



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 607 OF 2017**

**RAPHAEL THAITURU WANGORA.....PLAINTIFF**

**VERSUS**

**THE LAND REGISTRAR, NGONG REGISTRY.....DEFENDANT**

**JUDGEMENT**

By a Plaint dated 5<sup>th</sup> April, 2012, the Plaintiff is seeking for judgement against the Defendant as follows:

- a) A declaration that the restriction by the Defendant registered on 25<sup>th</sup> November, 2009 against Title Number NGONG/NGONG/2138 is unlawful.
- b) An order that the Defendant's refusal to remove the restriction was unreasonable and occasioned this suit and thereby renders the Defendant personally liable for the costs thereof.
- c) An order does issue compelling the Defendant to remove the restriction registered on 25<sup>th</sup> November, 2009 against title number NGONG/NGONG/2138.

The Defendant never entered appearance nor file a Defence despite being served on 24<sup>th</sup> April, 2017 as evidenced in the affidavit of service, and the suit hence proceeded to full hearing in accordance with the provisions of Order 10 (2) and (9) of the Civil Procedure Rules. The matter proceeded for hearing on 16<sup>th</sup> October, 2017 and Plaintiff only had one witness.

**Evidence of Plaintiff**

PW1 Raphael Thaturu Wangora.

He stated that he lives in Ngong, is a peasant farmer and is the Plaintiff in this case. He owns land parcel number NGONG/NGONG/2138 measuring 2.4 hectares, which he bought in 1973. He averred that in 2009 two of his nephews Gedion Mirichu Kerorio and Samuel Shena together with the Land Registrar Ngong entered a restriction on his land without his knowledge. Further in early 2017, his nephews were remorseful and wrote a letter to the Land Registrar to remove the restriction and they were asked to pay Kshs.3,000 which they did. He claims he visited the Land Registrar Ngong to check if the restriction had been removed but he asked him to go to Court and obtain a letter, knowing fully well the Court do not deal with letters. As a result of the Land Registrar's refusal to remove the restriction, he sought the assistance of a lawyer to institute the instant case.

He reiterated that he filed a witness statement dated the 5<sup>th</sup> April, 2017 which he wishes to rely on and adopt as his evidence in court. He affirmed that he filed documents in court which he wished to produce

in Court as Plaintiff's exhibit '1 – 7'. He confirmed that the restriction was removed on 21<sup>st</sup> August, 2017 after the suit was filed and this is evident from the Certificate of Official Search produced as Plaintiff's exhibit '8'. He further stated that he is not pursuing prayers (a) and (b) in the Plaint as they have been overtaken by events but only prays for costs of the suit.

The Plaintiff's Counsel Mr. Githuka thereafter closed the Plaintiff's case.

### **Analysis and Determination**

After perusal of the pleadings including documents filed herein and upon hearing the testimony of PW1, I find that the only issue for determination is whether the Plaintiff is entitled to the costs of this suit.

It is not in dispute that the Plaintiff is the absolute proprietor of land parcel number NGONG/NGONG/2138. Section 24 (a) of the Land Registration Act stipulates that **'Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

From the evidence presented, I note that the Defendant had entered a restriction against the suit land on 25<sup>th</sup> November, 2009 with the entry no. 6 in the inhibitions/cautions/restrictions section stating as follows: **' Restriction:. No dealings to be registered in the title. The rectification of the same is finalized vide Criminal Cae No. 1202/2005 in the Chief Magistrate's Court at Makadara.'**

The Court takes cognizance of the fact that the Plaintiff jointly with one JACOB WANGORA were convicted by the Chief Magistrates' Court, which conviction was upheld by the High Court but later quashed by the Court of Appeal on 17<sup>th</sup> January, 2014. The Court further notes that on 23<sup>rd</sup> February, 2017, Samuel Shena Motamperia and Gideon Kirorio sent a letter to the Defendant requesting him to remove restrictions on land parcel numbers NGONG/NGONG/ 23646, 23647, 23649, 23650, 23651 AND 2138 subject to the determination of the criminal case number 1202 of 2005 and appeal case no 468 of 2009. PW1 produced the said letter in court. PW1 confirmed that Samuel Shena Motamperia and Gideon Kirorio were made to pay Kshs. 3,000.

The Defendant never filed a Defence to controvert the Plaintiff's claim.

It was PW1's contention that he was forced to hire the services of a lawyer for the restriction to be removed. Section 78 of the Land Registration Act provides as follows: **(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 an order as to costs.'**

In relying on these provisions, I note that the Defendant declined to remove the restriction despite being requested by Samuel Shena Motamperia, Gideon Kirorio and the Plaintiff, and instead asked the Plaintiff to get a letter from Court. As per PW1's evidence, the Restriction was only removed in August 2017, after this suit was filed and hence prayers (a) and (b) were overtaken by events. It is against the foregoing that I find that due to the actions of the Defendant, the Plaintiff was indeed made to incur costs of hiring legal services including filing the instant suit before the restriction was removed.

In the circumstances, I find that the Plaintiff has proved its case on a balance of probability and enter judgement in its favour as prayed but since prayers (a) and (c) have been overtaken by events, I only make the following order:

- a) The costs of this suit to be borne by the Defendant.

Date signed and delivered in open court at Kajiado this 5<sup>th</sup> day of December, 2017.

**CHRISTINE OCHIENG**

**JUDGE**

**Present:**

Githuka for Plaintiff

N/A for Defendant

CC Mpoye