



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA
THIKA LAW COURTS
ELC.NO.438 OF 2017

SAMUEL MURIMI KINENE.....PLAINTIFF

-VERSUS-

THE ASSISTANT COUNTY COMMISSIONER, NGENDA WARD...1ST DEFENDANT

THE LAND REGISTRAR, GATUNDU.....2ND DEFENDANT

JUDGEMENT

By a **Plaint** dated **10th April 2017**, the Plaintiff herein **Samuel Murimi Kinene** has sought for these orders:-

a. An order for the 2nd Defendant to withdraw restriction lodged from the 1st Defendant against land parcel No.Ndarugu/Gacharage/2439.

b. Costs of this suit to be provided for.

The Plaintiff averred that he is the registered proprietor of all that land parcel **No.Ndarugu/Gacharage/2439** measuring **0.607 Hectares**. Further that the 1st Defendant lodged a restriction against this suit property without prior Notice to the Plaintiff herein. He also averred that by registering the restriction lodged by the 1st Defendant, on the stated parcel of land, the 2nd Defendant failed to protect the interest of the Plaintiff. He urged the Court to allow his claim.

The Defendants were served with **Summons** to enter appearance as is evident from the **Affidavit of Service** filed by **Margaret Nambala Wafula** the **Court Process Server**. However, they failed to enter appearance nor file defence.

The matter proceeded for hearing *exparte* and Plaintiff herein Samuel Murimi Kinene gave evidence for himself and called no witness. He testified that the Land Registrar, Gatundu placed a caution on his parcel of land and Plaintiff did not know why the same was placed. That he inherited the land from his father and he produced a copy of the green card as evidence in Court. He also stated that all his children are now grown up and his wife deserted him. He stated that the said caution is oppressing him and he urged the Court to order its removal.

The Court has carefully considered the pleadings herein and the exhibits attached to it. The Court has

noted that the Plaintiff did attach a copy of the green card which shows that the suit property **No.Ndarugu/Gacharage/2439** is registered in the name of the Plaintiff herein. However, there is a **restriction lodged on 7th April 2016**, restricting any dealing on the suit land on the strength of a letter from the **Assistant County Commissioner, Gatundu** dated **6th**

April 2016. The Plaintiff has alleged that no reasons were given for placing of the said restriction and the 1st Defendant has not explained to the Plaintiff why the restriction was registered on the suit land. The Defendants did not turn up in Court and they neither filed Defence nor gave evidence. There was no evidence tendered therefore on why the restriction herein was lodged or registered. Section 76(1) of the Land Registration Act deals with the issue of restriction. It provides as follows:-

“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”.

A careful consideration of the law on restriction shows that restrictions are placed on any suit property after inquiries have been made and notices are served and parties affected given a hearing.

The 2nd Defendant herein did not appear in Court to give evidence and it is not clear whether the Registrar carried any inquiries upon receiving the letter from the Assistant County Commissioner, Gatundu or whether he gave the Plaintiff any hearing or notice.

Further Section 77 provides that the Registrar shall give **Notice** in writing of the restriction to the proprietor affected by the restriction. The Plaintiff herein has alleged that he was not given any Notice in writing and the 2nd Defendant did not file any defence and attach the said Notice to the Plaintiff herein in writing if any such Notice had been given.

Further Section 78(2) of the same Act provides that a proprietor who is affected by the restriction **may** apply to Court to have the restriction removed. That application is upon Notice to the Registrar. The Plaintiff herein filed this suit and caused Summons to enter appearance to be served upon the Defendants herein. The said Summons were therefore sufficient Notice to the Registrar. The Registrar did not appear in Court to give reasons as to why the restriction was placed and why the same should not be removed. The Court therefore by virtue of Section 78 has discretion to order for the removal of restriction.

This Court finds that no justification has been shown as to why the restrictions on the Plaintiff's suit and was placed. The right procedure for making such restriction was not followed. In the case of **Maria Ngangi Ngwako..Vs...Charles Mwezi Ngangi 2014 eKLR**, the

Court held that:-

“When the caution is objected to by the proprietor, the onus is upon the cautioner to justify the lodging and the need for it to remain in place.”

The same reasoning apply in terms of a restriction. The restriction has been objected to by the proprietor of the suit property. The onus was on the person who placed the restriction to explain why the said restriction should remain. That explanation was not offered by the Defendants.

Consequently, the Court finds that the **Plaintiff has proved his case on a balance of probability**. For the above reasons, the **Court enters Judgement for the Plaintiff against the Defendants herein jointly and severally in terms of prayers No.(a) of the Plaint with costs to the Plaintiff herein.**

It is so ordered.

Dated, Signed and Delivered at Thika this 6th day of *October 2017*.

L. GACHERU

JUDGE

6/10/2017

In the presence of

In person – Plaintiff (present)

No appearance for 1st Defendant

No appearance for 2nd Defendant

Lucy - Court clerk.

Court – Judgement read in open court.

L. GACHERU

JUDGE

6/10/2017