



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO.179 OF 2014

MAINA MBUTHIA GAKERE.....1ST APPLICANT

DORCAS KANDIE2ND APPLICANT

VERSUS

DR. FREDRICK BUKACHI.....1ST RESPONDENT

LAND REGISTRAR (NAKURU).....2ND RESPONDENT

RULING

(Suit to lift a restriction; applicants being owners; properties earlier jointly owned by the 1st respondent and a third party; 1st respondent stating that he filed restriction as he had not authorized his partner to sell the properties to the applicants; there could have been reason for the restriction but the same cannot remain indefinitely; the issues surrounding the registration of any restriction need to be determined; 1st respondent directed to file suit within a specified period of time and in default the restrictions to be lifted)

1. This is an Originating Summons said to have been taken out pursuant to the provisions of Section 3 of the Environment and Land Court Act, 2011, Section 78 (2) of the Land Registration Act, Act No. 3 of 2012; and Order 37 Rule 5 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The main prayer is for orders to have the Land Registrar Nakuru, named as the 2nd respondent, compelled to lift restrictions registered against the land parcels Kiambogo/Kiambogo Block 2/1603 and Kiambogo/Kiambogo Block 2/1604 (hereinafter the suit properties). The application is founded upon the following grounds :-

(a) That the applicants are owners of the suit properties.

(b) That the applicants acquired the suit properties from Ngotho Commercial Agencies vide a sale agreement duly signed and executed.

(c) That both parties fully complied with the terms of the sale agreement and transfer was effected in favour of the applicants.

(d) That the applicants are owners and they have title documents.

(e) That the 1st respondent has unlawfully and without any colour of right registered restrictions on the suit properties.

(f) That the applicants' rights to own, transfer or deal with their properties have been hindered by the activities of the respondents.

(g) That the respondents' activities are illegal and unlawful.

2. The application is supported by the affidavit of Joseph Maina Gakere, the 1st applicant. In his affidavit, he has deposed that together with the 2nd applicant, they purchased the suit properties from Ngotho Commercial Agencies. The terms of agreement were complied with and they were issued with title deeds on 20 July 2010 and 29 March 2011. He has averred that the 1st respondent has unlawfully, and without any colour of right, registered restrictions on the two suit properties, which has denied them the right to deal with their properties. He has stated that they have sold the properties to third parties, but cannot effect transfer owing to the restrictions.

3. The Land Registrar, the 2nd respondent, did not file anything to oppose the motion but the 1st respondent has filed a replying affidavit. In it, he has deposed inter alia that he and one David W. Ngotho, jointly purchased the land parcel No. Kiambogo/Kiambogo Block 2/599 in the year 1993. They then caused the same to be subdivided into 42 plots from the parcel numbers 1600 to 1641. Title deeds were issued in their joint names, and he agreed with Mr. Ngotho, that they would equally share the plots, meaning that each was to get 21 plots. He has deposed that he instructed Mr. Ngotho to sell some of his plots, but he later informed him to stop the sale of the same, and return to him all the title deeds. He has averred that Mr. Ngotho declined to return the same. When he informed Mr. Ngotho to stop the sales, 8 plots had already been sold, but according to him, the two suit properties were not among the 8 that were sold. He was suspicious of fraudulent dealings and he therefore instructed his advocate to place restrictions on the properties. He has denied ever entering into any agreements of sale with the applicants and neither has he received any purchase price from them. He has deposed that on 18 February 2011, he entered into a sale agreement with one Joseph Mwangi Mwaniki selling to him the suit properties. He then wrote to Mr. Ngotho to release the title deeds but Mr. Ngotho did not. He has questioned how the applicants obtained title to the suit properties. It is his view that the restrictions are properly registered and are meant to safeguard his properties.

4. I invited counsels to make written submissions, but only Mr. Matiri, counsel for the applicant filed submissions. I have taken note of these.

5. The case of the applicants is simple. They hold titles to the suit properties and they wonder why the 1st respondent has placed restrictions. The 1st respondent has of course questioned how the applicants got title in the first place, for he has contended that he never executed any transfer to them. It does appear to me that the 1st respondent together with David Ngotho did at some point hold title to the suit properties. That is apparent from the copies of title deeds annexed by the 1st respondent. But it is now the applicants who hold title deeds to the suit properties which were issued to them on 20 July 2010 and 29 March 2011. They have explained that they purchased the properties through Ngotho Commercial Agencies. I presume that it is the same person who held titles jointly with the 1st respondent. The 1st respondent has admitted that at some point, he had authorized Mr. Ngotho to sell the properties due to him, but wrote to him on 20 January 2010, not to proceed with any further sales. However, I do not fathom why the applicants should be caught in between the tug between the 1st respondent and his partner, especially after the properties have already been registered in their names.

6. In my view, if the 1st respondent feels that the properties were fraudulently transferred to the applicants, then the right action to take is to file suit for the cancellation of their titles. In the course of the suit, the 1st respondent will of course be at liberty to ask that the court does issue an order of inhibition if he is so minded to do. There may not have been anything wrong in the 1st respondent registering the restrictions if he thought that the applicants' titles were obtained fraudulently, but keeping the same without following up on any court action, to me, is unfairly hindering the right of the applicants to deal with the properties. A restriction in my opinion, ought only to be for a short duration of time, as the

questions surrounding why the restriction was placed in the first place are resolved. It is not meant to be in place indefinitely without the underlying issues being addressed.

7. In my view, the fairest order to make in the circumstances of this case is to direct the 1st respondent to file suit, within a specific duration of time, for the cancellation of the titles of the applicants, and if no such suit is filed, then the restriction be lifted. There may have been good reason for the registration of the restrictions and I therefore make no orders as to costs.

8. I now make the following final orders :-

(a) That the 1st respondent, if he is of belief that the titles held by the applicants are fraudulent, is hereby directed to file suit for their cancellation or for such other orders that he may deem appropriate, within 30 days from today.

(b) If no such suit as directed above is filed, or if such suit is filed but the court is not inclined to issue any orders of inhibition, then the Land Registrar, Nakuru, is hereby directed to lift the restrictions on the land parcels Kiambogo/Kiambogo Block 2/1603 and 1604.

(c) In the circumstances of this suit, each party to bear his/her own costs.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 9th day of February 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :

Ms. Alwala holding brief for Mr. Matiri for applicants

N/A on part of M/s J.A Makau for 1st respondent

N/A on part of 2nd respondent

Court Assistant: Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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