



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 86 OF 2018

MAVOLONI COMPANY LTD.....PLAINTIFF

VERSUS

THE LAND REGISTRAR - THIKA.....1ST DEFENDANT

THE DIRECTOR OF SURVEY.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

KENYA AFRICAN NATIONAL TRADERS

AND FARMERS UNION.....5TH DEFENDANT

LONGNECK INTERNATIONAL LIMITED.....6TH DEFENDANT

DOMINIC KAMATA NJOGO.....7TH DEFENDANT

HELLEN NDUKA KAMATA.....8TH DEFENDANT

KENNETH KARATU KIBUNJA.....9TH DEFENDANT

YAHYA MUHAMED SULEIMAN.....10TH DEFENDANT

NAIMA SULEIMAN.....11TH DEFENDANT

DOMINIC KIKUL.....12TH DEFENDANT

ELIAS KIMANI.....13TH DEFENDANT

TERESIA NDUKU.....14TH DEFENDANT

STANDARD CHARTERED MANAGEMENT

AGENTS LTD.....15TH DEFENDANT

RULING

1. In the Notice of Motion dated 13th May, 2019, the Applicant is seeking for the following orders:

a) That the restriction lodged on 23rd June, 2011 by Mavoloni Company Limited- The Plaintiff herein against Title No. Gatuanyaga/ Ngoliba Block 2/640 be removed forthwith.

b) That the Plaintiff be ordered to pay the costs of this application.

2. The Applicant has described herself as one of the administrators and beneficiaries of the Estate of Peter Musyoka Maina; that the late Peter Musyoka Maina was the registered proprietor of land known as **Gatuanyaga/ Ngoliba Block 2/640** and that when she conducted a search on the property on the 7th May, 2019, the search revealed that there was a restriction lodged against the title on 23rd June, 2011.
3. According to the Applicant, the restriction made reference to Civil Suit NO 142 of 2008 in the High Court; that she was not aware of such a suit and that she later realized that she did not know the basis upon which the Plaintiff lodged the restriction on the suit land.
4. The Applicant deponed that they had never transacted with the Plaintiff and that there was absolutely no reason for the Plaintiff to maintain the restriction against the subject title.
5. The Applicant finally deponed that in any event, the Application for injunction filed by the counsel for the Applicants dated 15th June, 2010 and 4th January, 2011 were dismissed by the court.
6. The Plaintiff's Chairman deponed that the Application is incompetent, bad in law, fatally defective and a gross abuse of the court process; that the impugned restriction was not registered using the court order and that it is only the Land Registrar that can lift a restriction under section 78 (1) of the Land Registration Act.
7. The Plaintiff's Chairman finally deponed that the Applicant has never issued a notice to the Land Registrar to conduct a hearing for the removal of the said restriction; that every public body has powers to perform duties as allowed by the law and that the Land Registrar has the mandate to register and lodge restrictions, and not his court.
8. The 5th Defendant's Assistant Treasurer deponed that the title over which the Plaintiff's Originating Summons is based on did not exist; that the annexed title in the Originating Summons was surrendered to the government on 26th November, 1992 and a deed of surrender was registered and that the Plaintiff sub-divided LR No. 115412 into 203 agricultural plots, many of which it sold to the 15th Defendant.
9. According to the 5th Defendant, in order to raise money, the Plaintiff entered into a sale agreement with the 5th Defendant dated 6th May 1993 in which it agreed to sell various parcels of land to the 5th Defendant; that the plots that the 5th Defendant bought were 139 of 5 acres each and that the whole process was monitored by the 15th Defendant as chargee.
10. It is the 5th Defendant's case that it paid the full purchase price; that the transfer of all the plots were registered in the name of the 5th Defendant on 3rd July, 1993 and that the area that was reserved for public utilities was allocated to the 5th Defendant on 22nd July, 1996. The 5th Defendant deponed that there had been litigation between itself and the Plaintiff in HCCC No. 625 of 1994 and HCCC No. 957 of 1997.
11. The Application was canvassed vide written submissions. In his submissions, the Applicant's advocate submitted that the Applicants are not among the 15 Defendants in this suit; that the restriction specifically cites the High Court case; that under Section 78(2) of the Land Registration Act, the court may order a restriction to be removed and that the Applicants have been affected by the said restriction.
12. Counsel submitted that since the restriction is based on the pending suit, it is inequitable and unlawful for it to remain lodged against the Applicant's title which was prejudicial to the estate and the Applicant.
13. On his part, the Plaintiff's advocate submitted that the Ruling dismissing the Plaintiff's Application for injunction was not based on any restriction lodged; that the Application that was dismissed sought for orders which were quite different from what the Applicant has raised in the Application and that the restriction was lodged as a matter of right pursuant to the provisions of Section 70 of the Land Registration Act.
14. Counsel submitted that any person affected by the restriction ought to apply through an application to the court, having already issued a notice to the Land Registrar and that the Applicant had not demonstrated that he had issued a notice to the Land Registrar.
15. Counsel submitted that the Applicant had not invoked the process as contemplated by the provisions of Section 73(2), (3) and (4) of the Land Registration Act and that the said section stipulates the process that should be followed for the removal of a restriction. Counsel relied on the cases of **Mwangi Rukwaro & Another v Land Registrar (2019) eKLR** and **Lalji Bhimji Senghani Builders & Constructors v City Council of Nairobi (2012) eKLR** where it was held that a party who, without any justification, decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance, and where no explanation has been offered for failure to observe the rules of procedure, the court may well be entitled to conclude that the failure to comply therewith was deliberate.
16. This suit was commenced by way of an Originating Summons dated 15th September, 2008 which was amended on 27th June, 2019. In the Originating Summons, the Plaintiff has prayed for a declaration that the subdivision and transfer of land known as Gatuanyaga/Ngoliba Block 2/1-209 to the 5th to 14th Defendants was fraudulent, null and void; and an order directing the Land Registrar to reinstate the Plaintiff as the proprietor of the 209 parcels of land
17. In the current Application, the administrators of the Estate of the late Peter Mugeka Maina are seeking for an order lifting the restriction that was placed on parcel of land known Gatuanyaga/Ngoliba Block 2/640. Neither the late Peter Maina nor the said administrators are parties to this suit.
18. The Application is premised on the ground that the restriction was registered on the basis of an order of the court that was given in HCCC

No. 142 of 2008; that the said orders were obtained ex parte and that the Application was eventually dismissed by Okongo J. on 17th February, 2017. According to the Applicant, she has never interacted with the Plaintiff and that the restriction has hindered the lawful distribution of the Estate of the deceased.

19. The official search shows that parcel of land known as Gatuanyaga/Ngoliba Block 2/640 was registered in favour of Mugeka Maina on 28th April, 2005. On 23th June, 2011, a restriction was registered against the land in the following terms:

“Restriction no dealing until case number 142 of 2008 High Court Nairobi is heard and determined.”

20. The Applicant has averred that in a Ruling dated 17th February, 2017, Okongo J dismissed the Plaintiff’s Application for injunction and that as such, the restriction should be lifted. I have perused the Ruling of the court. The Ruling by Okongo J referred to a parcel of land known as Gatuanyaga/Ngoliba Block 2/1-209 which is the subject land in the current suit. The Ruling also referred to several parcels of land including parcel number 640.

21. *Inhibitions, cautions and restrictions* are terms of art that cannot and should not be used interchangeably. An inhibition can only be granted by the court, while a caution is usually registered against a title by a person claiming a right, whether contractual or otherwise, over a parcel of land (*see Sections 68 and 71 of the Land Registration Land*).

22. On the other hand, restrictions are usually registered by the Land Registrar either *suo moto* or on application of any person interested in the land for the purpose of compulsory acquisition of the land; the prevention of fraud or for any other sufficient cause. A restriction is usually registered by the Registrar for a particular period or until the occurrence of a particular event; or until a further order is made (*see section 76 of the Land Registration Act*).

23. Section 78 (1) of the Land Registration Act provides that the Registrar may, at any time 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. Section 78(2) of the Act provides that 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 or varied.

24. The reading of section 78 of the Act suggests that before one moves the court for the lifting of the restriction, he must move the Registrar first. Indeed, it is only after the Registrar has declined to lift the restriction, after hearing all the interested parties, that a suit for lifting the restriction can be filed by an aggrieved party. One cannot sidestep the provisions of section 78 (1) of the Act, which the Applicant in this matter has done.

25. Having not moved the Registrar appropriately under Section 78 (1) of the Land Registration Act, I find the current Application to be incompetent. Indeed, this court does not have the jurisdiction to lift a restriction before the applicant seeks the removal of the restriction by the Registrar.

26. This is so because restrictions are not made by courts, but by the Registrar. Therefore, the law contemplates that it is the same Registrar who should be moved by the proprietor of land to lift the restriction, and only move the court if the Registrar declines to do so.

27. The restriction being challenged by the Applicant was not made by the court but by the Registrar. The Ruling of Okongo J does not therefore have anything to do with the restriction. In any event, the Applicant is not a party to this suit, and has no *locus standi* to apply for the lifting of the restriction in this suit. If indeed the applicant was aggrieved by the decision of the Registrar, then she should have either joined this suit first as an Interested Party, or filed a separate suit, for the lifting of the Restriction. To the extent that she did not do any of the two acts, she cannot succeed in her Application.

28. The Application dated 13th May, 2019 is therefore dismissed with costs to the Plaintiff and the 5th Defendant.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE