



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC MISC. APPLICATION NO. 123 OF 2017

PHARIS WACHIRA MWANGI.....1ST APPLICANT

DENNIS AARON WACHIRA GICHANGI.....2ND APPLICANT

FRANCIS XAVIER OTIENO.....3RD APPLICANT

VERSUS

THE LAND REGISTRAR, NGONG LAND REGISTRY.....1ST RESPONDENT

VANE KWAMBOKA & COMPANY ADVOCATES.....2ND RESPONDENT

RULING

What is before Court for determination is the Applicants' Notice of Motion Application dated the 15th September, 2017 brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules, Section 78 (2) of the Land Registration Act and Section 3A of the Environment and Land Court Act. The Applicants seek for the Court to issue an order compelling the 1st Respondent to remove the Restriction placed on land parcel number Ngong/ Ngong/ 48669 by the 2nd Respondent. The application is premised on the summarized grounds that the Applicants are registered proprietors of land parcel number Ngong/ Ngong/ 48669 and they have discovered the 2nd Respondent entered a restriction thereon. The Applicants do not know the 2nd Respondent and have any had any dealings with her. The Applicants have made efforts to establish from the 2nd Respondent what her claim in the property could be, to no avail. Further, they have also sought to establish from the Land Registrar, Ngong, the reason for placing the restriction but the Registrar has ignored their requests. The Applicants are now reasonably apprehensive that the Respondents have connived to deprive them of their lawful property. The Respondents stand to suffer no prejudice if the orders sought are granted.

The application is supported by the affidavit of the 2nd Applicant DENNIS AARON WACHIRA GICHANGI where he confirms that together with the 1st and 3rd Applicants they are registered owners of the suit land. He explains that after undertaking a search on 6th December, 2016 they discovered that a Restriction had been placed on the suit land by the 2nd Respondent on 13th June, 2016. He contends that through their advocates vide a letter dated the 17th January, 2017 addressed to the 2nd Respondent, they demanded for the removal of the restriction. Further, that they never received a response to their said letter. He claims that their advocate sent a letter dated the 4th April, 2017 to the Land Registrar but this did not elicit any response.

The application is opposed by the 2nd Respondent who filed a replying affidavit sworn by VANE KWAMBOKA who is an advocate of the High Court of Kenya practicing in the name of VANE KWAMBOKA & COMPANY ADVOCATES who are the 2nd Respondent's herein. She denies placing the restriction on the suit land on her own volition as alleged but on instructions of their client JOHN MBIRARU NAITERA on the ground that the Applicants' had fraudulently subdivided his original title namely NGONG/ NGONG/ 46786 to produce the current title but he was still retaining it. She insists that they were clearly acting on instructions as evident in the Certificate of Official Search. Further, that she insists she did not place the restriction for her own benefit as she is neither the former nor the current registered owner and do not have a personal interest in the said parcel of land. She contends that she has no authority of her own to remove the restriction unless instructed to do so by her client. She confirms her inability to respond to the Applicants' Advocates letter dated the 17th January, 2017 due to lack of sufficient instructions. Further, that her client passed away and she is incapable of removing the restriction unless instructed by the Administrators of her client's estate. She reiterates that she is a non suited person as the proper person to sue is her client. Further, that the application as filed offends the mandatory provisions of the law as it is incurably defective and should be struck out. She avers that the Application is incompetent as the suit should have been commenced by Plaintiff as required by law. Further, the Land Registrar is sued without enjoining the Attorney General.

Both Applicant and 2nd Respondent filed their submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion application dated 15th September, 2017 including the Preliminary Objection, Parties Affidavits and Submissions, the only issue for determination is whether the restriction entered on the suit land by the 2nd Respondent should be lifted.

The Applicants in their submissions relied on sections 76 and 78 of the Land Registration Act and the cases of **David Macharia Kinyuru V District Land Registrar, Naivasha & Another (2017) eKLR** and **Joyce Waithira Mwangi V Thika Land Registrar (2018) eKLR** to support their application for removal of restriction.

The 2nd Respondent in her submissions insisted that the Restriction was to subsist until the dispute is resolved.

Section 76 of the Land Registration Act makes provisions on placement of restriction by stipulating thus: **‘(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. (3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.

While Section 78 makes provisions on Removal and variation of restrictions by stating 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.’**

The parameters on registration and removal of restrictions is well described in the legal provisions I have cited above.

In the case of **Joseph Kibowen Chemjor vs William C. Kiseru [2013] eKLR**, Justice Munyao Sila observed as follows;

I am alive to the provisions of Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be “pleadings”, goes beyond a mere technicality. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of “suit by a letter” which Mr. Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party.

If I am to allow the current “pleadings” to stand, I do not see how this matter will be determined without prejudice being caused to the defendant. Even if no prejudice will be caused to the defendant I would rather strike out this application at this stage, which will only invite minimal cost, rather than to allow the proceedings to stand, and thereafter be at a loss on how to thereafter proceed with the matter. The former action will benefit all parties and is certainly the lesser of the two evils.’

I note the 2nd Respondent averred that she was instructed by her client to place the restriction on suit land claiming the applicant had fraudulently subdivided his land. Further, that her client has since died. Section 76 cited above is clear that a restriction can be entered in instances of fraud. I note that the 2nd Respondent is actually the law firm that was representing the party who placed the restriction on the suit land. I opine that since the said law firm was acting on instructions of JOHN MBIRARU NAITERA who claimed that his land NGONG/ NGONG/ 46786 was fraudulently subdivided to produce the suit land yet he still had his original title, it would be pertinent if matter was set down for hearing. In associating myself with the decision cited above as well as facts as presented, I find that the issues relating to removal of the restriction herein are substantive and all parties concerned have to be enjoined in the suit. Further, insofar as the Applicants are registered proprietors of the suit land and raise pertinent issues in the instant application, I find that failure to include the party responsible for registration of the said restriction as well as furnishing the documents on how they acquired their land is incomplete. In the circumstance, I find that this miscellaneous cause as it stands is incompetent and will proceed to strike it out and direct the Applicants to file a substantive suit.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 5th day of December, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

M/S. Githinji for the Applicant

No appearance for the Respondent

Court assistant- Mpoye