



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 294 OF 2017**

**EDWARD MATHU KAMAU.....PLAINTIFF**

**VERSUS**

**JOYCE WAMBUI MBUGUA.....DEFENDANT**

**JUDGMENT**

By a Plaint dated **21<sup>st</sup> February 2017**, the Plaintiff herein filed a suit against the Defendant seeking for orders that;

- a) An order compelling the Defendant to withdraw the restrictions from the suit properties.***
- b) Damages and Costs of the suit.***

In his statement of Claim, the Plaintiff averred that on the **10<sup>th</sup> of September 2013**, he entered into a sale agreement with one **Hannah Wangui Mwangi**, for the sale and purchase of half acre curved out of **L.R No. Escarpment Jet Scheme/1581**, and another sale agreement with one **John Kamau Mwangi(deceased)**, for the sale and purchase of **L.R No. Escarpment Jet Scheme/1582**, and that further on the **1<sup>st</sup> of March 2013**, he entered into another sale agreement into another sale agreement with one **Stephen Gachoka Mwangi** for the sale and purchase of **L.R No. Escarpment Jet Scheme/ 1583**. He alleged that for all the parcels of land, he paid the full purchase price.

It was his contention that he subsequently caused the three parcels of land to be one parcel of land being **L.R No. Escarpment Jet Scheme/ 1825**, and later subdivided it into twelve parcels of land known as **L.R No. Escarpment Jet Scheme/1865 to L.R No. Escarpment Jet Scheme/ 1876 all measuring 50 by 100**. He later sold **1873 and 1874** and remained with ten parcels. He averred that the Defendant without any colour of right put cautions on all the **10 parcels** of land and that his claim is for an order compelling the Defendant to withdraw the said restrictions from the suit properties.

The Defendant despite being serve with the suit papers did not participate in the proceedings. The matter proceeded for formal proof hearing wherein the Plaintiff testified and closed his case.

**PLAINTIFF'S CASE**

**PW1 Edward Mathu Kamau** adopted his witness statement dated **27<sup>th</sup> February 2017** and testified that he bought a piece of land from two brothers. However one of the sisters who is the Defendant placed restriction on the suit land. He produced his list of documents as exhibit .It was his testimony that the brothers of the Defendant were the owners of the land and he further stated that he did not know why the Defendant placed restrictions on the 10 parcels of land.

Despite being served with the suit papers, the Defendant did not enter appearance nor file her response to the Plaint.

The Court directed the Plaintiff to file brief *written submissions* in support of his claim which he filed on **6<sup>th</sup> May 2019** and relied on **Section 76 of the Land Registration Act.**

The Court has now carefully considered the pleadings, evidence on record and exhibits thereto. The Court has also considered the written submissions, the cited authorities and the relevant provisions of law and makes the following rendition:-

The Defendant failed to enter appearance and thereby defend the suit. The fact that the suit has not been opposed means that the Plaintiff's evidence remained unchallenged and uncontroverted. However, the Plaintiff is still required to prove her case on the required standard of balance of probability. See the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR.** where the Court cited the case of **Karuru Munyororo.....Vs.....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988,** where it was 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 Defendant’s and or their Counsel to cross examine her on 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”***

The fact that the evidence is not challenged does not then mean that the Court will not interrogate the evidence of the Plaintiff. The Court still has an obligation to interrogate the Plaintiff’s evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as *ex parte* evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR**, where the Court stated:-

***“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it as truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”***

Further in the case of **Gichinga Kibutha...Vs...Carooline Nduku (2018) eKLR**, where the Court held that:-

***“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”***

Considering the available evidence, the issue for determination is **whether the Plaintiff is entitled to the orders sought.**

There is no doubt that the suit properties are registered in the name of **Edward Mathuu Kamau** the Plaintiff herein. There is also no doubt that as per the various **official searches** dated **2nd February 2017**, there is in existence a **restriction** on the titles of the suit properties registered on **23<sup>rd</sup> May 2016** wherein it is indicated that **“No dealings vide unreferenced Kituo Cha Sheria’s Letter dated 23<sup>rd</sup> may 2016”**

The Plaintiff testified that he is the registered owner of the suit property and the searches confirm the same. The Plaintiff has alleged that he was not given an opportunity to be heard nor was he aware of any complaint by the Defendant before the Restrictions were placed on the above stated parcels of land. It was his allegations that the Defendant unlawfully placed restrictions on the suit properties. Though the restriction indicates that no dealings should be done in accordance to a letter from **Kituo Cha Sheria**, 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 restrictions were placed therein. **Section 77 (1) of the Land Registration Act** provides

***“(1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.”***

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, then the Court finds that the placing of the said restrictions was unlawful and improper.

The 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 consequently the Court finds that the restrictions places on the 10 parcels of land belonging to the Plaintiff are not merited.

Further **Section 76(2) of the Land Restriction** states that:-

***“Restrictions may endure for:***

- a. A particular period***
- b. Until the occurrence of a particular event or***
- c. Until the making of further orders.***

It is evident that restrictions are not supposed to endure indefinitely on a title. The restriction on the title herein indicate that **‘No dealings vide unreferenced Kituo Cha Sheria letter dated 23<sup>rd</sup> May 2016’**. As the Court already held the testimony of the Plaintiff remains uncontroverted and since there is no evidence of any reason ever being given to the Plaintiff as to why the Defendant placed the restriction on the land and given that there is no sufficient reason given on why the suit properties were restricted, then the Court finds that the above stated restrictions should be removed.

**Section 78(2) of the Land Registration Act**, provides:-

***“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”.***

It is evident from the above provisions of law that the Court has power to remove any restriction on a title to land. The Defendant did not appear in Court to explain why the restriction should not be removed. This Court therefore finds no reason why the said restriction should remain on the said titles and consequently, the Court finds that the ***Plaintiffs suit is merited and the same is allowed entirely in terms of prayers (a) with costs.***

However, the court declines to award any damages as sought in the Plaintiff.

It is so ordered.

***Dated, Signed and Delivered at Thika this 15<sup>th</sup> day of November, 2019.***

**L. GACHERU**

**JUDGE**

**15/11/2019**

In the presence of

M/S Musungu holding brief for Mburu Machua for Plaintiff

No appearance for Defendant

Jackline - Court Assistant.

**L. GACHERU**

**JUDGE**

**15/11/2019**