



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.MISC.APP.58 OF 2017

ELIZABETH WAMBUI KAMICHAR.....1ST APPLICANT

NELSON THIONG'O MUKUNA.....2ND APPLICANT

-VERSUS-

THIKA LAND REGISTRAR.....RESPONDENT

RULING

The matter for determination is the **Notice of Motion** application dated **18th August 2017**, brought by the Applicants herein under Section 78(2) of the Land Registration Act, No.3 (Rev.2014) and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, wherein the Applicants have sought for the following prayers:-

a) That this Honourable Court be pleased to grant orders directing the Respondent, the Land Registrar, Thika District, to remove the restriction lodged against the Applicants parcel of land No.Thika Municipality/Block 9/430.

b) That costs of this application be provided for.

The application is premised upon the grounds stated on the face of the application and on the **Supporting Affidavit of Elizabeth Wambui Kamichar**. These grounds are:-

a) That basis upon which the restriction had been lodged have been resolved.

b) That the restriction cannot be lodged against the title indefinitely.

c) That it is fair and just in the circumstances that the restriction be removed.

In her **Supporting Affidavit, Elizabeth Wambui Kamichar**, averred that together with **Nelson Thiongo Mukuna**, the 2nd Applicant, they are the registered proprietors of all that parcel of land known as **LR.No.Thika Municipality/Block 9/430**, as per the annexed Certificate of title **EWK-1**. She further averred that the Respondent registered a restriction over the title to the said parcel of land pending investigations by the CID, Thika as evident from the copy of the official search **EWK-2**. Further that following the said investigations, she was charged with a criminal case **No.4873 of 2011**, before the Chief Magistrate's Court, Thika and was however acquitted on **7th August 2014**, and the court ruled that the said parcel of land belonged to them as per annexure **EWK-3**. Therefore the said restriction over their parcel of land is no longer justifiable and she urged the Court to remove the same.

This application was served upon the Respondent as per the Affidavit of Service filed by **Amos Chege Kanoga**, on **25th August 2017**. The said Respondent, Land Registrar Thika, did not enter appearance nor file any response to the instant Notice of Motion application. Therefore the application is unopposed.

The Applicants filed their written submissions on **9th November 2017**, and urged the Court to allow their instant application. The Applicants relied on various provisions of the **Land Registration Act 2012**, and various decided cases. The Applicants relied on the case of **Ezekiel Misango Mutisya...Vs...NLC & Others (2014) eKLR**, where the Court upheld the right of all concerned parties to be heard before a restriction is registered by the Registrar.

They also relied on Article 47 of the Constitution which stipulates as follows:-

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

The Applicants urged the Court to order the Respondent to remove the restriction placed on the registered land **LR.No.Thika Municipality Block 9/430**.

The Court has now carefully considered the instant **Notice of Motion** and the submissions herein. The Court has also considered the cited authorities and the relevant provisions of law and it renders itself as follows;-

The application herein is anchored under Section 78(2) of the Land Registration Act which provides as follows:-

“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”.

Under Section 78 (1) of the said Act, the Registrar has discretion to remove or vary any restriction placed on any land parcel. However the Registrar must give the parties affected by such restriction an opportunity to be heard. In the instant case, the Registrar did not act under Section 78(1) and thus the Applicants have come to court under Section 78(2) of the Act.

Further it is evident that Section 76(1) of the same Act grants **discretion** to the **Registrar** to place a **restriction** on any parcel of land for the purpose of prevention of **fraud** or **improper dealing**.

Such restriction is supposed to remain in place **for a particular period, until the occurrence of a particular event** or until **the making of a further order**.

It is evident that the Applicants herein have a Certificate of Lease in their favour issued on **6th December 2011**. Further as per the Certificate of official search dated **23rd February 2016**, there is a restriction on the said certificate of title indicating;-

“No dealing pending investigations by the CID Thika vide letter ref:CID(C) CR1 16/7 VOL.XVIII/19 OF 19th February

No dealings until allegations of another certificate of lease under Registration of Titles Act are investigated”.

The Applicants alleged that after the above investigations, they were charged in **Thika Chief Magistrate’s Court** in **CR.Case No.4873 of 2011** and was later acquitted under Section 215 of Civil Procedure Code. Indeed the Court has seen a copy of the said Judgement **EWK-3**.

The Respondent was served with the instant Notice of Motion application, but did not appear in court. It was therefore not clear whether the Respondent had notified the CID of the Applicants’ application for the removal of the restriction.

However, it is clear that the instant restriction was placed on the suit property pending the investigations made by the CID. After the said investigations were made, the 1st Applicant was charged and later acquitted. It is clear under Section 76(2) that Restriction is supposed to last for a particular period. In the instant case, the period was not given but it was to last pending the investigations by the CID. The said investigations were done and 1st Applicant was charged with a criminal case and later acquitted. The Court finds that the particular period herein was pending the investigations by the CID and that investigation was long concluded and the restriction is therefore not serving the intended purpose any more.

Further the restriction is to remain in force until occurrence of a particular event. In this case it was until the investigations of the second certificate of lease. This was done and Applicant was charged and the Court held that the Applicants’ Certificate of Lease was the first in time and so it prevailed. Since that particular event occurred, the Court finds that the restriction herein has served its intended purpose. Again the restriction was to last until the making of further order. The 1st Applicant was acquitted on **7th August 2014**, but it is not clear whether the Registrar of Lands Thika, did make any other further order.

The Land Registrar did not appear in court and it is not clear whether the Applicant's title has been expunged from the Register or not. However, since there is no court order to that effect, the ***Court finds that the Applicants are still the registered proprietors of the suit land*** and since there are no tangible evidence advanced by the Land Registrar as to why the restriction placed on the title herein should remain in place, the Court finds that the Applicants' ***Notice of Motion*** application dated ***18th August 2017, is merited.*** The said application is ***allowed entirely in terms of prayer No.(a) with costs being in the cause.***

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of February 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Kangethe holding brief for Mr. Macharia for Applicants

No appearance for Respondent

Diana - Court clerk.

Court – Ruling read in open court in the presence of the above advocate.

L. GACHERU

JUDGE

23/2/2018