RD APPLICANT

AND

LAND REGISTRAR, KAJIADO COUNTY.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

JUDGMENT

What is before Court for determination is the Ex parte Applicants Notice of Motion application dated the 12th April, 2019 brought pursuant to Order 53 Rule 1 of the Civil Procedure Rules 2010. The Applicants are seeking for an order of Mandamus to compel the Respondents herein to remove the restrictions entered on land reference numbers KAJIADO/ DALALEKUTUK/ 6870 ; 6871; 6872; 6873;6874; 6875; 6876; 6877; 6878; 6879; 6880; 6881; 6882; 6883; 6884; 6885; 6886; 6887; 6888; 6889; 6890; 6891; 6892; 6893; 6895; 6896; 6897; 6898; 6899; 6900; 6901; 6902; 6903; 6904; 6905; 6906; 6907; 6908; 6909; 6910; 6912; 6913; 6914; 6915; 6916; 6918 and 6919 hereinafter referred to as the 'suit lands'. Further that an order of prohibition do issue prohibiting the Respondents herein from making or causing to be made any restriction, caution, caveat, encumbrance and or any impediment whatsoever on the sale, transfer, alienation, leasing, charging and or disposition of the suit lands.

The application is supported by the Chamber Summons application already filed; Statement of Facts and verifying affidavit sworn by JANE WANJIKU NYOTA. In the said affidavit sworn by JANE WANJIKU NYOTA she avers that the applicants are joint proprietors of the suit lands which they acquired after exercising due diligence through obtaining requisite consents from the Land Control Board and subsequently transfers were effected in their favour with title deeds conferred upon them without any encumbrances.. She contends that on 14th December, 2016 they applied for official searches to the aforementioned parcels of land. She confirms that they were subsequently issued with Certificates of Official Searches on 21st December, 2016 which revealed that a Restriction had been registered on 3rd December, 2013 under the instructions of the Respondents against their titles without any colour of right. She insists they were not notified nor given any reasons for the registration of the restriction and efforts to have the Respondents remove the Restriction have not been successful. She reiterates that the restrictions against their titles have been subsisting for over four (4) years. Further, that their advocates wrote a letter dated the 5th December, 2017 to the Respondents raising concerns and demanding the removal of the impugned restriction or providing reasons thereof but this letter

was ignored. She denies being a party to any legal proceedings in respect to the suit lands and contends that the said restriction smacks of impropriety, irrationality, manifest injustice, arbitrary, irrational as well as illegal and a breach of their constitutional rights as enshrined under Article 40 of the Constitution. She states that they have been unable to enjoy their rights of alienating, quiet possession and any commercial transaction over the suit lands.

The Respondents though duly served only filed a Memorandum of Appearance dated the 2nd July, 2019 but failed to file a replying affidavit to oppose the instant application.

The instant application was canvassed by way of written submissions and it is only the Applicants who filed their submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 12th April, 2019 including the statement of facts; verifying affidavits as well as the annexures thereon including the submissions, the only issue for determination is whether the ex parte applicants are entitled to orders sought in the said application.

It is not in dispute that the Applicants are the registered proprietors of the suit lands as evident in the Certificates of Titles annexed to the verifying affidavit. It is further not in dispute that a restriction was entered against the said suit lands by the 2nd Respondent on the 3rd December, 2013. Further, despite the Applicants through their Advocates seeking for the removal of the restriction vide their letter dated the 5th December, 2017, the 1st Respondent has failed to lift the said restriction. The Applicants have hence sought for orders of mandamus and prohibition to compel the 1st and 2nd Respondents to remove the restriction registered over the suit lands on 3rd December, 2013. In their submissions the ex parte Applicants contend that they were not notified before the restrictions were entered against the suit lands. Further, they have never been accorded an opportunity to be heard in respect to the said Restriction nor have they been given any reasons for the decision to place the Restrictions on the suit land. They insist the Respondents flouted the law and procedure in their decision making to place the restriction on the suit lands. They have relied on section 26 of the Land Registration Act as well as the following cases: **Margaret Njeri Wachira V Eliud Waweru Njenga (208) eKLR; Republic V Kenya Revenue Authority ex parte Yaya Towers Limited (2008) eKLR and Kenya Re insurance Corporation V National Land Commission (2018) eKLR** to buttress their arguments.

The legal provisions cited herebelow within the Land Registration Act govern the procedure to be adhered to in the registration and removal of restrictions to wit:

Section 76 of the Land Registration Act 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 a further order is made, and may prohibit or restrict all dealings or only 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.’*

While section 77 provides that: *‘ (1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction. (2) An instrument that is inconsistent with a restriction shall not be registered while the restriction is still registered except by order of the court or of the Registrar.’*

Further section 78 of the Land Registration Act stipulates 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 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.’*

In the current scenario, the Respondents failed to file a replying affidavit to controvert the Applicants averments. I note the Respondents never responded to the Applicants letter seeking for the removal of the restriction. From the legal provisions cited above, it is clear that the 1st Respondent had an administrative role to play in respect to the registration and removal of restriction. Further, this role had to be in tandem with the provisions of the Fair Administrative Action Act as well as the Constitution. Since the Respondents failed to controvert the Applicants averments, I opine that they failed to adhere to the provisions of the Land Registration Act as well as the Fair Administrative Action Act by failing to notify the proprietors of the suit land before registering a restriction thereon. Which now brings me to the issue as to whether the Respondent acted ultra vires as well as arbitrarily to enter the restriction which culminated in the prayers sought herein.

Article 47 of the Constitution provides that every person has a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair as well as to be given reasons for the said action. Further, the provisions of section 4 of the Fair Administrative Actions Act are anchored in the principles enshrined in Article 47 of the Constitution and reaffirms that a person who can be affected by an administrative action has to be granted an opportunity to be heard and to make representations. In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to

support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”

In relying on the facts as presented including the two cited judicial authorities, I find that failure by the Respondents to accord the Applicants a hearing before registering the restriction on their land as well as failing to remove the said restriction when demanded by the Applicants is against the rules of Natural Justice and violated the Applicant’s Constitutional right not to be condemned unheard. To my mind, I find that by failing to notify the ex parte applicants of his intention to register a restriction over his land, the 1st Respondent did not observe the Constitutional principles of reasonability and procedural fairness. I opine that since the Respondents did not controvert the averments in the supporting herein, it amounts to an admission on their part that they unlawfully entered the restrictions against the suit lands and this hence amounts to ‘procedural impropriety’ as the basic rules of natural justice as well as procedural fairness were not been observed in the said process herein. From a reading of the legal provisions cited above, restriction can only subsist over a period of time and not indefinitely. Since at this juncture, there was no reason given for the subsistence of the restriction on the suit land, I do not see the need for retaining it over the suit land.

On the issue of costs, since this generally abides the outcome of the suit, I find that the 1st Respondent who registered the restriction should be made to bear the same.

It is against the foregoing that I find the Notice of Motion dated 12th April, 2019 merited and proceed to allow it in the following terms:

1. An order of MANDAMUS be and is hereby issued compelling the 1st Respondent the Land Registrar Kajiado, to remove and/ or lift the Restriction pursuant to the provision of Section 78 (1) & (2) of the Land Registration Act 2012 to all that parcel of land known as Land Reference Nos. KAJIADO/ DALALEKUTUK/ 6870 ; 6871; 6872; 6873;6874; 6875; 6876; 6877; 6878; 6879; 6880; 6881; 6882; 6883; 6884; 6885; 6886; 6887; 6888; 6889; 6890; 6891; 6892; 6893; 6895; 6896; 6897; 6898; 6899; 6900; 6901; 6902; 6903; 6904; 6905; 6906; 6907; 6908; 6909; 6910; 6912; 6913; 6914; 6915; 6916; 6918 and 6919 respectively.
2. An order of Prohibition be and is hereby issued prohibiting the Respondents herein from making or causing to be made any restriction, caution, caveat, encumbrance and/or any impediment whatsoever on the sale, transfer, alienation, leasing, charging and/or disposition of KAJIADO/ DALALEKUTUK/ 6870 ; 6871; 6872; 6873;6874; 6875; 6876; 6877; 6878; 6879; 6880; 6881; 6882; 6883; 6884; 6885; 6886; 6887; 6888; 6889; 6890; 6891; 6892; 6893; 6895; 6896; 6897; 6898; 6899; 6900; 6901; 6902; 6903; 6904; 6905; 6906; 6907; 6908; 6909; 6910; 6912; 6913; 6914; 6915; 6916; 6918 and 6919 respectively, without following the due process of the law.
3. The costs of this application is awarded to the applicants and should be borne by the 1st Respondents.

Dated signed and delivered in open court at Kajiado this 28th day of January, 2020.

CHRISTINE OCHIENG

JUDGE