



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 331 OF 2016

DAVID MACHARIA KINYURU.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR, NAIVASHA.....1ST RESPONDENT

BERNARD M. KABIRU2ND RESPONDENT

RULING

(Application to remove a restriction from certain land; applicant being proprietor of the suit property; restriction lodged by respondents; restriction claiming an interest as owner; no suit filed to claim ownership of the land; purpose of restriction is only to subsist as underlying claim is determined; no claim filed; respondents not opposing the application; application allowed)

1. This suit was commenced by way of a Miscellaneous Application brought pursuant to the provisions of Section 78 (2) of the Land Registration Act, 2012, and Section 3 of the Environment and Land Court Act, and Order 50 Rule 1 of the Civil Procedure Rules. It seeks orders that a restriction placed by the 1st respondent on the instigation of the 2nd respondent, over the applicant's land parcel Gilgil/Gilgil Block 1/2765 (Kekopey) (hereinafter "the suit land"), be removed.

2. The applicant has averred that he is the owner of the suit land after purchasing it from one Ngaruiya Njoroje vide an agreement entered into on 19 March 2014. He then became registered as proprietor of the suit land. In the month of February 2015, he conducted a search over the property and found the restriction in issue. He was later summoned to appear before the District Land Registrar on 3 March 2015 over the said caution. It is said that the Land Registrar, the 1st respondent, decided that the caution remains in place until further orders of the court and any aggrieved party to appeal to the Chief Land Registrar in 30 days. He has contended that the 2nd respondent who placed the restriction has no valid reason to do so. He is of the view that the actions of the respondents are aimed at frustrating his proprietary interests.

Despite being served with the application, the respondents have not entered appearance nor responded to this motion.

3. What I have before me is an application for removal of a restriction. Section 76 of the Land Registration Act, Act No. 3 of 2012, does give power to Land Registrars to place restrictions. The said section is drawn as follows :-

Restrictions.

76. (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, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers 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—

(a) for a particular period;

(b) until the occurrence of a particular event; or

(c) until the making a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

(3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.

4. It will be noted from the above, that the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time, or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance, as the underlying issue leading to the restriction is being resolved, since a restriction by itself does not solve a dispute.

5. In our instance, I have seen that the applicant became the owner of the suit land on 25 March 2014. The restriction was placed on 22 July 2014. It states as follows: - "*No dealings until the issue of ownership is determined.*"

6. An issue of ownership of land is a matter that is squarely determined by the courts. In the event that a person is of the view that he is entitled to certain land it is his duty to approach the courts for relief. If a Land Registrar has to place a restriction because the ownership of land is in issue, then it is advisable that such restriction be limited in time, to allow a reasonable period for the person claiming the land to lodge his case in court. If such applicant does not present his case for determination, then the restriction ought to be lifted.

7. In our case, there was no time given for the restriction to subsist, save that the Land Registrar noted that the restriction should remain in place until an alleged ownership dispute is resolved. I have not been informed that any proceedings have been filed by the 2nd respondent claiming the suit property since the year 2014 when the restriction was registered. It is now close to 3 years since the said restriction was lodged and no suit over ownership of the land has been lodged. It is apparent therefore that the rights of the applicant as proprietor are being curtailed on an alleged interest which remains unknown and undetermined to date. If indeed the 2nd respondent, who instigated the registration of the restriction was serious, he would by this time have presented his case in court and given reasons why he feels entitled to ownership of the suit land. None has been filed and on my part, I do not see why the applicant should be unduly restricted.

8. The court has power under Section 78 of the Land Registration Act, to remove cautions. This provision of the law is drawn as follows :-

Removal and variation of restrictions.

78. (1) The Registrar may, at anytime 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 that the removal or variation of a restriction.

(2) 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 other order as it deems fit, and may make an order as to costs.

9. The court's power to remove a restriction is given in Section 78 (2) above. On application by a proprietor, the court may order the restriction removed or varied, or the court may issue such order as it deems fit and may also make an order as to costs.

10. I have already stated that the respondents have not appeared before this court to explain why the restriction should continue being in the register. I have not seen any reason why such restriction should remain and I am persuaded that the applicant must succeed. I therefore order the Land Registrar to remove the restriction registered on 22 July 2014. I also award the costs of this motion to the applicant.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Kahigah for the applicant

No appearance for the respondents.

Court Assistant: Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU