



**Mitugo v Lands Registrar, Marimanti (Environment & Land Case
E005 of 2023) [2024] KEELC 6234 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E005 OF 2023
CK YANO, J
SEPTEMBER 25, 2024**

BETWEEN

JULIUS KIBORO NJOGOO MITUGO APPLICANT

AND

THE LANDS REGISTRAR, MARIMANTI RESPONDENT

RULING

1. Before me is a Notice of Motion dated 28th November, 2023 brought under Order 51 Rule 1 & 3 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Section 78 of the [Land Registration Act](#), 2012, Article 159 of [the Constitution](#) of Kenya 2010 and all enabling provisions of the Law. The motion seeks for the following orders:-
 1. Spent.
 2. That the restriction registered against Land Reference Number N. Tharaka/Marimanti/664 entered as Entry Number 3 be lifted and/or removed.
 3. That the orders issued herein be served upon the Land Registrar Marimanti for Compliance.
 4. That such other or further orders or directions be granted as this Honourable Court may deem fit to meets the ends of justice.
 5. That the costs of this application be provided for.
2. The motion is supported by the grounds on its face and a supporting affidavit sworn by Julius Kiboro Njogoo Mitugo on 28th November, 2023 together with annexures thereto. The applicant avers that he is the registered owner of land parcel known as N.Tharaka/Marimanti/664 (“the suit premises”) The applicant has annexed a Photostat copy of the title deed marked “JKNM 1”. He avers that he is in occupation of the suit premises.



3. The Applicant states that after the land adjudication proceedings over the suit premises, an appeal was filed to the Minister against the decision of the Land Adjudicator. That the Minister heard the appeal; and rendered a decision. The applicant has annexed a Photostat copy of the Minister's decision marked "JKNM 2".
4. The Applicant further states that he appealed against the said Minister's decision in Nairobi Misc. Application No. 572 of 2004. That pending the hearing and determination of the appeal before the Minister and the High Court, two (2) restrictions were registered/entered against the suit premises. The Applicant has annexed a Photostat copy of an official search of the title containing entries of the restrictions marked "JKNM 3".
5. The Applicant states that the restriction that was entered and registered as entry number 3 of 5.4.2004 was to the effect that there be no dealing until appeal to the Minister is heard, while entry number 4 of 6.7.2004 stated that there be dealing until Misc. Application No. 572 of 2004 in the High Court of Kenya at Nairobi is finalized.
6. The Applicant states that he has lately experienced financial difficulties and he is desirous of dealing with the suit premises to access credit facility, but he cannot do so because of the restriction. That upon the finalization of both appeals, he caused his advocates on record to write to the Land Registrar, Marimanti, to lift the restrictions so that he could deal with his land. The Applicant has annexed a Photostat copy of his Advocate's letter dated 18th October, 2023 marked "JKNM 4". That pursuant to the letter from his Advocate, the Land Registrar lifted the restriction registered as Entry No. 4 but failed, refused and/or neglected to remove entry No. 3 relating to the Minister's appeal. That the said restriction is detrimental to his interests and is unnecessary restricts him from dealing with the parcel land.
7. Relying on legal advice, the Applicant states that restrictions are to endure for a particular time or until the occurrence of an event or the events for which they were registered and that a restriction should only hold a property in abeyance as the underlying issue leading to the restriction is being resolved. The applicant further states that the underlying issue in regard to the Minister's Appeal were resolved when the Minister delivered a verdict as per stated above. That since the restriction Entry No. 3 was imposed to await the determination of the Minister's Appeal and since the appeal was heard and finally determined, he believes that there is no need of keeping the restriction on the title forever.
8. The Applicant contends that the court has a duty to protect his right to property as enshrined in Article 40 of the Constitution of Kenya 2010, adding that the respondent has no justification at all to refuse to lift the restriction against his land title.
9. In opposing the application, the respondent filed grounds of opposition dated 19th April, 2024 on the following grounds:-
 1. That the Application is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore, are (sic) unsustainable in the obtaining circumstances.
 2. That the Application does not meet the threshold for the orders sought as there is no suit pending hearing and determination of this Honourable Court hence the Application violates the provisions of The Land Registration Act which sets out the procedure for removal of a restriction.



3. That this Honourable Court lacks Jurisdiction to hear and determine this Application as the [Land Registration Act](#) provides a clear procedure for removal of a restriction.
 4. That further, it is an established principle of law that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order would be granted by Courts and the Plaintiff (sic) herein has not established the existence of any exceptional circumstances.
 5. That the issues raised in the Application can only be ventilated through a Judicial Review Application.
 6. That the Application is otherwise frivolous, vexatious and an abuse of the court process.
10. The application was canvassed by way of written submissions. The Applicant filed submissions dated 22nd March, 2024 through the firm of JK Mungania & Co. Advocates while the respondent filed his submissions dated 24th July, 2024 through the office of the Honourable Attorney General.

Applicant's Submissions

11. The applicant gave a background and brief facts of the case and submitted that two restrictions that were registered against the title of the suit premises were dependent upon the occurrence of the events which are spelt out in the restrictions. That those events have occurred in that the Minister rendered his verdict as demonstrated by annexures "JKNM 2". The applicant states that he appealed the decision of the Minister in Nairobi Misc. Civil Application [No. 572 of 2004](#) and the High Court rendered its decision in the said Application and struck out the application. That the decision was not appealed against. That the restriction filed pending the outcome of the Miscellaneous Application was lifted by the Land Registrar, but he has refused and/or declined to lift the restriction relating to the Minister's Appeal.
12. The applicant submitted that restriction entry No. 3 was lodged to await the determination of the Minister's appeal. That the Minister's Appeal was heard and determined and it defies logic not to lift the restriction upon the occurrence of the event for which it was registered.
13. The applicant further submitted that the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. That restrictions are to endure for a particular time or until the occurrence of an event. It is the applicant's submission that it is not the purpose of Section 76 (2) of the [Land Act](#) to have restrictions remain indefinitely. That the reasoning is that a restriction should only hold property in abeyance as the underlying issues leading to the restriction is being resolved since a restriction by itself does not resolve a dispute. The applicant relied on the case of Daniel Macharia Kanyura Vs. District Land Registrar & Another Nakuru ELC Misc. Application [No. 331 of 2016](#). The applicant submitted that he has complied with the law and especially Section 78 (2) of the [Land Act](#).

Respondent's Submissions

14. The respondent also gave a background of the Application and identified two issues for determination namely: Whether the suit contravenes the provisions of the [Land Registration Act](#) and whether this Honourable Court has jurisdiction to hear and determine this matter.
15. Regarding the first issue, the respondent cited Section 78 (1) of the [Land Registration Act](#) and submitted that the Applicant has failed to demonstrate that he invoked the provisions of Section 78.



The respondent relied on the cases of Mwangi Rukwaro and Another Vs. Land Registrar Nandi (2019) eKLR, Anna Chesaina Kenduiywa Vs. Nandi County Land Registrar (2022) eKLR, John Kamau Kinyanjui Vs. Thika District Land Registrar (2017) eKLR and Nyaga Nderi Vs. James Nyaga Kinyua (2021) eKLR. The respondent submitted that from the face of the Application, it is not clear who placed the Restriction and neither is it explained why they are not enjoined as parties and as such this Application should fail.

16. On the issue whether the court has jurisdiction, the respondent relied on the cases of Speaker of the National Assembly Vs. James Njenga Karume (1992) eKLR, Mutanga Tea & Coffee Company Ltd. Vs. Shikara Ltd. & Another (2015) eKLR and Geoffrey Muthinja Kabiru & 2 Others ...Vs... Samuel Munga Henry & 1756 Others (2015) eKLR, and submitted that having demonstrated that the procedure under Section 78 (1) of the *Land Registration Act* was not exhausted by making the necessary application before the Land Registrar, the applicant has not established the basis for invoking this Court's jurisdiction. It is the respondent's submission that the court lacks jurisdiction to hear and determine the suit and the same ought to be dismissed with costs to the Respondent.

Analysis and Determination

17. I have considered the application, the response and the rival submissions. The issue for determination, in my view, is whether the Applicant is entitled to the orders sought.
18. The Application herein is brought under Section 78 of the *Land Registration Act*, 2012 and Section 3A of the *Civil Procedure Act*. Section 78 (2) of the *Land Registration Act* deals with removal and variation of restrictions and provides as follows:
 - “(1) The Registrar may, at any time 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 the removal or variation of a restriction.
 - (2) Upon the application by 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.”
19. It is apparent therefore that under Section 78(2) above, the court has jurisdiction to make an order for removal of any restriction placed on a title. The respondent's submission that the court lacks jurisdiction over the matter is therefore misplaced and is rejected.
20. Further, the application is anchored upon Section 3A of the *Civil Procedure Act* which gives the Court the inherent power to make such orders that are necessary in ensuring that the ends of justice are met and to prevent abuse of the court process.
21. Bearing in mind the above provisions of law, the Court will consider the available evidence and determine whether the Applicant is deserving of the orders sought.
22. The applicant's case is that two restrictions were registered against the title of the suit premises. The first one was on 5th April, 2004 which provided that there should be no dealings until appeal to the Minister is determined. The second restriction was registered on 6th July, 2004 and stated that there would be no dealing until Miscellaneous Civil Application *No. 572 of 2004* in the High Court of Kenya at Nairobi is finalized. It is the applicant's submission that the restrictions were dependent upon the occurrence of the events which are spelled out in the restrictions. The applicant submitted that the said events have occurred in that the Minister rendered his verdict which is annexed to the supporting



affidavit and marked “JKNM 2”. The Applicant stated that he appealed the decision of the *Minister vide Nairobi Misc. Civil Application No. 572 of 2004*. That the High Court rendered its decision in the said Miscellaneous Application which decision is also annexed, and wherein the said Application was struck out. The applicant avers that there was no appeal filed against the High Court decision. That since the restriction was filed pending the outcome of the Miscellaneous Application, he wrote to the Land Registrar to lift the restrictions, but lifted the second restriction, but refused/or neglected to lift the restriction relating to the minister’s appeal. The applicant argued that the Minister’s appeal was heard and determined and it defies logic not to lift the restriction upon the occurrence of the event for which it was registered.

23. In this case, the applicant has shown evidence in the form of a letter dated 18th October, 2023 addressed to the Land Registrar (the respondent herein) to lift the said restrictions. The applicant states that the registrar only lifted the restriction registered as Entry Number 4, but failed, refused and/or neglected to remove the restriction registered as entry number 3 which relates to the Minister’s Appeal. The said restriction was to remain in force until the appeal to the minister was determined. The applicant has demonstrated that the said minister’s appeal was heard and determined and there is nothing pending. This court has looked at the respondent’s response to the application herein. I have not seen any good reason given by the Land Registrar why the said restriction should not be lifted. It is clear to me that the said restriction was dependent upon the occurrence of the event which was clearly spelt out in the restriction, and it was to remain in force until the Minister’s appeal is determined. Evidence has been shown that the said event has since occurred in that the minister rendered his verdict. Although there was an appeal filed vide Nairobi High Court Misc. Civil Application *No. 572 of 2004*, the court has also been shown that the High Court rendered its decision in the said Miscellaneous Application. The Court struck out that application.
24. From the material on record, it is my finding that the applicant has made out a case for the grant of the orders sought herein. In my view, there is no reason that has been shown why the said restriction should not be lifted and/or removed. I find that the application has merit and the same is allowed as prayed. The applicant is awarded costs of the application.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH SEPTEMBER, 2024.

In the presence of:

Court Assistant – Moses

Muungania for Applicant

Ms. Kendi for Respondent

C.K YANO,

JUDGE

