



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA
ELC CASE NO. 345 OF 2017
(FORMERLY NAIROBI ELC NO. 1995 OF 2007)

DAVID MWAURA MWANGI.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF KIAMBU.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, KIAMBU.....2ND DEFENDANT

JUDGMENT

By an **Amended Plaint** dated **17th July 2015**, the Plaintiff filed this suit against the Defendants and sought for the following orders;

- a) A declaration that the imposition of the restriction on the parcel of land LR/Dagoretti/Thogoto/T.82 is unlawful*
- b) Unconditional removal of the restriction placed on the said parcel of land.*
- c) An injunction restraining the Defendants from interfering in any way with the Plaintiff's parcel of land.*
- d) Cost of this suit.*
- e) Interest on (d) above*
- f) Any other or further relief that this Court may deem fit and just to grant.*

In his statement of Claim, the Plaintiff averred that he has been the registered proprietor of the suit property having purchased it from **Micheal Mwathi** and **Mercy Mwathi**. That around the month of **August 2002**, the 1st Defendant unlawfully placed a restriction on the suit land and that the 2nd Defendant failed to ensure that the mandatory requirements under the Land Registration Act were complied with. That despite demand to have the restriction removed, the Defendants have failed, refused and/or neglected to do so.

The suit is contested and the 1st Defendant filed a Defence dated **13th April 2007**, and denied all the allegations in the plaint and averred that the alleged seller had no proprietary right over the suit land and

could not pass a good title. The Court was therefore urged to dismiss the suit.

PLAINTIFF'S CASE

PW1 David Mwaura Mwangi adopted his witness statement dated **5th March 2013** and produced the list of documents dated **20th December 2010** as exhibits. He testified that the **title deed** was issued to the Vendors on the **24th November 1992**, and the transfer was effected in his favour on the **9th of January 1998**. Further that he bought the suit land free from any encumbrance and started a school in the year **1999**, which has been in existence until the 1st Defendant placed a restriction on the suit property on the **2nd August 2002**.

He told the Court that when he conducted a search and noticed that there was a restriction, he wrote a letter to the Clerk of Kikuyu Town Council, but he did not receive any response. Further that he was never given an opportunity to be heard and hence he has suffered as he has been unable to secure any fundings with the restriction in place.

He further testified that the Mwathi's were not the original owners of

the suit property but the suit property did not have any disputes. Further that before purchase, they went to the **Land Control Board** for Consent. He further testified that he took the letter to the **Town Clerk**, but it was not stamped as it was within the Jurisdiction of the Kikuyu Town Council. Further that he conducted a search before he bought the suit land and the Council did not object.

PW2 Mercy Njoki Mwangi, adopted her witness statement dated **13th March 2013**, and testified that she jointly owned the suit property with her husband as per the Green Card. That her husband sold the suit property to the plaintiff in the year **1998**, and that before the restriction was placed on the suit land, they had never received any **Notice** and that at the time of purchase, there was no encumbrance and the **Consent** of the **Land Control Board** was granted.

She reiterated that she had sold **Dagoretti/Thogoto/T.82**, to the Plaintiff having bought it from one **Hannah Njeri Mwathi**, who had bought it from **Peris Muthoni**. She further testified that the Green Card shows that the said **Hannah Mwathi** owned the suit property from **1971** and there were no restrictions.

The Defendant did not call any witness and the parties were directed to file written submissions which the Court has now carefully read and considered. The 2nd Defendant did not participate in the proceedings though it had been duty served with the suit papers.

Though the 1st Defendant filed a Defence and cross examined the Plaintiff, it did not call any witness. This Court therefore finds that the Plaintiff's evidence is to be believed and remains uncontroverted and unchallenged as the Defendants did not cally any evidence to prove their claim. See the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR** where the Court held that;

"It is settled law in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.

In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002**, Lesiit, J. citing the case of **Avtar Singh Bahra & Another ..vs.. Raju Govindji, HCCC No.548 of 1998** appreciated that:

"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the

Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

Further the Court cited the case of Karuru Munyororo ...Vs... Joseph Ndumia Murage & Another Nyeri HCCC No.95 of 1988, where the Court

held that:-

"The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

Having considered the available evidence and the submissions herein, the Court finds the issues for determination are as follows;-

- 1. Whether the Plaintiff has a good title*
- 2. Whether the Restriction is unlawful*
- 3. Whether the Plaintiff is entitled to the orders sought*

1. Whether the Plaintiff has a good title

The Plaintiff testified that he is the registered owner of the suit property having bought it from PW2 and her husband. The Plaintiff produced a Certificate of title and a search document which showed that indeed he was the registered owner of the suit property. The Plaintiff was registered as such on 9th January 1998.

On the other hand, the 1st Defendant has alleged in their Defence that the suit property did not belong to the Vendor who sold the suit property to the Plaintiff as he did not have a good title that he could pass to the Plaintiff. However Section 27 of the Registered Land Act Cap 300 (now repealed), gives the registered owner of the suit property absolute and indefeasible title to the land. Further Section 28 of the said Cap 300 (repealed) provides that the right of such registered owner can only be defeated by the relevant provisions of law. It states as follows;-

"The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever".

Further Section 26(1)(a)&(b) of the Land Registration Act 2012 provides:-

"The certificate of title issued by the Registrar upon registration, .or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

It was therefore imperative upon the Defendants to prove that the Plaintiff either acquired the suit property through fraud or through an unlawful process. This Court has already held and found that the evidence of the Plaintiff remains uncontroverted as the Defendants did not call any witness to controvert the evidence by the Plaintiff. Further, the Plaintiff has alleged that he bought the suit land from PW2. On the other hand, PW2 averred that they bought the suit land from her mother-in-law one Hannah Njeri, who had bought the land from Peris Muthoni, and to prove this trail, the Plaintiff produced a Green Card which showed that the suit property was initially granted to Peris Muthoni in 1959. The said Peris then passed it on to Hannah Njeri, who later sold it to and Micheal Mwathi, and subsequently to the Plaintiff herein. Again there has never been any dispute over the land and the said land had not been restricted before the same was purchased by the Plaintiff.

When a registered proprietors title to land has been called to question, what the party then needs to prove to Court is the root and history of the title in order for the Court to make a determination. This Court is therefore satisfied that the green card produced in Court has explained the root of the Plaintiff's title and without any evidence to confirm that there was any misrepresentation, the Court holds and finds that the Plaintiff has a good title that was passed on to him. It is therefore this Court's finding that the Plaintiff is the absolute and indefeasible owner of the suit property. See the case of Kiplangat Shelisheli Mutarakwa ...Vs... Joseph Rotich Kones [2018] eKLR where the Court held that;

“Nothing has been presented by the defendant to prove that the plaintiff's title is unlawful or that it was fraudulently acquired. Thus, from the evidence that has been presented before me, I have no difficulty in holding that the plaintiff's title is a good title which deserves protection. As title holder, it is only the plaintiff who is vested with proprietary rights over the suit property”.

2. Whether the Restriction is unlawfull

This Court has already held and found that the Plaintiff is the lawful registered owner of the suit property. It is not in doubt that there is an existence of a **restriction** on the title of the suit properties registered on **2nd August 2002** wherein it is indicated that **“No dealings vide Letter KTC/13/1/1/Vol VII/178 dated 26th July 2002 by Town Council Of Kikuyu”**

*The Plaintiff has alleged that he was not given an opportunity to be heard nor was he aware before the Restriction was placed as the Defendant unlawfully placed the said restriction on the suit property. Though the restriction indicates that no dealings should be done in accordance to a letter, the Court has not seen any letter giving any reasons as to why the restrictions were placed. Further the Plaintiff has testified that he did not know why the restriction were placed and the claim by the Defendant that the land was acquired through fraudulent means has not been proved. The suit land was registered under **Cap 300 (repealed)** and that is the applicable law herein. **Section 137 (1) of the Registered Land Act (repealed)** provides:-*

“The Registrar shall give notice in writing of a restriction to the proprietor affected thereby.”

Since that there is no evidence that the Plaintiff as the registered owner of the suit property was ever notified before the restrictions were placed, the court finds that the placing of the said restriction was unlawful and improper.

Restrictions are placed on a title to land to **prevent any fraud or improper dealing**. See case of David Macharia Kinyuru...Vs...District Land Registrar, Naivasha & Another, Nakuru ELC Misc. Appl.No.331 of 2016, where the Court held that:-

“.....the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance

as the underlying issue leading to the restriction is being resolved; since restriction by itself does not solve a dispute....”

There is no evidence of any such fraud or improper dealing and therefore this Court finds that the restriction is not merited.

Further **Section 136(2)** of the **Registered Land Act, Cap 300 (repealed)** states that:-

“A Restriction may be expressed to endure:-

- a. for a particular period; or*
- b. Until the occurrence of a particular event; or*
- c. Until the making of a further order.*

It is evident that restrictions are not supposed to endure indefinitely on a title. As the Court already held that the testimony of the Plaintiff remains uncontroverted and further since there is no evidence of fraud as claimed by the 1st Defendant and since the Plaintiff was never notified before the restriction was placed, this Court finds that there is no reason as to why the said restriction should not be removed **Section 138(1)** of the **Registered Land Act, Cap 300 (repealed)** provides:-

“The Registrar may at any time, upon application by any person interested or of his own motion, and after giving the parties affected thereby an opportunity of being heard, order the removal or variation of a restriction”.

It is evident from the above provisions of law that the Court has power to remove any restriction on a title to land. The Defendants did not call evidence to explain why the restriction should not be removed. Therefore the Court finds no reason why the said restriction should remain on the Plaintiff's title. Further, the Court finds that the restriction herein is unlawful.

3. Whether the Plaintiff is entitled to the orders sought.

This Court has already held and found that the Plaintiff is the registered owner of the suit property and has a good title. Further that the **restriction** placed on the title did not follow due process and therefore unlawful as there was no fraudulent dealing that has been proved. Consequently, the court finds and holds that the Prayers sought by the Plaintiff are merited and the claim is therefore allowed entirely with costs.

For the above reasons, the court enters Judgment for the Plaintiff against the Defendants jointly and severally as prayed in the Plaint in terms of prayers **(a),(b),(c),(d),** and **(e)** of the **Amended Plaint**.

It is so ordered.

Dated, Signed and Delivered at Thika this 29th day of November 2019.

L. GACHERU

JUDGE

29/11/2019

In the presence of

M/S Wanyama holding brief for M/S Maina for the Plaintiff

No appearance for 1st Defendant

No appearance for 2nd Defendant

Lucy - Court Assistant.

L. GACHERU

JUDGE

29/11/2019