



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 72 OF 2017 (O.S.)

EFUREITH IRIMA MBOGO.....PLAINTIFF

VERSUS

IBARA MWANIKI.....1ST DEFENDANT

PETERSON WAMBUGU.....2ND DEFENDANT

MWANGI MUTHINJI

ALIAS MOSES MWANGI MUTHINJI.....3RD DEFENDANT

KAHARIRI BURI KARUGU.....4TH DEFENDANT

JOSIAH WAMBUA SILAS

ALIAS JOSIAH KINYUA MUCHINA.....5TH DEFENDANT

DOUGLAS KIRINYU MATHENGE

ALIAS DOUGLAS KIRUNYU MWANGI MATHENGE.....6TH DEFENDANT

MOFFAT MURIITHI KANGI.....7TH DEFENDANT

RULING

A. The Applicant's case

1. By a notice of motion dated 25th November 2019 expressed to be brought under **Sections 3 & 3A of the Civil Procedure Act (Cap. 21) and Section 73 (1) and 78 (1), (2) of the Land Registration Act 2012, and all other enabling provisions of the law**, the 7th Defendant sought an order directing the Land Registrar, Mbeere North/South to remove all cautions and restrictions placed against *Title No. Mbeere/Kirima/5047* ("parcel 5047"). The 7th Defendant also sought an order restraining the Plaintiff from lodging any cautions or restrictions on parcel 5047 without a court order to that effect.

2. The said application was based upon the grounds set out on the face of the application and the 7th Defendant's supporting affidavit sworn on 25th November 2019. The gist of the application was that the 7th Defendant was a purchaser of parcel 5047 for valuable consideration and that the Plaintiff had no beneficial interest in the said property. It was contended that the 7th Defendant was in the process of developing parcel 5047 but his efforts were being frustrated by the subsisting encumbrance.

B. The Respondent's response

3. The Plaintiff filed a replying affidavit sworn on 16th December 2019 in opposition to the said application. It was contended that the 7th Defendant acquired ownership of parcel 5047 during the pendency of the suit. The Plaintiff further stated that her sole intention in causing a restriction to be entered against parcel 5047 was to preserve the *status quo* pending the hearing and determination of her suit.

4. In further response to the said application, the Plaintiff stated that although she had filed an application dated 15th February 2018 for interim orders the said application could not be prosecuted due to the pendency of a preliminary objection by the 7th Defendant. She further stated that upon the disposal of the said preliminary objection the court file went missing for a long time hence she could not prosecute her pending application. The Plaintiff contended that removal of the restriction would be prejudicial to her suit hence she urged the court to dismiss the said application with costs.

C. Directions on submissions

5. When the said application was listed for hearing on 16th January 2020 the parties present agreed to canvass it through written submissions. The parties were consequently granted 30 days within which to file and exchange their written submissions. The record shows that the 7th Defendant filed his submissions on 4th February 2020 whereas the Plaintiff filed hers on 9th March 2020. The rest of the Defendants did not file any submissions or participate in the said application.

D. The issues for determination

6. The court has considered the 7th Defendant's said application, the Plaintiff's replying affidavit in opposition thereto as well as the written submissions on record. The court has noted that both parties expanded the scope of their arguments in their submissions. The 7th Defendant challenged the restriction entered by the Land Registrar on the basis that it was registered without due process as set out in **Sections 76, 77 and 78 of the Land Registration Act 2012**. On the other hand, the Plaintiff submitted that the court should invoke the doctrine of *lis pendens* in order to preserve parcel 5047 pending the hearing and determination of the suit.

7. The court is of the view that the following issues arise for determination in this matter:

- a. Whether the restriction entered against parcel 5047 was lawfully registered.
- b. Whether the 7th Defendant has made out a case for removal of the restriction.
- c. Whether the court should invoke the doctrine of *lis pendens* and uphold the restriction.

8. The registration and management of restrictions is regulated by the **Land Registration Act, 2012**. **Section 76** of the said **Act** stipulates as follows:

“(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 of a further order, 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.”

9. The material on record shows that vide a letter dated 21st May 2018, the Plaintiff's advocate requested the Land Registrar to restrict parcel 5047 pending the hearing and determination of the instant suit. It would appear that the restriction was entered without following due process. There is no evidence on record to demonstrate that the Registrar ever conducted inquiries and held any hearing of the affected parties prior to the registration of the encumbrance. The Plaintiff did not even suggest that the 7th Defendant was accorded a hearing by the Registrar at any given time.

10. It has been held that where an illegality has been apparently committed a court of law ought not to shut its eyes to such matter. It does not matter whether or not such illegality was pleaded. As long as it has been brought to the attention of the court, the court is bound to consider the allegation. See **Scott V Brown, Doering, Mcnab & Co. (3) [1892] 2 QB 724**.

11. The court has considered the case of **Mary Wanjiku V Muranga County Government [2018] eKLR** which was cited by the 7th Defendant's advocate. The court is in complete agreement with the decision of the Hon. Justice J.G. Kemei that due statutory process must be followed in the registration of a restriction which affects the rights of a registered proprietor. The Land Registrar was bound to follow the statutory process set out in **Section 76** of the **Land Registration Act** and his failure to do so was a violation of the law. Accordingly, the court finds and holds that the restriction entered against parcel 5047 was irregularly and unlawfully registered.

12. The 2nd issue is whether the 7th Defendant has made out a case for removal of the said restriction. The Plaintiff submitted that a

restriction cannot be removed without a party filing a substantive suit or counterclaim. It was also contended that it would be premature to have the restriction removed before the conclusion of the suit. The court is unable to accept the first objection for two reasons. First, the Plaintiff herself did not file any substantive suit for registration of the restriction. Second, the court has already found that the restriction was registered irregularly and in violation of express statutory provisions.

13. The court is also unable to accept the Plaintiff's submission that it would be premature to remove the restriction. The provisions of **Section 76 of the Land Registration Act** stipulate that a restriction may be entered for a limited period of time, until the occurrence of a particular event or until the making of a further order. A restriction is not an end in itself. It is not intended to last indefinitely or forever. Moreover, the Plaintiff has not rendered any reasonable or satisfactory explanation for her failure to prosecute her application for interim orders dated 19th February 2018. There is no evidence on record to demonstrate that the court file ever went missing or that a letter was ever sent to the Deputy Registrar requesting for assistance in tracing the court file. It would appear from the material on record that the Plaintiff abandoned her application for interim orders only because she was able to cause a restriction to be entered against parcel 5047 through her letter of 21st May 2018.

14. The court is thus satisfied that the 7th Defendant has made out a case for the removal of the restriction since it was irregularly and unlawfully registered in the first place. The court is not persuaded by the case of **Peter Ramoya V Eusedus Baraza [2018] eKLR** which was cited by the Plaintiff's counsel holding that removal of a restriction is a remedy of final nature which can only be granted upon conclusion of a suit. However, the court is not satisfied that the Land Registrar should be restrained from registering a restriction against parcel 5047 in future. The Land Registrar has a statutory discretion to register such an encumbrance upon following due process. Such discretion should not be fettered by a court of law without a very good reason. It would be a very exceptional case where such an order may be issued, say, where a pattern of abuse of power and discretion on the part of the Registrar has been clearly demonstrated. There is, however, no evidence of such abuse in this matter.

15. The 3rd issue is whether the court should invoke the doctrine of *lis pendens* and uphold the restriction. The court has fully considered the Plaintiff's submissions on this issue. In the case of **Naftali Ruthi Kinyua V Patrick Thuita & Another (supra)** the Court of Appeal held that the common law doctrine of *lis pendens* was still applicable in Kenya despite the repeal of the **Indian Transfer of Property Act, 1882**. It was held that it was still applicable by virtue of **Section 3 of the Judicature Act (Cap. 8)**.

16. In the said case of **Naftali Ruthi Kinyua (supra)** the court described *lis pendens* as follows:

“Black’s Law Dictionary 9th edition, defines *lis pendens* as the jurisdiction, power or control acquired by a court over property while a legal action is pending.

***Lis pendens* is a common law principle that was enacted into statute by Section 52 of the Indian Transfer of Property Act (ITPA) – now repealed. While addressing the purpose of the principle of *lis pendens*, Turner L. J, in Bellamy Vs Sabine [1857] 1 De J 566 held as follows:-**

‘It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgement or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.’

17. Whereas this court agrees with the Plaintiff that the doctrine of *lis pendens* is applicable to Kenya and that its purpose is noble, it is the forum and manner of its application that appears to be in issue in this matter. Whereas it is clear from the material cited by the Plaintiff that the proper forum is a court of law, the Plaintiff would like to extend its application to the office of the Land Registrar. It would appear that, indeed, the Plaintiff employed the said doctrine in such manner as to exclude the court altogether whereas *lis pendens* refers to the jurisdiction, power or control of the court over property the subject of a suit.

18. Be that as it may, the court is not persuaded that upholding a restriction which was irregularly and unlawfully registered by the Land Registrar would be the appropriate manner of applying the doctrine of *lis pendens*. The Plaintiff is the one who chose this judicial forum for the resolution of the dispute over parcel 5047. She is the one who filed the application for interim orders dated 15th February 2018. It is not clear why she could not prosecute her said application and invoke the doctrine of *lis pendens* before the court. The court is of the opinion that the jurisdiction of the court has not been properly invoked to make it apply the doctrine of *lis pendens*. A court of law cannot be legitimately moved through a replying affidavit or written submissions. The 3rd issue is therefore answered in the negative.

19. The upshot of the foregoing is that the 7th Defendant's application dated 25th November 2019 partially succeeds in the following terms only:

- a. The Land Registrar Mbeere North/South shall forthwith remove the restriction placed against Title No. Mbeere/Kirima/5047.
- b. Order No. 3 of the application is hereby declined.
- c. Each party shall bear his own costs of the application.

20. It is so decided.

RULING DATED and SIGNED in Chambers at **EMBU** this **30TH DAY** of **APRIL 2020** in the absence of the parties due to the prevailing

Covid-19 situation. The ruling was transmitted to M/s Rose W. Njeru & Co. Advocates for the Plaintiff and G.O. Ombachi & Co. for the Defendants through the email addresses which they provided.

Y.M. ANGIMA

JUDGE

30.04.2020