



**REPUBLIC OF KENYA**

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

**ELC NO. 114 OF 2008**

**GEOFFREY KIRIMI ITANIA .....PLAINTIFF**

**VERSUS**

**THE CHIEF LAND REGISTRAR .....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR MERU CENTRAL.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT**

**THE MUNICIPAL COUNCIL OF MERU .....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. Plaintiff is the registered owner of two parcels of land namely Meru Municipality Block II/641 and 642 in Meru Town. Restrictions were lodged by the 2<sup>nd</sup> defendant on instructions of 1<sup>st</sup> defendant sometime in the year 2002 hence the filing of this suit. The restrictions were put in place on the basis that the two plots were mentioned in the Ndung'u report (the commission of inquiry into irregular and illegally acquired land).
2. On 29.6.2010, the trial court was informed (off record) that the land in question had been allocated by the Municipal council of Meru. In the circumstances, and on its own motion, the court had directed that Municipal council of Meru be joined as a party to this suit in the best interest of Justice. Municipal council of Meru hence became the 4<sup>th</sup> defendant for the next close to 4 years.
3. On 7.5.2014, plaintiff made an application to have municipal council of Meru struck out from the pleadings as apparently plaintiff had no complaint with this entity. Vide a ruling of 22.10.2014, the application was allowed.

**Plaintiff's case**

4. Plaintiff's case is that he bought the two plots on 28.2.2002, after learning about the intended sale through the standard newspaper. He availed the newspaper abstract as well as the copies of banker's cheques effecting payment of sale as P exhibit 1 & 2 respectively.
5. The land was then transferred to him as per the transfer documents produced as P exhibit 3 (a & b). He was then issued with the lease certificate produced as P exhibit 4 a & b, both issued on 18.6.2002
6. Plaintiff desired to develop the suit land, so he embarked on getting approvals to build on the land.
7. He was issued with a notification of approval for development which document he produced as P exhibit 7. He also states that there were minutes of the town planning which he availed as P exhibit 8.
8. Plaintiff avers that when he tried to develop the land, he was not able to do so because after carrying out a search at the land registry he found that there were restrictions placed on the two parcels of land. Plaintiff availed copies of the certificate of search as well as the green card in respect of the two parcels of land as p exhibit 5 a & b and 6 a & b respectively.
9. Plaintiff testified that to date, he is unable to develop the land. That is why he is praying for removal of the restrictions as well as for general damages.

## Defence case

10. Defence case is that the land in question was grabbed public land. The defence pleadings are however in shambles. After the suit was filed and service of summons were effected upon defendants, defence was not filed in time and hence an application to enter judgment against defendant was made on 6.3.2009. A memorandum of appearance was however filed on 15.12.2008. When the matter was mentioned in court on 4.6.2009, counsel for defendants intimated to the court as follows ***“I will file defence today”***. The court gave directions that ***“The defendant to file and serve their defence within 7 days from today. Failure to which judgment to be entered for plaintiff as prayed.....”***

11. On 29.6.2010, defence counsel had informed the court that he had managed to retrieve the defence statement but it was not filed. This is when the court gave directions that municipal council of Meru be enjoined as a 4<sup>th</sup> defendant. The other defendants were given 7 days to file their defence, and matter was given a mention date for 22.7.2010. Come 22.7.2010 and there was no clarification as to whether a statement of defence had been filed, but a day after, (on 23.7.2010) a reply to defence was filed.

12. Then on 17.9.2009, interlocutory judgment was entered against the defendants on the basis that defendants had ***“failed to file their defence despite being granted leave of seven days to do so from 4.6.2009 where by it was directed by Lady Justice Kasango Judge that failure to file their defence, the application by the plaintiff dated 26.2.2009 stood allowed.....”***

13. I have combed through the entire file and I have not come across a statement of defence by the defendants save the one filed by municipal council of Meru dated 14.10.2010. This is the 4th defendant who was brought on board by the court. This defendant had left the scene quietly and without resistant about 4 years later.

14. Even if there is interlocutory judgment against defendants and even if I can see no trace of a statement a defence, I will still proceed to consider the defence of defendants primarily because of the reply to defence filed on 23.7.2010 which has never been expunged. The plaintiff must have seen a defence statement for them to file a reply thereof.

15. DW 1, one Bernard Kamwaro testified that he is the land registrar Meru (2<sup>nd</sup> defendant). His testimony is anchored on his statement filed in court on 2.3.2017. He avers that on 17.5.2005, his office got a letter from the chief land registrar giving instructions that all parcels of land that were mentioned in the commission of inquiry into the illegal/irregular allocation of public land (the Ndun’u report) were to be restricted absolutely. DW 1 produced the extract from the Ndungu report as D exhibit 1, while the letter from the chief land registrar was D exhibit 2.

16. DW 1 also produced the green card for the two parcels of land as D exhibit 3 a & b respectively, and he also produced a letter from the district land registrar to the state counsel informing the latter of the instructions given by the chief land registrar.

## Determination

17. It is not disputed that plaintiff is the registered owner of the two parcels of land. It is also not disputed that the restrictions were lodged by the defendants. The issues for determination are two;

(i) Whether there was any justification to lodge the restrictions and whether the restrictions should be removed.

(ii) Whether plaintiff is entitled to damages.

## Restrictions

18. The applicable law at the time regarding the placement of the restrictions was section 136-138 of the Registered lands act (cap 300 LOK-repealed), where it was provided that;

136(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, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks 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 - for a particular period; or until the occurrence of a particular event; or until the making of a further order.....”***.

137(1) ***“The Registrar shall give notice in writing of a restriction to the proprietor affected thereby. So long as any restriction remains registered, no instrument which is inconsistent with it shall be registered except by order of the court or of the Registrar”***.

138(1) ***“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. Upon the application of any proprietor affected by a restriction, and upon notice thereof to the Registrar, the court may order a restriction to be removed or varied, or make such other order as it thinks fit, and may make an order as to costs”***.

19. Plaintiff has submitted that he did not acquire his property through fraud and hence there was no basis for placing the restrictions. He has cited the case of **Kent Libiso and Another versus Cirkon Trust Co. Ltd and 2 others ELC suit No. 288 of 2011 and case of George Njuguna Kinanu versus Njeri Kibui ELC 228 of 2011.**

20. The plaintiff has further submitted that before a registrar registers a caution on any land, he must direct that such inquiries be made and notices issued and served and to hear the affected persons. On this point, plaintiff has cited the case of **Matoya versus Standard Chartered Bank (K) LTD & others (2003) I EA 140** where it was held that;

***“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented”.***

21. Defendants’ submissions on this point is that the chief land registrar was duly acting in good faith to protect public property and that the proper forum where plaintiff ought to have sought redress was in filing a Judicial Review matter.

22. Land has always been a sensitive and emotive issue in Kenya. The desire to own land has been insatiable and it resulted in what came to be known as Land grabbing of any land including public land. This was the background against which the commission of inquiry into irregular/illegally acquired land better known as the Ndungu report came to be formed. This report is valuable and important. It remains one of the most important document to have brought forth land reforms in Kenya. It did galvanize the nation whereby entities entrusted with responsibilities of protecting public land took decisive action. I am certain that this is the back ground against which the chief land registrar issued his letter produced as Defence exhibit 2.

23. Despite this appearance of good faith, I have found no justification in the lodging and maintenance of the restrictions on the following grounds;

24. Firstly, the Ndungu report contained **only recommendations and not binding resolutions**. The raft of recommendations contained in the report were primarily on revocation and repossession of titles, investigations as well as policy developments. A restriction falls under investigations. The onus was upon the defendant to commence investigations as to whether the land in question indeed was public land or not. Defendants have not availed even the slightest evidence to show that they did any investigations. The applicable law then S. 138 of the Registered Land Act envisaged a situation where investigations would be conducted. It follows that the Ndungu report was to be implemented within the existing legal structures. The directive issued by the chief land registrar on 17.5.2005 (Defence exhibit 2) to the effect that the restriction was to be lodged on the land “ABSOLUTELY” was without justification and was against the applicable law.

25. The second point to note is that the land in question is within Meru Municipality. The suit land was ostensibly a car park going by the averments of the defence. The entity which ought to have been at the forefront of defending this suit is the county government of Meru. During the proceedings, the predecessor of the county government was enjoined as a party to these proceedings. There is no evidence to indicate that defendants sought the views of the municipal council on whether the suit land was public land or not. Defendants did not even defend plaintiff’s application to have the municipal council removed from these proceedings.

26. What has emerged is that the county government of Meru appears to have no problems with plaintiff. In the documents attached to plaintiff’s application of 7.5.2014 (to have the municipal council of Meru removed as a party), there is annexure GK 5”, a letter from the Municipal council to the deputy registrar indicating that the council had given the go ahead for plaintiff to develop the plots. They also confirmed that plaintiff had been paying rates. The property rate payment requests have also been annexed and confirm that plaintiff is the ratable owner of the two plots. With this kind of information, defendants ought to have taken steps of removing the restrictions instead of waiting for this case to proceed to full trial.

27. The third issue to note is the arbitrary manner in which the restrictions were lodged. There is no evidence to indicate that plaintiff was ever notified of the placement of these restrictions. He was never given an opportunity to be heard. That is not all. The restrictions were just lodged there without a date hence no one can tell when they were lodged. The green cards availed by both plaintiff and defendant contain no entry number and no entry date for the restrictions. The plaintiff is therefore right in stating that the restrictions were lodged on unspecified date.

28. The manner in which the restrictions were lodged coupled by the wanting conduct of the defence in this suit is a clear manifestation of the casual and lackluster manner in which defendants handled a very important document, **the Ndungu report**.

29. The provisions of the Article 40 (3) of the constitution stipulates that ***“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation— results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament...”***

30. The plaintiff is the registered owner of the two suit properties. The year 2005 is when 1<sup>st</sup> defendant gave directions that restrictions be placed on the suit land. 13 years down the line, there is nothing to show that the titles to this land were irregularly/illegally acquired. Plaintiff should therefore enjoy his property as provided under section 24 of the Land Registration Act; ***“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.***

31. The upshot of my findings are that there was no justification to place a restriction absolutely on the suit parcels and hence the said restrictions should be removed.

## **Damages**

32. Plaintiff avers that he has suffered loss as he was not able to develop his property. He is asking for general damages of Kshs.5,000,000.

33. Defendant on the other hand avers that the damages sought are special in nature and were not specifically pleaded. This suit was filed on 10.9.2008. For the last ten years that the matter has been in court, defendants never attempted to mitigate the situation by either conducting investigations or removing restrictions.

34. In paragraph 10 of the plaint, plaintiff has clearly indicated the plans he had for the plot. These were future plans of which he had sought approval from the relevant authorities. Certainly plaintiff could not have been in a position to compute the damages as the plot was not yet developed. I am therefore inclined to find that plaintiff is entitled to **general damages for the wrongful, unlawful, unwarranted and unmitigated actions of the defendants**. Still the figure of Kshs.5,000,000 is on the higher side as the projected income from the proposed development is still in the realm of speculation. I proceed to award damages of Kshs.1,000,000.

### **Conclusion**

35. Judgment is hereby entered for the plaintiffs against defendants as follows:

(i) An order is hereby issued for the removal of the restrictions placed on Land parcel L.R No. Meru Municipality Block 11/641 & 642.

(ii) General damages are awarded in the sum of Kshs.1,000,000.

(iii) Defendants are condemned to pay costs of the suit.

(iv) Plaintiff is awarded interests on general damages and costs at court's rates but the said interest is to be computed after 45 days from today.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 23<sup>RD</sup> MAY, 2018 IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Mungai for plaintiff present

Plaintiff present

Attorney General for 1<sup>st</sup> – 3<sup>rd</sup> defendant absent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**