



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

JUDICIAL REVIEW APPLICATION

MISCELLANEOUS APPLICATION NO. 4 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES 2010, LALWS OF KENYA

AND

IN THE MATTER OF LEAVE FOR THE ORDERS OF CERTIORARI TO QUASH A DECISION BY THE 1ST RESPONDENT, RESTRICTION DATED 21ST JUNE, 2017 PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES, SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 AND FAIR ADMINISTRATION ACTION ACT OF 2015 OF THE LAWS OF KENYA

AND

IN THE MATTER OF LEAVE FOR THE ORDERS OF MANDAMUS PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES, SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 AND FAIR ADMINISTRATION ACTION ACT OF 2015 OF THE LAWS OF KENYA FOR LIFTING/ REMOVAL OF THE RESTRICTION AGAINST ALL THAT PARCEL OF LAND KNOWN AS LAND REFERENCE NO. KAJIADO/ DALALEKUTUK/ 3700

AND

IN THE MATTER OF LIFTING AND/OR REMOVAL OF RESTRICTION REGISTERED AGAINST LAND REFERENCE NO. KAJIADO/ DALALEKUTUK/ 3700 PURSUANT TO THE PROVISIONS OF SECTION 78(1) OF THE LAND REGISTRATION ACT OF 2012

BETWEEN

DANIEL PIRANTO OLE NCHANI.....EX PARTE APPLICANT

AND

THE DEPUTY COUNTY COMMISSIONER KAJIADO

HON. M. C. WAMBUGU.....1ST RESPONDENT

ESTHER IPITE.....2ND RESPONDENT

THE LAND REGISTRAR

KAJIADO LAND REGISTRY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

EX PARTE DANIEL PIRANTO OLE NCHANI

JUDGMENT

By a Notice of Motion filed on 13th February, 2018 the ex parte applicant is seeking the following orders:

1. An order of CERTIORARI to quash the 1st Respondent Circular and/or letter dated the 21st June, 2017 and the Restriction registered on 21st June, 2017.
2. An order of MANDAMUS compelling the 1st and 2nd Respondents 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 No. KAJIADO/ DALALEKUTUK/ 3700.
3. Costs of the suit.

The application is premised on the statutory statement and verifying affidavit of Daniel Piranto Ole Nchani. In the statutory statement the Ex parte Applicant avers that he is the registered proprietor of land reference number KAJIADO/ DALALEKUTUK/ 3700 hereinafter referred to as the 'suit land'. The Applicant discovered that the 1st Respondent had lodged a caution over the suit land on behalf of the 2nd Respondent. Vide an official search conducted on 23rd August, 2017, it is shown that on 26th June, 2017, the 1st Respondent through a letter dated the 21st June, 2017 directed the 3rd Respondent to register a restriction against the suit land thus prohibiting any transaction from taking place on it. He claims the lodgement of the restriction by the 1st and 2nd Respondents is selfish, baseless, malicious and wrongful as the 1st Respondent does not have any colour of right in law to place the said restriction on a private land and this makes his omission including commission arbitrary, unlawful as well as unfounded. Further, the Ex parte Applicant wrote a letter dated the 21st July, 2017 to the 1st Respondent, through his advocates on Record, to have the said restriction lifted but they have failed to do so to date. The Ex parte Applicant avers that it is now over three (3) months since they wrote to the 1st Respondent but he has not withdrawn the Restriction nor shown cause why the Restriction. Further, that the 1st, 2nd and 3rd Respondents have completely failed to invoke the clear provisions of the law and thus exhibit unfair, unreasonable and irrational decision in this particular case. He reiterates that the restriction should be removed as he is unable to carry out any meaningful development planning on the suit land.

In the verifying affidavit, he reiterates his claim above and deposes that he was in the process of causing subdivision of his land for purposes of giving it to his heirs, including the children of the 2nd Respondent. He contends that the 3rd Respondent did not invite him to give reasons as to why the restriction was to be placed on his parcel of land. He claims the 2nd Respondent does not have any claim or right on his land as a beneficiary since she abandoned his deceased son when he was sick and remarried another person who sired a child with her. Further, that the 2nd Respondent had previously in 2015 incited and advised his two grandchildren to register a caution over his land but they later withdrew it after realizing she had incited them, to frustrate him.

The 1st, 3rd and 4th Respondents opposed the application and filed a replying affidavit sworn by Paul Tonui who is the 3rd Respondent herein where he confirms that the ex parte Applicant is the registered proprietor of the suit land since 17th November, 2010 and a title deed was issued to that effect. He explains that on 5th October, 2013, a caution was registered against the suit land by Daniel Piranto Ole Nchani and Emily Tianui Nchani claiming beneficiary interest but they removed the said caution on 15th February, 2017. He avers that on 21st June 2017, a restriction was placed vide Deputy County Commissioner's letter dated the 21st June, 2017 to restrict dealings on the suit land until a complaint reported by Esther I. Nchani was resolved and the said restriction is still in place. He contends that the 2nd Respondent was mandated to place a restriction on the suit land under section 76 of the Land Registration Act to prevent fraudulent or improper dealings. He reiterates that the application lacks merit as against the 1st, 3rd and 4th Respondents' and the same should be dismissed with costs to them.

The 2nd Respondent though duly served did not enter appearance nor file a response to the instant application.

The Applicant including the 1st, 3rd and 4th Respondents filed their submissions that I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 13th February, 2018 including the statement of facts; verifying and replying affidavits as well as the annexures thereon including the parties' submissions, the following are the issues for determination:

- Whether the ex parte applicant is entitled to the orders sought in this substantive application.
- Who should bear the costs of this proceedings

As to whether the ex parte applicant is entitled to the orders sought in this substantive application. It is not in dispute that the Ex parte Applicant is the registered proprietor of the suit land. It is further not in dispute that a restriction was entered against the said title by the 3rd Respondent at the behest of the 1st Respondent. The Applicant sought for orders of certiorari and mandamus to compel the 1st and 2nd Respondents to remove the restriction dated the 21st June, 2017 but to date the 3rd Respondent has declined to remove the same. He submitted that he is the registered proprietor of the suit land and had indefeasible title over it. He relied on the cases of **ELC No. 65/ 2013 Christopher Kitur Kipwambok Vs Vipulratilal Dodhia & 3 others; ELC No. 222 of 2015 Kisumu, Victoria Distributors Vs Joseph Abwao Nyawir** to support these arguments. As to the claim on removal of restriction, he relied on the case of **David Macharia Kinyuru Vs District Land Registrar Naivasha & Another, Nakuru ELC Misc. Appl. No. 331 of 2016** to buttress his claim. The 1st, 3rd and 4th Respondents submitted that the entry of the restriction was justified and relied on section 76 including 78 of the Land Registration Act as well as the cases of **Joyce Waithira Mwangi V Thika Land Registrar (2018) eKLR** to oppose this application. From the averments in the replying affidavit, the 3rd Respondent contended that on 21st June 2017, a restriction was placed vide Deputy County Commissioner's letter dated the 21st June, 2017 to restrict dealings on the suit land until a complaint reported by Esther I. Nchani was resolved and the said restriction is still in place. He insisted that the 2nd Respondent was mandated to place a restriction on the suit land under section 76 of the

Land Registration Act to prevent fraudulent or improper dealings. The 1st Respondent's letter dated the 21st June, 2017 which led to the registration of restriction on suit land reads as follows: **' the above parcel of land is registered in the name of Daniel Piranto Nhani. Esther I. Nhani ID No. 1308936 has registered a complaint in this office over the above mentioned parcel of land. Therefore the purpose of this letter is to request you to restrict it. '**

The 2nd Respondent never filed a response to the instant application to offer an explanation on her interest in the suit land and why the restriction should subsist.

I wish to make reference to the various legal provisions within the Land Registration Act which govern registration and removal of restrictions: Section 76 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 or 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 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 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 the current scenario, the Land Registrar in his replying affidavit did not indicate whether he had informed the ex parte applicant before the entry of the restriction over the suit land. Further, I note the letter dated 21st June, 2017 from the 1st Respondent which directed the 3rd Respondent to enter a restriction was not copied to the ex parte applicant. From the above cited legal provisions, it is the Land Registrar who is legally mandated to enter a restriction over any land after notifying the proprietor of the land. This now brings me to the issue as to whether the 1st and 3rd Respondent acted ultra vires as well as arbitrarily to enter the restriction which culminated in the prayers sought herein.

I note the 2nd Respondent failed to file a response to the instant applicant to controvert the Applicant's averments and further did not explain her interest in the suit land . In the response filed by the 1st, 3rd and 4th Respondents' there is no indication as to whether the Ex parte Applicant was accorded a hearing before the restriction was registered against his land. I note the actions of the 1st and 3rd Respondents were administrative. 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 **Livingstone Kunini Ntutu Vs Minister for Lands & 4 others (2014) eKLR**, the learned Judges Odunga and Weldon Korir stated as follows: **' we are of the view that judicial review is not the most efficacious remedy where what is in contention is the ownership of the suit property. On the other hand, there is clear evidence that the decision to revoke the Applicant's title is not backed by the law. The same was illegal and indefensible..... It is an abuse of power for a party to bypass the courts and use its might to determine its case against a powerless opposite party.'**

In relying on the facts as presented and associating myself with the two cited judicial authorities, I find that failure by the Respondents to accord the Ex parte Applicant a hearing before registering the restriction on his parcel of land as well as failure to remove the same when the Applicant sought for it, is against the rules of Natural Justice and violated the Ex parte Applicant's Constitutional right not to be condemned unheard. Insofar as the 3rd Respondent was legally mandated to enter the restriction, he also admits that the restriction can be removed. In the said 1st Respondent's letter, except for reference to a dispute, it is not clear on what the said dispute was all about. To my mind, I find that by failing to notify the ex parte applicant of his intention to register a restriction over his land, the 3rd Respondent did not observe the Constitutional principles of reasonability and procedural fairness. I opine his averments that the restriction should subsist until the dispute referred to in the letter dated the 21st June, 2017 is determined is not logical as no evidence was presented to him in respect of the dispute and this hence amounts to 'procedural impropriety' as the basic rules of natural justice as well as procedural fairness has not been observed in the 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.

On the issue of costs, since this generally abides the outcome of the suit, I find that the 1st and 2nd Respondents who initiated the registration of the restriction should be made to bear the same but not the Land Registrar.

It is against the foregoing that I find the Notice of Motion dated the 13th February, 2018 merited and proceed to allow it in the following terms:

4. An order of Certiorari be and is hereby issued to quash the **1st Respondent Circular** and/or letter dated the 21st June, 2017 and the Restriction registered on 21st June, 2017.

5. An order of MANDAMUS be and is hereby issued compelling the 3rd 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 No. KAJIADO/ DALALEKUTUK/ 3700.

6. The costs of this application is awarded to the applicant and should be borne by the 1st and 2nd Respondents equally.

Dated signed and delivered in open court at Kajiado this 16th day of September, 2019

CHRISTINE OCHIENG

JUDGE