



**Kingdom Bank Limited v Land Registrar – Kisumu & 2 others (Originating Summons E42 of 2021) [2024] KEELC 180 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 180 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ORIGINATING SUMMONS E42 OF 2021**

**E ASATI, J**

**JANUARY 25, 2024**

**IN THE MATTER OF: AN APPLICATION UNDER SECTIONS 78  
(2) AND 18 (2) OF THE LAND REGISTRATION ACT NO.3 OF 2012**

**BETWEEN**

**KINGDOM BANK LIMITED ..... APPLICANT**

**AND**

**LAND REGISTRAR – KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS - KISUMU . 2<sup>ND</sup> RESPONDENT**

**ROSE ATIENO OLENYO ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. *Vide* the Originating Summons dated 25<sup>th</sup> November, 2021 stated to be brought pursuant to the provisions of sections 3A and 65 (e) of the [Civil Procedure Act](#) and sections 76, 77, 78(2), 18(2) & 19 of the [Land Registration Act](#), the applicant sought for orders that;
  - a. The restriction placed on the parcels of land known as Kisumu/Kanyadwera/3975 and Kisumu/Kanyadwera/3976 be removed.
  - b. The costs of the application be borne by the Respondents.
2. The grounds upon which the Originating Summons was brought are that the applicant has a Chargee's interest in the suit lands. That the 2<sup>nd</sup> Respondent placed a restriction on the suit lands on 11<sup>th</sup> November, 2014 until investigations are concluded.

That the Charger is now in default in her obligations under the legal charges over the suit lands dated 13<sup>th</sup> November, 2013. That the applicant has asked the 1<sup>st</sup> Respondent to remove and/or lift the restrictions on the suit lands. That placing the restrictions without notifying the chargee while the



legal charges dated 13<sup>th</sup> November, 2013 have not been discharged is inconsistent with the law in the absence of a court order. That no cause was shown why the restrictions should remain in place. That the applicant now craves the protection of the court as it's constitutionally protected statutory power of sale over the property is being unfairly limited. That it is in the interest of just that the application be allowed and the restrictions removed.

3. The Originating Summons was supported by the averments in the Supporting Affidavit and annexures thereto.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the application vide the grounds of opposition dated 15<sup>th</sup> November, 2021 filed on their behalf by the Attorney General. The case of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is that the application is bad in law and incurably defective. That the caution was lawfully placed to inhibit fraudulent transactions on the suit lands. That if the orders sought are granted, they will be in furtherance of a criminal enterprise. That it is in the interest of justice that the orders sought be denied and that the applicant stands to suffer no prejudice if the orders sought are denied.
5. The 3<sup>rd</sup> Respondent did not respond to the Originating Summons. Affidavit of service by Job Odhiambo Ochieng sworn on June 27, 2022 shows that the 3<sup>rd</sup> Respondent was served with the Originating Summons on June 26, 2022.
6. On March 1, 2023, directions were taken that the Originating Summons be disposed of by way of Affidavit evidence and written submissions.
7. It was submitted on behalf of the applicant that the issues for determination in the Originating Summons are;
  - i. Whether the right procedure was followed prior to the restrictions being placed;
  - ii. Whether the duration of the restrictions is lawful;
  - iii. Whether the charged properties have become a commodity for sale.

I adopt these as the issues for determination in the application.

8. On whether the right procedure was followed prior to the restrictions being placed, Counsel for the applicant submitted that section 76 and 77 of the [Land Registration Act](#) provide for the procedure to be followed before a restriction is placed. That the procedure was not followed. That the applicant being a person interested in the suit properties ought to have been notified and given a chance to be heard. Counsel relied on the provisions of articles 10 and 47 of the [Constitution](#) and section 4(3) of the [Fair Administrative Actions Act](#) on the rule of law and the right to be heard. Counsel further relied on the case of [Nasca Housing Co-operative Society Limited v The Land Registrar Machakos & 4 Others](#) ELC Misc. Application No.E018 of 2021 where it was held that the issuance of a Notice to the owner or an interested party over the suit land where a restriction is placed is mandatory and not discretionary.
9. Section 76 of the [Land Registration Act](#) 2012 provides for the placing of restrictions on land under section 76(1) provides the reasons for placing of restriction are for purposes of compulsory acquisition, the prevention of any fraud or improper dealing or for any other sufficient cause. Section 77 provides for notice to be given to the proprietor. It provides;

“77(1) The Registrar shall give Notice in writing, of a restriction to the proprietor affected by the restriction”.



The requirement for giving of notice is mandatory. In the present case, though the land was registered in the name of the 3<sup>rd</sup> Respondent, it had been charged to the applicant. The Chargee was entitled to notice of placement of the restriction because under section 77(2) the restriction was going to have the effect of restricting registration of any instrument inconsistent with the restriction. It was going to limit and fetter the rights of the applicant as the Chargee. I find that the right procedure was not followed in placing the restrictions. The chargee ought to have been given notice.

10. The second issue is the duration of the restriction.

Section 76(2) provides for duration of restriction. It provides that;

“ 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 that do not comply with the specific conditions and the restriction shall, be registered in the appropriate register.”

The restriction in the present case was placed on 11<sup>th</sup> November, 2014. The duration of the restriction was stated to be until investigation is completed by DCIO. Since 2014 to date is about 10 years. There is no evidence placed before the court as to whether the investigations are ongoing, what the investigations are all about and the progress thereof.

11. Section 78 of the *Land Registration Act* provides for removal and variation of restrictions as follows:

- “ 1) The Registrar may at any time 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 caution.”

The applicant deposed in paragraph 9 of the Supporting Affidavit that a letter was written to the Land Registrar to remove the caution but to date there has been no response. A copy of the letter was exhibited as JK – 5 to the Supporting Affidavit.

12. Section 78 (2) of the *Land Registration Act* 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 make other order it deems fit and may make an order as to costs.”

The Registrar was served with the application herein and responded by way of the grounds of opposition filed by the Attorney General.

13. The applicant has deposed that the effect of the restriction are that the hands of the applicant as the chargee are tied and it is prevented from dealing or otherwise exercising its statutory power/right of sale over the suit lands. That the restriction is an infringement of the rights of the Chargee to deal in the suit lands as such.

14. The grounds of opposition filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not been expounded or proved. There is no evidence of existence and/or status of the investigations pursuant to which the restrictions were placed. Under section 78 either the court or the Land Registrar may remove a restriction. The applicant has demonstrated that the Registrar has not responded to the application made by the applicant to the Registrar for removal of the restriction.



15. In the case of *Lillian Wakiiya Mwaura & 2 others v Chief Land Registrar* [2021] eKLR it was held that:

“the Appellants are entitled to the removal of the restrictions unconditionally as there are no reasons given as to why the said restrictions were placed without notifying them as the registered owners and why the said restrictions should endure after 13 years. Indeed restrictions cannot endure forever”.

No reasons have been tendered as to why the restrictions have endured for over a decade. The Appellants have discharged their responsibilities and served the Land Registrar and if there was any reason as to why the restrictions ought not to be removed, then the Land Registrar was the person to give such reasons.

16. Also in *Mukuria James Chacha & 2 others v Land Registrar Muranga* [2019] eKLR the court held: -

“Given that a 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, the registration of the restriction was made in 2016 and 2017 respectively and at the time of the hearing there was no evidence that the investigations were ongoing. There was no evidence that the titles were irregularly acquired or ownership had been successfully challenged on grounds of fraud. The Defendants Counsel requested for time to brief the Court on the stage of investigations which the Court allowed but she did not comply. It is the Courts view that the Plaintiffs should be allowed to enjoy their rights of proprietorship in the land in accordance with section 24 of *Land Registration Act, 2012*”

A restriction cannot remain in force indefinitely.

17. For the foregoing reasons I find that the Originating Summons herein has merit and allow it as follows:

- i. The Land Registrar, Kisumu to forthwith remove the restrictions placed on land parcels known as Kisumu/Kanyadwera/3975 and Kisumu/Kanyadwera /3976.
- ii. Each party to bear own costs.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 25<sup>TH</sup> DAY OF JANUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Ochieng for the Applicant.

Miss Ocholla for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

No appearance for the 3<sup>rd</sup> Respondent.

