



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC MISC CASE NO. 55 OF 2017

STEPHEN CHACHA MWITA.....PLAINTIFF

-VERSUS-

THE LAND REGISTRAR KURIA DISTRICT.....1ST RESPONDENT

BOKE MWAMU TABUYA.....2ND RESPONDENT

RULING

1. The applicant namely **STEPHEN CHACHA MWITA** has approached this court through the firm of Abisai and Company Advocates by a notice of motion dated 2nd August 2017 under Section 78 of Land Registration Act 2012, Sections 1A,1B,3, 3A and 63 (e) of the Civil Procedure Act (Cap 21 Laws of Kenya (the motion). He is seeking the following orders:-

a) THAT the County Land Registrar Kuria District be compelled to remove the restriction lodged on LR NO. BUGUMBE/MABERA/639. (Hereinafter referred to as the suit property).

b) THAT the costs of this application be borne jointly by the respondents.

2. The motion is premised on the applicant's supporting affidavit sworn on even date with an annexed copy of certificate of official search dated 13th January 2010 marked "SCM1" ,a copy of a letter dated 4th July, 2017 by the applicant's counsel addressed to the 1st respondent marked "SCM-2(a)" and copy of a letter dated 5th July, 2017 being a response to letter marked "SCM -2 (a)" (SCM-2(b)). The motion is also premised on seven (7) grounds which include that:-

i. The 1st respondent at the behest of the 2nd respondent lodged a restriction on the applicant's land on 3rd December 2003.

ii. The respondent have never taken any step to have the applicant heard on the restriction.

iii. The applicant has moved the County Land Registrar who is adamant on maintaining the restriction on the applicant's land.

3. In her replying affidavit sworn on 18th November, 2018, the 2nd respondent, BOKE MWAMU TABUYA who is represented by Kwanga Mboya and Company Advocates, opposed the motion. She averred, inter alia, that the motion is utterly frivolous, misconceived, incurably defective, bad in law and an abuse of the due process of this court. That the applicant has not given sufficient grounds or satisfied any of the conditions set out for the grant of the orders sought in the motion.

4. The 2nd respondent further averred that she is a beneficiary in respect of the suit property and that she filed the restriction to safe guard her interest over the property. That Kisii HC Misc. Civil Application No. 122 of 2005 **Boke Wamwamu Tabuya –v- Stephen Chacha Mwita** is still pending as shown by documents marked "BMT-1" and if the restriction is removed, the applicant is likely to charge and or sell the suit property hence defeat the ends of justice. She termed the motion unmerited and filed in bad faith. She urged the court to dismiss the same with costs.

5. On 19th November, 2018, the court directed and ordered the parties to argue the motion by written submissions. The applicant's counsel complied by the filing of submissions dated 10th January 2019 whereby he relied on authorities including the case of **Joyce Waithira Mwangi –v- Thika Land Registrar (2018) eKLR, sections 24(a), 25 (i), 26, 76, 78(1) and (2) of the Land Registration Act, 2016 (2012)** and urged the court to grant the orders sought in the motion.

6. The 1st respondent was duly served as shown on the affidavits of service sworn on 10th October 2017 and 19th September 2018. The said

1st respondent neither entered appearance nor filed any response or submissions to the motion.

7. The 2nd respondent's counsel filed submissions dated 28/1/2019. Counsel submitted that the restriction was registered as a result of Kisii HC Civil Application No. 122 of 2005 which is pending determination. That removal of the restriction would deny Justice to the 2nd respondent. Counsel urged the court to dismiss the motion with costs.

8. I have carefully considered the entire motion, the 2nd respondent's replying affidavit together with the annexures thereto and submissions by learned counsel for the applicant. To that extend, it is the duty of this court to determine whether:-

- a) **The applicant is the registered proprietor of the suit property.**
- b) **A restriction was made affecting the applicant in respect of the property.**
- c) **A notice has been issued to the Registrar (1st respondent) regarding the restriction.**
- d) **The applicant is entitled to orders sought in the motion.**

9. The applicant averred at paragraph 2 of his supporting affidavit that he is the registered proprietor of the suit property. A document marked SCM-1 at part B – proprietorship section, is in support of the applicant's claim that he is the proprietor of the property.

10. The applicant also averred at paragraphs 6 and 11 of his affidavit that he has been subjected to enormous costs in seeking the removal of the restriction made over title to his property for the last fourteen (14) years. He contended that he has suffered for the said period as he has not enjoyed title to the suit property which is restricted.

11. The applicant further averred at paragraphs 5,6, 7, and 10 of his supporting affidavit that he has attempted to have the restriction removed by Land Registrar Kuria in vain. A copy of a letter marked "SCM 2 (a)" Annexed to the applicant's supporting affidavit, shows the notice issued to the Registrar and the latter's response thereto is revealed in a copy of a letter marked SCM-2(b).

12. **Section 78 (2) of the Land Registration Act, 2016 (2012)** under which the motion is expressed, provides:-

"78 (1) 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 of 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." (Emphasis added)

13. The 2nd respondent contended that the applicant has not disclosed sufficient grounds for the grant of the orders sought. He claimed that he is a beneficiary in respect of the suit property. That Kisii HC Misc. Application No. 122 of 2005 is still pending and to remove the restriction would deny her justice.

14. I have perused copy of a notice of motion dated 29th April, 2011 and 2nd respondent's supporting affidavit in Kisii HCC Misc. Application No. 122 of 2005. I note the nature of that motion as revealed in the orders sought, the grounds thereon and the 2nd respondent's supporting affidavit. There is nothing to show that the said suit has a bearing on this motion as the suit property does not feature therein.

15. Moreover, the 2nd respondent has not demonstrated how she is a beneficiary of the suit property. **Black's Law Dictionary 10th Edition** defines the term "**beneficiary**" as:-

"A person to whom another is in fiduciary relation whether the relation is one of agency guardianship, or trust especially a person for whose benefit property is held in trust."

16. The Registrar is empowered to make a restriction, give notice of a restriction and remove or vary any restriction under **sections 76,77 and 78 (1) of the Land Registration Act, 2016 (2012)**. Admittedly, a restriction is for the prevention of any fraud or improper dealing or for any other sufficient cause and is to endure for a particular time or until the occurrence of an event, or the making of a further order as provided under **section 76 (supra)**.

17. Restrictions are not to remain indefinitely since a restriction by itself does not solve a dispute; see the case of **Joyce Waihera Mwangi (supra)**.

18. I bear in mind the term "**Proprietor**" as defined at **section 2 of the Land Registration Act,2016 (2012)**. I also note the applicant's interest conferred by registration and his rights as proprietor of the suit property under **sections 24 and 25 of the said Act**. The applicant has the right to acquire and own the suit property as provided for under **Article 40 (1) of the Constitution of Kenya,2010**.

19. The 1st respondent duly served has not appeared before this court to render an explanation why the restriction made on 3rd October 1995 should still remain in force. There is no reason why the said restriction should remain on the title to the suit property for eternity. In the circumstances I find the motion merited.

20. Wherefore, the motion succeeds. I order the Land Registrar, Kuria East and West sub counties to remove the restriction made on 3rd December 2003 in respect of **LR NO. BUGUMBE/MABERA/639** forthwith.

21. Since the applicant has been successful in his notice of motion dated 2nd August 2017 and by dint of the proviso to section **27 of the Civil Procedure Act (Cap 21)**, costs of the motion shall to be borne jointly by respondents.

DELIVERED, DATED and SIGNED at MIGORI this 13th day of MARCH 2019.

G. M.A. ONGONDO

JUDGE

In presence of :-

Mr. Okota, learned counsel for the applicant

Ms. Opiyo, learned counsel for 1st respondent

Mr. Kwanga Mboya, learned counsel for the 2nd respondent

Tom Maurice – Court Assistant.