



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**E.L.C. CASE NO. 47 OF 2018**

**(FORMERLY EMBU HCC 91 OF 1997)**

**AUGUSTINE NJAGI NGUNGI.....PLAINTIFF**

**VERSUS**

**MICHAEL NTHIGA NJAMBURI.....1<sup>ST</sup> DEFENDANT**

**GABRIEL NJERU NJIRU.....2<sup>ND</sup> DEFENDANT**

**JAMES MAINA WARUHIU.....3<sup>RD</sup> DEFENDANT**

**NDUMA MWINGIRE.....4<sup>TH</sup> DEFENDANT**

**ESTHER NGUKU NGUMANE.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 18<sup>th</sup> October 2018 brought under **Order 51 Rule 1 of the Civil Procedure Rules**, the Plaintiff sought the following orders:

*a) That the Siakago Land Registrar be ordered to remove restrictions on land parcel Nos. Nthawa/Riandu/2903, 2905, 2906, 6533, 6534, 6535, 7075, 7076, 7077, 7078, 7079, 7080, 7081, 7082, 7083 and 7084.*

*b) That costs of this application be provided for.*

2. The application was based on the ground that legal proceedings amongst the parties had been finalized and that there was no justification for keeping the encumbrances against the suit properties. The said application was supported by a very brief affidavit sworn by the Plaintiff on 18<sup>th</sup> October 2018 which reiterated the grounds set out on the face of the motion.

3. The 3<sup>rd</sup> Defendant filed a replying affidavit sworn on 20<sup>th</sup> November 2018 in opposition to the said application. It was contended that the procedure adopted by the Plaintiff in the removal of the encumbrances was defective; that he had acquired an interest in some of the suit properties through an award of the Land Disputes Tribunal; and that he was on the verge of filing suit for recovery of some of the suit properties. The Plaintiff filed a supplementary affidavit sworn on 9<sup>th</sup> June 2019 in response to the said replying affidavit.

4. When the said application was listed for hearing on 21<sup>st</sup> May 2019 the advocates for the parties agreed to canvass the said application through written submissions. The parties were granted 60 days within which to file and exchange their respective submissions. The record shows that the Plaintiff filed his submissions on 10<sup>th</sup> June 2019. The 3<sup>rd</sup> Defendant's submissions were not on record by the time of preparation of the ruling.

5. The court has considered the Plaintiff's said application, the 3<sup>rd</sup> Defendant's replying affidavit in opposition thereto as well as the Plaintiff's supplementary affidavit. The court has also considered the Plaintiff's written submissions on record as well as the entire material on record.

6. It is evident from the material on record that the litigation amongst the parties has come to a conclusion. The record shows that judgement was delivered in favour of the Plaintiff by the Hon. Justice H.I. Ong'undi on 24<sup>th</sup> April 2012. There is no indication of any appeal having been filed against the resultant decree. The 3<sup>rd</sup> Defendant's attempt to forestall execution of the decree vide his application dated 14<sup>th</sup> August 2018 was dismissed by the court on 16<sup>th</sup> August 2018.

7. The material on record further shows that the restrictions in the issue were entered on the basis of a letter from the firm of Beth Ndongoro & Co. Advocates dated 2017 which was long after delivery of the judgement. Although the court does not agree with the Plaintiff's contention that the encumbrances were entered pending the hearing and determination of the suit, the court is nevertheless inclined to allow the application. It is clear that the litigation amongst the concerned parties has come to its logical conclusion. There is no pending appeal or review against the original decree. There is thus no reason to maintain the encumbrances against the suit properties.

8. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 18<sup>th</sup> October 2019 and the same is consequently allowed with costs to be borne by the 3<sup>rd</sup> Defendant only.

9. It is so ordered.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 24<sup>TH</sup> DAY of OCTOBER 2019.**

In the presence of Ms. Materi holding brief for Mr. Mogusu for the Plaintiff, Mrs. Njuguna holding brief for Ms. Beth Ndongoro for the 3<sup>rd</sup> Defendant and in the absence of the rest of the Defendants Nos. 1, 2, 4, 5 & 6.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**24.10.19**