



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC MISC APPLICATION CASE NO. 1 OF 2018

JAMES MWITA WAMBURA.....PLAINTIFF

-versus-

JACKSON NYAMOSONSO JAMES.....1ST DEFENDENT

MAISORI JAMES.....2ND RESPONDENT

RULING

1. On 23rd February 2018, the applicant namely James Mwitwa Wambura filed an application by way of Notice of Motion of the even date under Order 51 of the Civil Procedure Rules 2010 Sections 1, 1A, 3 and 3A of the Civil Procedure Act (Cap 21 Laws of Kenya), against the 1st and 2nd Respondents namely Jackson Nyamosonso James and Mansori James respectively. He is seeking the following orders:-

a) Spent.....

b) **THAT** the Honourable court issues orders lifting and or removing restriction placed by the defendants on land parcel **NO. BUGUMBE/MABERA/561**

c) Spent.....

d) Costs of this suit be provided for.

2. The application is supported by a ten (10) paragraphed replying Affidavit sworn on the even date by the applicant and a title deed issued to the applicant on 7th December, 2017 marked "JM1" and a certificate of Official Search dated 21st February 2018 marked JM2 in respect of the suit land, L. R. NO. Bugumbe/Mabera/561. It is also premised on grounds which include:-

a) **THAT** the plaintiff/applicant is the registered owner of the suit land.

b) **THAT** the defendants/ respondents have without any legally justifiable reasons put a restriction on the suit land and thereby denied the plaintiff/applicant the right to deal with the property.

c) **THAT** the plaintiff/applicant is seriously ailing and wishes to dispose off part of the suit land to cater for his medical expenses.

3. The Respondents opposed the application by the 1st respondents' 21 – paragraphed Replying Affidavit sworn on 9th May 2018 of the 1st Applicant and further to authority to plead on behalf of the 2nd respondent of the even date. The Respondents claimed that the suit land is registered in the name of the applicant in trust for members of his (applicant) family. That the applicant acquired the land by way of inheritance from the respondent's grandfather. They fortified their opposition to the application by way of copy of the minutes of the clan meeting marked JN1 and annexed to the replying affidavit.

4. Mr. Mwitwa Kerario, learned counsel for the applicant and Mr. Sam Onyango, learned counsel for the respondents filed their submissions dated 17th May 2018 and 4th June, 2018 respectively further to their consent and court directions given on 9th May 2018; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice directions number 33 (a) of Environment and Land Court practice Directions, 2014.**

5. Learned counsel for the applicant submitted on the orders sought in the application and **Sections 71 to 73 of the Land Registration Act, 2012** as regards cautions on registered land. In support of his application, counsel identified and analysed in two (2) issues namely:-

a) Was the caution placed by the respondents with interest on the suit land?

b) Do the respondents have basis to lodge a caution on land registered in the names of the applicants?

6. To buttress his submissions, counsel relied on case law as hereunder:

a) **George Cheyne & Others – v- Robin Munyao Kimotho & others Civil Appeal No. 27 of 1998** with regard to indefeasibility of title to registered land except on grounds of fraud or misrepresentation to which the owner was or is a party.

b) **Kanyi w/o Muthiora –v- Maritha Nyokabi Muthioro Court of Appeal No. 19 of 1982** that a registered proprietor of land has title free from all claims and interest subject to the existing overriding interests.

c) **Muriuki Marigi –v- Richard Maragi Muriuki & 2 others (1997) eKLR** to the effect that the rights of wives and children over their husband's or father's estate as the case may be, remains inchoate and are not legally enforceable in any court of law or otherwise under the **Law of Succession Act (Cap 160)**.

7. Learned counsel for the respondents also referred to the orders sought in the application and **Section 76 (1) of the Land Registration Act, 2012** in his submissions. Counsel contended that the Land Registrar acted suo motto in entering the restriction and that the applicant has not enjoined the Registrar in the proceedings.

8. Counsel further stated that the application is not in the best interest of the family and urged the court to dismiss it with costs. In support of his submissions, he cited the following authorities;

a) **Re estate of Buuri Orware** (deceased) 2018 & eKLR in regard to, inter alia, non-joinder of a Land Registrar and right to fair trial.

b) **Article 45 (1) of the Constitution of Kenya, 2010** that recognizes the institution of the family.

9. I have considered the entire application, the replying affidavit and submissions by counsel for the respective parties. The issues for determination are whether the applicant is entitled to the orders sought and whether the court is enjoined to grant the orders.

10. The applicant contended that he is the absolute and indefeasible proprietor of the suit land as shown on the document marked JM1 to his application. At paragraph 8 of his supporting affidavit, he averred inter alia, that he is the registered owner of the suit land and he is entitled to enjoy all rights accorded to him thereon.

11. Notably interest conferred on registration and rights of a proprietor are secured under **Sections 24 and 25 of the Land Registrations Act, 2012** respectively. More fundamentally, the right to property is jealously protected under **Article 40 (1) of the Constitution of Kenya, 2010**.

12. It was the contention of the respondents that they have inheritance rights over the estate of their grandfather. That the applicants acquired the suit land from their grandfather as inheritance; see **Re Estate of Buuri Irware** (supra)

13. The respondents further contended that the applicant holds the suit land in trust for members of his family. They sought protection of family institution including family property and heritage under Article 45 (1) of the Constitution of Kenya, 2010. The 1st respondent averred to that effect at paragraph 8 of the replying affidavit.

14. It is common ground that a restriction was registered in respect of the suit land on 4th January 2018 as shown on certificate marked JM2 and annexed to the application. Land Registrar has the discretion to make an order for a restriction under **Section 76 (1) of the Land Registration Act, 2012**.

15. It was contended by the applicant that he is seriously ailing and wishes to dispose of part of the suit land to cater for his medical expenses. He is still alive and the registered owner of the suit property. He has unfettered discretion to sub-divide, sale and or distribute the suit land.

16. In **Muriuki Marigi** case (Supra), the court of Appeal held, inter alia,

“The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute it among them. He may not be urged directed or ordered to do it against his own will.” (Emphasis added)

17. Under **Section 28 of the Land Registration Act, 2012**, all registered land are subject to overriding interest including customary trusts. Both respondents claim customary trust and I am aware of this court's guiding principles including intergenerational and intergenerational equity provided at **Section 18 of the Environment and Land Court Act, 2015 (2012)**.

18. Be that as it may, the applicant has ably demonstrated that he is the absolute and indefeasible I defeasible proprietor of the suit land.

There is no material placed before the court to show that either overriding interests or exceptions under **Section 26 of the Land Registration, Act 2012**, exist to the title he holds in respect of the suit land.

19. In view of the above cited authorities, I do find the restriction made on 4th January 2018 over the suit land unsustainable. The application is merited.

20. In the result and for those reasons, I allow the application dated 23rd February 2018 in terms of orders (b) sought therein.

21. The parties are family members. Each party to bear his own costs.

DELIVERED, DATED and SIGNED at MIGORI this 18th day of JULY 2018.

G. M.A. ONGONDO

JUDGE

In presence of :-

Mr. Sam Onyango learned counsel for the Respondents

Mr. Oguttu Mboya learned counsel holding brief for Mr. Mwitia Kerario for the Applicant

Tom Maurice – Court Assistant.