



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

MISC APPLICATION NO. 98 OF 2017

(formerly Milimani ELC Misc. No. 87 of 2013)

**IN THE MATTER OF AN APPLICATION UNDER SECTION 78(2) OF THE LAND
REGISTRATION ACT**

BETWEEN

AZELIA INVESTMENTS LIMITED.....APPLICANT

VERSUS

LAND REGISTRAR NGONG DISTRICT.....1ST RESPONDENT

HASSAN IDDI MALAMBU.....2ND RESPONDENT

RULING

The application before Court is an originating motion dated 26th September, 2013 and filed in court on 30th September, 2013 brought pursuant to Section 3 A of the Civil Procedure Act, Section 78(2) of the Land Registration Act and all other enabling provisions of the Law.

The application is premised on the grounds that the Applicant purchased the parcel of land known as NGONG/NGONG/5048 (hereinafter referred to as the suit land) from Bestel Agencies Limited in 2010 after undertaking due diligence. The vendor Bestel Agencies Limited caused the parcel of land to be transferred to the Applicant with the transfer being successfully lodged and a title deed issued on 19th October, 2010 in their favour. The Applicant moved to develop the property and contracted the services of a Planner to inter alia obtain a change of user for the property but sometime in January, 2013 it came to its attention that a restriction had been entered against the property by the 2nd Respondent who was unknown to it. The Applicant was notified by the 1st Respondent that there were allegations that the title deed issued to Bestel Agencies Limited (vendor) had been fake although the Green Card did not show any flaw in the series of transactions. Applicant wrote to the 1st Respondent to remove the restriction on the property, following which the Land Registrar invited the parties for a meeting. No cause was shown by the 1st Respondent why the restriction was entered or should remain in force and no evidence of fraud or at all was provided in support of the allegation of fake title. 1st Respondent has failed to remove the restriction despite being requested to do so and this has limited dealing of the property by the Applicant who is a purchaser for value without notice; undertook due diligence; was not notified when the restriction was lodged and not invited to participate in the proceedings leading to the registration of the restriction.

The application is supported by the affidavit of PHILIP JOHN RANSLEY who is a shareholder and Director of the Applicant company who deposes that after undertaking a search and being satisfied that

the title was not encumbered, the Applicant and Bestel Agencies Limited (vendor) executed an agreement for sale of land. He avers that the Applicant obtained consent of the land control board on 10th August, 2010 in order to have the property transferred to it, with the transfer being successfully registered and title deed issued on the 19th October, 2010. He states that on 19th June, 2012 the Applicant received a letter dated the 17th May, 2012 addressed to the Chief Land Registrar by the 1st Respondent herein claiming the title document issued to it was not genuine and the Applicant responded to the said letter by alerting the Chief Land Registrar that it was a beneficial purchaser for value without notice of the suit land and sought for confirmation that it was the owner. He claims on 10th January, 2013, the Applicant learnt that the 2nd Respondent had colluded with the 1st Respondent to register a restriction on the suit land without notice to them. Further, that it instructed its advocates who wrote to the 1st Respondent to remove the restriction but he did not respond. He reiterates that on 15th April, 2013 the Applicant wrote to the 1st Respondent seeking to be issued with a certified copy of the Green Card and the same was not responded to. He confirms that on 20th May, 2013 the 1st Respondent wrote to the vendor and the applicant setting out the allegations upon which the restriction was entered and calling all the concerned parties including the 2nd Respondent for a meeting on 5th June, 2013 but the said meeting failed to take off due to non attendance of the 1st Respondent. He affirms that on 17th July, 2013 the 1st Respondent convened a meeting whose outcome was that in the year 2007, Bestel Agencies Limited had been called to the Land Registry on allegations that the title it purchased in 2007 was fake but after investigations the Police informed them that there was no evidence of the alleged fraud and it could therefore deal with the property as it wished. He also states that on 2nd August, 2013 at a meeting with the 2nd Respondent, the 1st Respondent indicated he would not remove the restriction. Further that on 6th August, 2013 he wrote to the Respondent to remove the restriction within 21 days failing which he would move to court but the 1st Respondent failed to remove it.

The application is opposed by the 2nd Respondent who filed a replying affidavit sworn by HASSAN IDDI MALAMBU where he deposes that the suit land belonged to his late sister AMINA NAANYU MALAMBU having been given the same by their late father IDDI MALAMBU HASSAN. He states that his late sister died intestate on 21st November, 1986 and did not have any issues of her own and as such he applied for letters of administration intestate and the grant was yet to be issued but the application was gazetted on the 25th October, 2013. He insists at the time of his sister's demise she had not sold the suit land or transferred it to anybody and the original title is in his custody. He avers that in 2012 it came to the family's knowledge that someone was purporting to have bought the suit land from his late sister prompting them to file a complaint with the Chief Land Registrar and a criminal complaint with the police. He reiterates that upon investigation it emerged that Messrs Bestel Agencies Limited purported to have bought the said property in the year 2007 long after his sister had died, while no letters of administration intestate had been taken out; the original title to the suit land was in his custody; no consent of the land control board was issued if at all the transaction was carried out as no family member attended; and no photographs have been exhibited of the transfer to Bestel Agencies Limited. He claims the Sale Agreement annexed to the supporting affidavit is undated; not affixed with revenue stamp; has no name of purchaser; does not bear the executory part and is not witnessed. He affirms that this is a clear case of fraud and the purported vendor did not have any transferable interest nor title deed to the suit land and at the Chief Land Registrar's Office, the said vendor did not provide proof of how it acquired title to the suit property. He sought for the application to be dismissed.

The Applicant through PHILIP JOHN RANSLEY who is one of the Directors', filed a supplementary affidavit where he reiterated that the 2nd Respondent does not dispute the validity of the Applicant's title and/or the irregularity of the restriction registered against it. He insists the 2nd Respondent has not demonstrated any interest in the suit land and had therefore no locus to move the Registrar to register the restriction against the title. He claims there was nothing stopping 2nd Respondent from applying for a Limited Grant in order to preserve the estate of the deceased AMINA NAANYU MALAMBU which would have in turn protect the Applicant from acquiring a faulty title. He reiterates that the Applicant was a bona fide purchaser for value, without notice and therefore acquired a good title to the suit land.

Both parties filed written submissions which I have considered.

Analysis and Determination

I have considered the issues raised, the affidavits both in support of and in opposition to the application, the submissions and authorities relied upon. The issue for determination is whether the restriction entered by the 1st Respondent over the suit land should be removed.

The Applicant contends that it bought the suit land parcel for valuable consideration from Bestel Agencies Limited in 2010 after undertaking due diligence and a title deed was issued to it on 19th October, 2010. It states that in January, 2013 it discovered a restriction had been entered against the suit property by the 2nd Respondent who was unknown to them. The Applicant learnt through the 1st Respondent that there were allegations that the title deed issued to Bestel Agencies Limited had been fake although the Green Card did not indicate so. Despite the Applicant writing to the 1st Respondent to remove the restriction, he has failed to do so and this has limited their dealings on the suit property. The Applicant argues that the restriction was registered against the suit land without them being notified and yet they were the legal proprietors.

The 2nd Respondent maintains that the suit land belonged to his late sister AMINA NAANYU MALAMBU who died intestate on 21st November, 1986 and he applied for letters of administration intestate and the grant was yet to be issued but the application was gazetted on the 25th October, 2013. He insists by the time the sister died, she had not sold the suit land or transferred it to anybody and he has in his custody the original title. The 2nd Respondent further insists that this is a clear case of fraud since Bestel Agencies Limited did not have any transferable interest nor title deed to the suit land and at the Chief Land Registrar's Office, they failed to provide proof on how it acquired title to the suit property.

I note that there was another suit ELC Case No. 877 of 2014 IDDI HASSAN MALAMBU versus BESTEL AGENCIES LIMITED & AZELIA INVESTMENTS LIMITED which also involved the dispute over the suit land but the same was dismissed by Lady Justice Gitumbi in 2014.

Section 76 of the Land Registration Act: ***'(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 a further order is made, (2) 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.'***

In relying on the provisions above and the facts presented by the respective parties, and since the suit was dismissed and no appeal preferred, I find that the 1st Respondent should have adhered to the Applicant's request to remove the restriction.

Section 78 (1) of the Land Registration Act provides that: ***' 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 orders as it deems fit, and may make an order as to costs.

I note in the Applicant herein has sought the Land Registrar Kajiado North to remove the restriction but he has declined.

In relying on these provisions, I note that the 1st Respondent who is statute bound to remove the restriction failed to do so despite being severally requested by the Applicant. I note the 2nd Respondent has already instituted the ELC case in Nairobi over the same subject matter but the same was dismissed and he did not provide any evidence that the judgement was appealed against. It is against the foregoing

that I find that the 1st Respondent's actions of declining to remove the restriction over the suit land is prejudicial to the applicant.

The 1st Respondent did not file any pleadings to oppose the Applicant's claim and has not provided any reason why he should not remove the restriction. According to provisions of Section 78, I find that is statute bound to remove the restriction as there is no Court Order indicating the same should remain in place.

In relying on the foregoing and the proceedings and Judgement in ELC Case No. 877 of 2014, I find that the application is merited and allow it as prayed. In accordance with Section 78 of the Land Registration Act, the Land Registrar Kajiado North be and is hereby ordered to remove the restriction on land parcel number NGONG/NGONG/5048.

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 5th day of December, 2017.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Wambui Thanu for Applicants

N/A for Respondents