



Gituma & another v Land Registrar, Nairobi Land Registry (Environment & Land Miscellaneous Case E124 of 2023) [2024] KEELC 69 (KLR) (16 January 2024) (Ruling)

Neutral citation: [2024] KEELC 69 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E124 OF 2023**

**MD MWANGI, J
JANUARY 16, 2024**

BETWEEN

ERNEST GITUMA 1ST PLAINTIFF

JAMES KINIYA GACHIRI 2ND PLAINTIFF

AND

THE LAND REGISTRAR, NAIROBI LAND REGISTRY DEFENDANT

RULING

1. The application before me is the Notice of Motion dated 21st November 2023. It is brought under the provisions of Section 78 (2), of the *Land Registration Act*, Sections 3A and 63 (e) of the *Civil Procedure Act*, and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010. The Plaintiffs/Applicants seek an order of mandatory injunction directed at the Defendant/Respondent, the Land Registrar, Nairobi Land Registry ordering him to lift, remove and or vacate the impugned restrictions registered on the 1st Plaintiff's suit property known as Nairobi/Block 97/456 on 19th June 2007, 9th January 2008, 10th January 2008 and 10th August 2010. The Plaintiffs further pray for the costs of the application.
2. The Plaintiffs' application is premised on the grounds on the face of it and on the supporting affidavits of Ernest Gituma and James Kiniya Gachiri sworn on 21st November 2023.
3. The 1st Plaintiff avers that he is the absolute proprietor of L.R. No. Nairobi Block 97/456. On 27th August 2009, he sold a portion known as Nairobi/Block 97/2437 upon sub-dividing the main title. He has however not been able to transfer the said portion (the sub-division) to the 2nd Plaintiff since then. The transfer to the 2nd Plaintiff has been hindered by the restrictions registered against the title on 19th June 2007, 9th January 2008, 10th January 2008 and 10th August 2010, by the Defendant purportedly on the application of intended purchasers.



4. The 1st Plaintiff argues that the impugned restrictions are not only unreasonable but also unjustifiable and amount to an infringement of his right to property contrary to the provisions of Article 40 of the Constitution. The 1st Plaintiff further asserts that the impugned restrictions were illegally and unlawfully registered on his property without affording him any opportunity to be heard or notice of restriction within the meaning of Section 77 (1) of the Land Registration Act. The 1st Plaintiff alleges that he only learned about them upon conducting an official search for purposes of sub-division of his property into two portions.
5. The 1st Plaintiff states that since the year 2006, the 2nd Plaintiff has on numerous occasions visited the Defendants/Respondents' offices and has made several applications requesting for the lifting, vacation and deregistration of the restrictions without success. Consequently, the restrictions have been in existence for a period of approximately sixteen (16) years.
6. The Plaintiffs/Applicants urge the court to order the removal of the impugned restrictions.

Response By The Defendant/respondent

7. The Defendant/Respondent opposed the Plaintiffs' application by way of grounds of opposition dated 11th December 2023. The Respondent asserted that the Plaintiffs' application being a Notice of Motion was not a pleading as per the law (Section 2 of the [Civil Procedure Act](#) and Order 3 Rule 1 of the [Civil Procedure Rules](#)) and therefore not capable of forming the basis for a determination of any question/issue. Hence, there was no suit properly before the court for determination in accordance with Order 3 Rule 1.
8. The Respondent further stated that the Applicants had not made any application to the Respondent for the removal of the restriction in line with Section 78 of the [Land Registration Act](#), Regulation 8 (4) of the [Land Regulation \(General\) Regulations, 2017](#). The Respondent therefore asserted that the Applicants had approached the court prematurely and in contravention of the doctrine of exhaustion which requires that a party exhausts all the available dispute resolution mechanisms provided by law before approaching the court.
9. The Respondent stated that the Plaintiffs' application lacked merit, was made in bad taste, was vexatious and an abuse of the court process. It therefore prayed for its dismissal.
10. Unfortunately, the Respondent did not turn up to argue its grounds on the date scheduled for the hearing of the application. The date was given in court in the presence of the Advocate for the Respondent.

Issues For Determination

11. Having considered the Plaintiffs' application in its entirety, the sole issue for determination is whether the Plaintiffs have satisfied the conditions for removal of a restriction under Section 78 (2) of the [Land Registration Act](#).

Determination

12. Section 78 (2) of the [Land Registration Act](#) empowers the court upon the application of a proprietor of land affected by a restriction, and upon notice to the Registrar, to order the restriction to be removed, varied or issue other orders as it deems fit.
13. The 1st Plaintiff in this case is the proprietor of the suit property herein and has moved the court under the provisions of the said Section seeking a mandatory injunction directed at the Land Registrar,



Nairobi, Land registry to remove, lift and or vacate the restrictions registered against the 1st plaintiff's land, Nairobi/Block 97/456 on 19th June 2007, 9th January 2008, 10th January 2008 and 10th August 2010.

14. From the copy of the official search exhibited by the Plaintiffs as annexures 'EG-3', the restrictions on the suit property are in the nature of cautions registered against the title to the suit property as entries number 14, 15, 16 and 17. They are described as caution by Shameta Villas Limited claiming a purchaser's interest, caution by Mercy Wanjiru Gachau claiming purchaser's interest, caution by Johnson M. Mbugua claiming purchaser's interest and caution by James Kinyua Gachiri claiming a purchaser's interest, respectively. They were registered between the year 2007 and 2010. The 4th caution is actually by the 2nd Plaintiff/Applicant herein whose interest the 1st Plaintiff has acknowledged.
15. A caution as this court has stated elsewhere is a temporary measure to enable the cautioner seek reliefs to protect his interest elsewhere, for example by way of a civil suit or other forms of legal proceedings. It is not supposed to exist in perpetuity.
16. The Court of Appeal in *Boyes v Gathure* [1969] EA 385 stated that a caveat is intended to serve two fold purpose;-

“On the one hand, it is intended to give the caveator temporary protection, and on the other, it is intended to give notice of the nature of the claim to the person whose estate in the land is affected and to the world at large.”
17. There cannot be any justification whatsoever for maintaining a caution/caveat/restriction on someone's title for over ten (10) years.
18. The Registrar is indeed empowered under the law to, on his own motion with notice to the parties affected, order the removal of such a restriction/caution/caveat. Restrictions in any event ought to be registered for a particular period of time only at the expiry of which period they be removed. They inhibit the full enjoyment of property rights by proprietors of land.
19. In this instance, the cautioners have had more than ten (10) years to take appropriate legal action to enforce their alleged interests in the land if they so wished. Accordingly, it is my finding that there is no legal justification for the maintenance of the cautions registered over the 1st Plaintiff's title any longer.
20. I agree with the holding of my brother Judge, E.K. Wabwoto J in the case of *Sammy Ng'ang'a Ngatiri v George Ngatiri Mbugua & 2 Others* [2021] eKLR that a caution should only serve as a temporary measure and should not be used to limit or deprive the Applicant of his right to property indefinitely.
21. Accordingly, I allow the Applicant's application dated 21st November 2023 and hereby order the Land Registrar, Nairobi Land Registry to remove the cautions registered as entries number 14, 15, 16 and 17 on the 1st Plaintiff's title number Nairobi/Block 97/456 forthwith.
22. There shall be no orders as to costs.
23. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JANUARY, 2024

M.D. MWANGI

JUDGE

In the virtual presence of:



Ms. Wachira for the Applicants
No appearance for the Respondent
COURT ASSISTANT - YVETTE

