



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISCELLANEOUS CIVIL APPLICATION 2 OF 2019

JOHN KAMAU KINYANJUI.....PLAINTIFF/ APPLICANT

VERSUS

THIKA DISTRICT LAND REGISTRAR.....1ST DEFENDANT/RESPONDENT

GITU MUKAMI.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determinations is the **Notice of Motion** Application dated **4th December 2018**, by the Plaintiff herein brought under **Section 78(2) of the Land Registration Act 2012, Section 3A of the Civil Procedure Act, Cap 21** Laws of Kenya, **Order L Rule 2** of the Civil Procedure Rules and all enabling provisions of the law. Against the Defendants seeking for orders that;

1. The Court be pleased to order lifting of Restriction filed against title number Ruiru/ Kiu Block 2/2616.

2. THAT costs of this Application be provided for

The Application is premised on the grounds that the Plaintiff/

Applicant is the registered owner of the suit property. However the 1st Respondent has refused to remove the restriction even after he requested for removal of the same as the restriction had no merit. Further that the Respondents have no justification to refuse or pend a restriction against the suit land. That the Restriction has been lodged either by the 2nd Respondent, his agents Applicants rights to property and not keen on proving why the restriction should be maintained on record and that the Court has a duty to protect his property as he is the registered owner as the Respondents are being used by people unknown to him who are interested in swindling him.

In his supporting Affidavit sworn on the **4th of December 2018**, the Plaintiff/Applicant averred that he purchased the suit property from the 2nd Respondent and he was issued with a title in the year **2004**, and took possession of the said land. That however the 1st Respondent without any justification and without informing him lodged a restriction against his title. He averred that he has sought for information as to who prompted the filing of the restriction or their address to know the reason for such restriction, but he has been unable to get any help. He averred that the 1st Respondent's actions have not been formally communicated to him and it has been over 7 years since the restriction was placed. He alleged that no reason exists why the restriction has been placed for over 7 years and there is no Court case challenging his ownership or an ongoing investigation.

He averred that he holds a clean title which has not been challenged in any Court and there is no proceedings whether criminal or civil that he is aware of. Applicant urged the Court to lift the restriction to enable him proceed appropriately to deal with his land.

Despite being served with the Application, the 1st Respondent, *Thika Land Registrar and the 2nd Respondent* did not enter appearance nor file

their responses to this application. The Court directed the Applicant to file brief *written submissions* to support his claim which he filed on **18th April 2019** and relied on **Sections 77(1) and 78(1) of the Land Registration Act.**

The Applicant submitted that despite being the registered owner, he has never been called by the 1st Respondent in relation to any investigations with regards to the suit property and given that a restriction should not last for an indefinite period, the Court should direct and order that the restriction be removed

The Court has now carefully considered the instant application and the annexures thereto. Further, the Court has also considered the written submissions, the cited authorities and the relevant provisions of law and makes the following rendition:-

There is no doubt that the suit property herein **Ruiru/Kiu Block 2 (Githuunguri) 2616**, is registered in the name of **John Kamau Kinyanjui**, the Applicant herein as from **5th January 2005**. There is also no doubt that as per the *official search* dated **17th June 2016**, there is in existence a *restriction* on the title of the suit property registered on **1st December 2011**, wherein it is indicated that **“Consult the original owner before any dealings”**

The Applicant has produced a title deed that bears the name of the 2nd Respondent. It is also very clear that the 2nd Respondent was the original registered owner of the suit property as per the green card and before it changed hands to the Applicant. The Applicant has alleged that he was not given an opportunity to present his documents nor was he made aware of the reasons for the restriction. The Applicant has alleged that he has asked the 1st Respondent to withdraw the restriction but to no avail. Indeed the Court has seen one such letter dated 21st July 2016, requesting the Land Registrar to withdraw the restriction imposed on the suit property.

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.”

The Applicant has alleged that he was not given notice before the restriction was placed on the suit property. This contention or evidence is uncontroverted and therefore the Court finds and holds that there is no evidence that the Applicant was notified before the restriction was placed and consequently the same is unlawful and the restriction is 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 without such evidence, the Court finds that the restriction is 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 **‘consult original owner before any dealing’**. Though the Applicant has alleged that the 2nd Respondent is deceased, there is no evidence to confirm the same. However, the Applicant alleged that he was never informed of the reason for the pending restriction. Consequently, the Court finds that there is no reason why the same should not be removed.

The Applicant has alleged that even after applying to the Land Registrar to remove the restriction, the said Registrar has failed to do so and thus the filing of this application as provided by **Section 78(2) of the Land Registration Act**, which 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 Respondents 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 title and for the above reasons, the Court finds that the Applicant’s Notice of Motion dated **4th December 2018** is merited. The said application is allowed entirely with costs in the cause.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th day of November, 2019.

L. GACHERU

JUDGE

8/11/2019

In the presence of

No appearance for Applicant

No appearance for 1st Respondent

No appearance for 2nd Respondent

Jackline - Court Assistant.

L. GACHERU

JUDGE

8/11/2019