



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. MISC. CASE NO. 225 OF 2014

ITRADE COMPANY LIMITED.....APPLICANT

VERSUS

JANE MUKAMI MWANGI.....1ST RESPONDENT

THE LAND REGISTRAR THIKA LAND REGISTRY.....2ND RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 25th June 2014 in which the Applicant, Itrade Company Limited, seeks for orders that the Respondent be ordered to lift and remove the restriction registered against the Applicant's property identified as Ruiru East Block 1/1490 (hereinafter referred to as the "suit property") and that costs of this Application be awarded to the Applicant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Samuel Gachomba Njenga, sworn on 25th June 2014 in which he averred that he is the Managing Director of the Plaintiff. He further averred that the Applicant purchased the suit property on 14th December 2012 for the sum of Kshs. 12,500,000/- from one David Mwangi Kibunja. He further averred that prior to concluding the said purchase, he carried out a due diligence of verifying the ownership of the suit property by conducting a search at the Land Registry, Thika. He confirmed that the search results did not reveal any encumbrances registered against the title. He confirmed further that the suit property was transferred to the Applicant on 27th December 2012. He exhibited a copy of the title deed bearing the Applicant's name. He then averred that in line with their business as estate developers, the Applicant commenced construction of an estate on the suit property after obtaining approved building plans, mobilizing finances and moving to site. He further averred that the Applicant also begun marketing their construction project off plan and had begun receiving deposits and expression of interest from various prospective purchasers of the housing units but that the process was brought to a halt when the prospective purchasers obtained searches on the suit property indicating that the Respondents had placed a restriction thereon claiming an unspecified interest. He further averred that the Applicant was forced to halt the development plans, refund the deposits and defer the credit obtained for construction with heavy losses. He further averred that he subsequently tried to engage the Respondents by invoking the procedure under the Land Registration Act but that the Respondent refused to hold a hearing or withdraw the

restriction. He added further that the Applicant is aggrieved by the maintenance of the irregular and illegal restriction on the suit property. He also stated that he later came to learn that the 1st Respondent claims to be the spouse of the vendor David Kibunja Mwangi but that he had been furnished with an Affidavit under Oath giving Spousal Consent to the Sale Agreement for the suit property. He went on to state that the Applicant was an innocent purchaser for value without notice and that its rights should be protected by the removal of the restriction.

The Application is contested. The 1st Respondent, Jane Mukami Mwangi, filed her Replying Affidavit sworn on 15th July 2014 in which she averred that the suit property is the subject matter of **HCCC No. 2 of 2012** between the said David Mwangi Kibunja and herself and that the suit is part-heard. She averred that she registered the first caution against the suit property on 22nd June 2011 which caution was improperly removed on 16th July 2012 under a non-existent provision of the law. She added that the purported transfer of the suit property to the Applicant was effected despite the encumbrances existing namely a letter from Federation of Women Lawyers (FIDA)'s letter dated 14th December 2012 informing the Registrar that the said David Mwangi Kibunja was subdividing the suit property which was the subject matter of court proceedings. She also averred that the Applicant had not obtained good title as the same was fraudulently transacted.

In response thereto, the Applicant filed the Supplementary Affidavit of Samuel Gachomba Njenga sworn on 1st December 2014 in which he averred that the Applicant is not a party to **HCCC No. 2 of 2012** and that the suit property was vacant at the time of the purchase. He further averred that the search results of the suit property which he obtained prior to the purchase did not reveal the name of the 1st Respondent as an owner or part owner thereof. He further added that he was an innocent purchaser for value and was not party to any fraud.

The issue that I am called upon to determine is whether or not to lift the restriction registered against the suit property.

Section 76(1) of the Land Registration Act, No. 3 of 2012 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 ... 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...”

Further, **Section 77(1) of the Land Registration Act, No. 3 of 2012** provides as follows:

“The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.”

In this Application, the Applicant complains that they were never contacted or given a chance to be heard by the Registrar prior to the entering of the restriction on the suit property and further that after the restriction was entered, they were never notified of the same by the Registrar and only came to learn of it after prospective purchasers of the contemplated housing units conducted searches on the suit property. The law is quite clear that the Registrar is required to give the affected proprietor a chance to make representations to him prior to proceeding to enter a restriction on any property. This was not done. Further, the Registrar is bound by the law to notify the affected proprietor of a restriction which has been entered against their property. This was also not done in this case. Clearly, the Applicant was condemned unheard and has suffered great financial loss as a result.

Section 78(2) of the Land Registration Act, No. 3 of 2012 provides as follows:

“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.”

A look at the restriction placed against the suit property reveals that it reads as follows:

“Restriction: no dealings vide letter Re: FIDA/6294/MT/6/11/P dated 14th December 2012”

This particular letter is annexed to the 1st Respondent’s Replying Affidavit sworn on 15th July 2014. This was a letter written by the 1st Respondent’s lawyers, the Federation of Women Lawyers – Kenya addressed to the Lands Registrar, Thika District Registry. In that letter, it was stated that the 1st Respondent is a part owner of the suit property together with the said David Mwangi Kibunja. This letter was not copied to the Applicant and he was not notified of its existence.

I am inclined to rule in favour of the Applicant for the main reason that the restriction was entered against the suit property with the Applicant, the affected proprietor, not being given a chance to be heard. Only the 1st Respondent’s side of the story was heard and acted upon. The Applicant made the necessary efforts to seek a hearing with the Registrar but was not accorded a hearing. This goes contrary to the provisions of **section 76(1) of the Land Registration Act** cited above and further goes contrary to the rules of Natural Justice that dictate that a party shall not be condemned unheard. Further, the Registrar failed to notify the Applicant that he has entered a restriction on the suit property as required under **section 77(1) of the Land Registration Act** resulting in the Applicant proceeding with its plans to develop the suit property only to come later to learn of the existence of the restriction. This resulted in the Applicant suffering major financial and other losses.

Section 78(2) of the Land Registration Act cited above empowers the court to intervene and either remove or vary the restriction or issue any other order deemed appropriate to the court. In exercise of those powers, I hereby remove the restriction registered against the suit property.

In essence, I hereby allow the Application and award the costs thereof to the Applicant.

DELIVERED AND DATED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE