

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 2124 OF 2007 (OS)

**JOHN NJOROGE MWAURA &
TERESIAH MURUGI KARIUKI**

PLAINTIFFS

VERSUS

P.N THUKU & SONS LIMITED

DEFENDANT

AND

**DIRECTOR OF CRIMINAL
INVESTIGATIONS 1ST INTERESTED**

PARTY

**LAND REGISTRAR MURANGA
LAND REGISTRY 2ND INTERESTED**

PARTY

RULING

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Ruling

1. What is before the Court for determination is the Plaintiffs' Notice of Motion application dated the 13th November 2024 where they seek the following Orders:

- a) That summons do issue to the Director of Criminal Investigations either by himself or through his appointed representative to attend before this honourable court to be cross examined on the restriction it has registered on 27th November 2018 as against the subject property; Title No. Loc 16/Gatura/2174.**
- b) That an order be and is hereby issued directing the Land Registrar Murang'a to lift and/or remove the restriction made on 27th November 2018 in Title No. Loc 16/Gatura/2174 within 14 days of the order and in default the Deputy Registrar of this honourable court to sign all documents and instruments to have the said restriction removed.**
- c) That this Honourable court to issue any further/other orders in the interest of justice.**
- d) That costs of this application be provided for.**

2. The application is premised on grounds on its face and on the 2nd Plaintiff's supporting affidavit. She avers that judgement was entered in the Plaintiffs' favour in the matter and they were awarded costs. Subsequently, their advocates had the costs taxed and a Certificate of Taxation was issued for Kshs.488,687/= and a Decree issued to that effect. He avers that thereafter, a Notice to Show Cause why the immovable property of the Defendant being **Title No. Loc 16/Gatura/2174** should not be attached and sold to recover the costs was issued and the Court directed that a Settlement of Terms and conditions of sale of the Defendant's said property be prepared and filed for adoption by the Court. He deposes that when the matter came up for adoption of the said Settlement of Terms, the Deputy Registrar was unable to give a Ruling because of the restriction by the 1st Interested party dated 27th November 2018. She states that the restriction was registered for the

sole purpose of frustrating the sale of the said parcel of land in a public auction.

3. The application is opposed by the Defendant vide the replying affidavit sworn by its director, one Peter Karuma Kangai. He avers that contrary to the allegation that the Defendant is frustrating the execution process, he has tried to hasten the process by writing to the Directorate of Criminal Investigations enquiring on the investigation of the restriction placed on **Title No. Loc 16/Gatura/2174**. He insists that the said property is not free property as per its official search.
4. He contends that the Court does not have jurisdiction to join the Interested Parties after judgement has already been delivered. Further, that the issue of attachment of the parcel had been dealt with vide a Ruling delivered by Hon T. Marienga and the same has not been appealed against or stayed.

5. The application was canvassed by way of written submissions but the Plaintiffs' failed to file theirs.
6. On its part, the Defendant submits that without proper joinder of the Interested parties, no orders can be granted against them. Further, that they cannot be joined now that the suit has been concluded.
7. It also submits that at the time the Plaintiffs' filed their Settlement of Terms and conditions of sale, they were cognizant of the encumbrance on **Title No. Loc 16/Gatura/2174** and the legal implication of attaching the same. Further, that in its Ruling of 16th May 2024, this Court (Hon. T. Marienga) opined that the property cannot be free property. It argues that re-opening the issue on whether the property is free and calling for the cross-examination of the 1st Interested Party is res judicata and it would require Court to hear and determine issues touching on a property, which was never the subject matter of pleadings when this Court is functus officio having rendered its judgment.

8. It submits that the Court is devoid of jurisdiction to enlarge its scope to encompass property that was introduced belatedly after judgment as to do so, would amount to expanding the cause of action beyond what was litigated.
9. To buttress its averments, the Defendant relied on the following decisions: **Lilian Wairimu Ngatho & Another v Moki Savings Co-operative Society Limited & Another [2014] eKLR; JMK v MWM & Another [2015] eKLR; Absalom Opini Makenye v James Obegi [2018] eKLR and Wesley Barasa v Immaculate Awino Abongo & Another [2020] KEELC 1879 (KLR).**

Analysis and Determination

10. Upon consideration of the instant Notice of Motion application including the respective affidavits and Defendant's submissions the only issue for determination is whether the Plaintiffs' are entitled to the Orders as sought.

11. The Plaintiffs have sought for summons to be issued to the Director of Criminal Investigations (DCI) to be cross examined on the restriction it has registered on 27th November 2018 on Title No. Loc 16/Gatura/2174 or in the alternative that the Land Registrar Murang'a to lift the said restriction within fourteen (14) days or in default the Deputy Registrar to sign all the documents.
12. The Defendant opposed the instant application and insisted that the issues surrounding the encumbrance on Title No. Loc 16/Gatura/2174 has already been determined by the Deputy Registrar thus the Court does not have jurisdiction to re-open them, as it is barred by res-judicata. It contends that the Orders sought against the Interested parties cannot issue since they were not parties in the suit and they cannot be joined since judgement has already been entered herein.
13. It is not in dispute that the Plaintiffs' have a Decree in the matter and they already commenced execution proceedings against the Defendant's property known as **Title No. Loc**

16/Gatura/2174, which is encumbered by a restriction registered by the 1st Interested Party.

14. The Plaintiffs' filed a Settlement of Terms and Conditions of Sale of the Defendant's said property and in a Ruling delivered on 16th May 2024, by Hon. T. Marienga (Deputy Registrar) she stated as follows:

"... Noting the restriction on the subject property, the same cannot be said to be free and non - encumbered for purposes of which the decree holder asserts. The court would therefore require the decree holder to provide a report from the DCI on the restriction and status of the investigations..."

15. I note the Plaintiffs have joined the DCI and Land Registrar Muranga in these proceedings without leave of court and post judgment. On joinder post judgement, in **K v. MWM & Another (2015) eKLR**, the Court of Appeal stated that:

"We would, however, agree with the respondents that Order 1 Rule 10 (2) contemplates an

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application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's code (Supra) quoting authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10 (2) of the Civil Procedure Rules in Tanga Gas Distributors Ltd Vs Said & Others (2014) E. A. 448, stated that the power of the Court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceedings has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable..."

16. In the foregoing, while relying on the aforementioned Court of Appeal decision, I find that the DCI and Land Registrar

Muranga cannot be joined in these proceedings post judgement and will decline to do so.

17. On the prayer for cross examination of the DCI, in the case of **G G-R v H-P S [2012] KEHC 5208 (KLR)**, the Court stated as follows on a prayer for cross-examination during execution:

“Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically.....The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination....my view is that ordering cross-examination of the deponents of the subject Affidavits in the circumstances of this case would not amount to a trial..”

18. I opine that the Orders sought for summoning the DCI for cross examination will amount to conducting a trial when the matter has been concluded and I find that this Court is

functus officio. In the foregoing, I decline to grant the prayer as sought.

19. I note the Plaintiffs seek for removal of the restriction which was placed by a party who did not participate in these proceedings. On registration and removal of restrictions, 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, (2) 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.'

20. While Section 78 (1) of the Land Registration Act provides that:

'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 that 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 orders as it deems fit, and may make an order as to costs.'

21. In **Matoya Vs Standard Chartered Bank (K) LTD & Others (2003) I EA 140**, it was held that:

"A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by

law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented”.

22. From a reading of the legal provisions I have quoted, I note a party dissatisfied by an existing restriction has to apply to the Land Registrar for its removal, in the first instance. At this juncture, it is my considered view that the Plaintiffs' should have first made an application before the Land Registrar Muranga for removal of restriction before coming to Court.

23. In the circumstances, I find the instant Notice of Motion application unmerited and will strike it out.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
28TH DAY OF OCTOBER, 2025**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Mr. Kago for Respondent

Karuga for Decree Holder/ Applicant

Court Assistant: Joan