



**Sedani & another v County Land Registrar, Kisumu & another (Constitutional  
Petition 4 of 2022) [2023] KEELC 111 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 111 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
CONSTITUTIONAL PETITION 4 OF 2022**

**A OMBWAYO, J**

**JANUARY 19, 2023**

**IN THE MATTER OF ARTICLES 1, 2, 3,10 (1) & (2), 19, 20(1),  
(2), 50 (1), 61 (1), 64 (B) , 67,68, 73 (1) , 75(1), (2) & (3), 159, 162,  
176, 184 & 232 (1) OF THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2012**

**AND**

**IN THE MATTER OF THE LAND ADMINISTRATIVE ACTION, 2015**

**AND**

**IN THE MATTER OF THE REPUBLIC OFFICER ETHICS ACT NO. 4 OF 2003 AND  
2. IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS ) PRACTICE AND PROCEDURE RULES, 2013.**

**BETWEEN**

**PARESH NARANDAS SEDANI ..... 1<sup>ST</sup> PETITIONER**

**SMITA PARESH SEDANI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**COUNTY LAND REGISTRAR, KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT**



## JUDGMENT

### Petitioners Case

1. Paresh Narandas Sedani and Smita Paresh Sedani have brought this petition against the County Land Registrar, Kisumu and the Ethics and Anti- Corruption Commission. The petitioners claim that they are registered as joint owners of the leasehold interest in all that the land comprised in Land Registration Number Kisumu Municipality /Block12/306 containing by measurement 0.681 Hectares of land situate in Kisumu County in the Republic of Kenya and have been so registered since July 28, 2010 (hereinafter “the suit property”).
2. Sometimes on or about the July 16, 2020, the Petitioners requested for and were supplied with an extract of the register of the suit property which appeared to show that the 1<sup>st</sup> Respondent had registered a restriction against the title to the suit property on the March 28, 2017 at the instance of the 2<sup>nd</sup> Respondent vide a letter dated February 11, 2016.
3. The 1<sup>st</sup> respondent failed to furnish the petitioners notice of the registration of the caution as required under section 77 (1) on the *Land Registration Act*, No 3 of 2012. The Petitioners have not been shown or furnished with the 2<sup>nd</sup> Respondent’s letter dated February 11, 2016 on the strength of which the restriction is said to have been registered. The petitioners therefore requested the 1<sup>st</sup> Respondent to initiate the process of removal of the restriction to enable them enjoy the use of the suit property. Consequently, the 1<sup>st</sup> Respondent initiated the process of removal of the restriction mistakenly described as a caution by a letter dated March 3, 2021.
4. The 2<sup>nd</sup> Respondent failed to show cause why the restriction should not be removed within the time limited by the 1<sup>st</sup> Respondent’s directive aforesaid or at all and as consequent of the default, the Petitioners’ counsel reminded the 1<sup>st</sup> respondent to remove the restriction by a letter dated April 17, 2021 which was also copied to the 2<sup>nd</sup> respondent
5. The 1<sup>st</sup> respondent failed to discharge his duty by removing the caution as he was by law enjoined to do. In reaction to the letter dated April 17, 2021, the 2<sup>nd</sup> Respondent who has to date not shown any cause why the restriction should not be removed, instead purported to commence investigations into the matter in which the Petitioners acquired title to the suit property by writing a letter dated April 20, 2021 to the 1<sup>st</sup> Petitioner only asking for various documents from the 1<sup>st</sup> respondent.
6. Despite the fact that the failure to show cause why the restriction should not be removed wasn’t explained, the 1<sup>st</sup> Respondent complied with the directive of the 2<sup>nd</sup> Respondent by forwarding to it all the documents it requested for to aid the alleged investigations under cover of a letter dated April 21, 2021. The documents were delivered to the 2<sup>nd</sup> Respondent on April 22, 2021.
7. Despite being furnished with the documents it had requested for, the 2<sup>nd</sup> Respondent in a deliberate scheme to harass the petitioners issued a summons dated May 25, 2021 to the 1<sup>st</sup> petitioner to appear at their offices in Kisumu and to appear before it with the same documents that he had furnished.
8. The petitioners responded appropriately by reminding the 2<sup>nd</sup> Respondent that it had already provided the information sought, bemoaning the scheme to simply harass and intimidate the Petitioners and demanding a copy of the letter dated February 11, 2016 on the basis of which the restriction was registered by the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent has refused to provide the information sought.



9. The move to cause a restriction to be registered over the suit property and then fail to undertake any investigations since March 2017 is being used to corruptly extort money from the Petitioners by persons working for a connected with the 2<sup>nd</sup> respondent, a fact that the 2<sup>nd</sup> respondent has not denied.
10. The petitioners assert that their rights were violated by the respondents thus their right to a fair administrative Action pursuant to article 47 of the fair administrative action and section 4 of the *Fair Administrative Action Act* No 4 of 2015.
11. In the supporting affidavit of Paresh Navandas Sedoni, it is stated that the petitioners are joint owners of leasehold interest in LR No Kisumu/Municipality Block12/306. That on 15<sup>th</sup> or July 16, 2020, they discovered that the 2<sup>nd</sup> respondent had caused a restriction to be registered on the property. The 1<sup>st</sup> respondent did not give any notice to the petitioners.
12. The petitioners were advised to start the process of removal of the restriction which they did. The 1<sup>st</sup> respondent wrote to the 2<sup>nd</sup> respondent to show cause why the restriction should not be removed but no response was forthcoming. The 1<sup>st</sup> respondent had a duty to remove the restriction upon writing and show cause letter but did not do so despite the petitioners giving information as to the ownership of the property to 2<sup>nd</sup> Respondent did not take any action.
13. The petitioner have requested the respondent to remove the restriction but with no success.
14. In the replying affidavit of Dorothy Letting, the Land Registrar, it is stated that the 2<sup>nd</sup> respondent approached the 1<sup>st</sup> respondent with a request to place and register a restriction on the suit parcel on grounds that a fortifiable and competent complaint had been lodged hence need to preserve the status of the land.
15. The investigation took place but she doesn't know the outcome. According to the deponent, the petitioners have come to court prematurely. The 2<sup>nd</sup> respondent did not file any response.
16. The petitioners submitted that the process of removal of a restriction is set out in section 78(1) of the *Land Registration Act*. The petitioners contend that the argument that the petitioner is premature has no basis as the law provides for the removal of a restriction. Moreover, the petitioner contends that the Land Registrar has the power to remove a restriction.
17. The petitioner contend that the restriction was registered secretly and that the Registration did not give notice contrary to the provision of section 77(1) of the *Land Registration Act*. The petitioners contend that the registration of the restriction was done contrary to the law and I therefore breached the provision of Article 47 of the *Constitution of Kenya* that provides for a fair administrative Action. Furthermore, the same was in breach of article 40(2) of the *Constitution of Kenya* that prohibited deprivation by state or any person of or property of any description or of any right or intent therein without due process and without the prefer of full and brought compensation.
20. The 1<sup>st</sup> respondent in her party argues that there was a valid restriction by the 1<sup>st</sup> respondent against the suit property. The 2<sup>nd</sup> respondent approached the 1<sup>st</sup> respondent with a formal request to register a restriction due to the fact that they had a justifiable complaint to register a restriction pursuant to a letter by the 2<sup>nd</sup> respondent.
21. According to the 1<sup>st</sup> respondent, the applicant has not followed the right process for the removal of the restriction. According to the 1<sup>st</sup> respondent the petitioner have not moved the Land Registrar Kisumu for the removal of the restriction.



22. I have considered the petition, supporting affidavit replying affidavit and rival submissions and do find that it is clear that on March 28, 2017, the 1<sup>st</sup> respondent registered a restriction on the suit property due to a complaint by the 2<sup>nd</sup> respondent vide a letter dated February 11, 2016 Ref No Kisumu/15/1/0/6 and it is not in doubt that before registration of the caution the petitioner were not informed. It is also evident that the County Land Registrar later wrote to the 2<sup>nd</sup> respondent to show cause why the restriction should not be removed but there was no reply.

Section 76 of the *Land Registration Act* provides:

76.

- (1) For the purposes of compulsory acquisition 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, and may prohibit or restrict all dealings or only those dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.
- (2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.
- (3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.

[Act No 28 of 2016, s 23, Act No 15 of 2019, s 16.]

Section 77 provides

77. Notice and effect of restriction.

- (1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.
- (2) An instrument that is inconsistent with a restriction shall not be registered while the restriction is still registered except by order of the court or of the Registrar.

Section 78 provides

78. Removal and variation of restrictions.



- (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 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 make an order as to costs.

23. The restriction entered by the 1<sup>st</sup> respondent was in breach of the law as there was no notice to the proprietors before registering the restriction. This was in breach of articles 47 of the [Constitution of Kenya](#) that provides as follows :-

47. Fair administrative action

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration.

24. The procedure applied by the land registrar in registering the restriction was contrary to the provisions of section 78 of the [Land Act](#). Moreover, the 1<sup>st</sup> respondent failed to act on its letter to show cause why the restriction should not be removed. It was upon the 1<sup>st</sup> respondent to remove the restriction upon the failure by the 2<sup>nd</sup> respondent to reply to its letter. The 1<sup>st</sup> respondent had the power to remove the restriction upon the request by the petitioner in the letter dated July 5, 2021.

25. This court finds that by registering a restriction on the parcel of land without notice and without allowing the petitioner an opportunity to be heard was a breach of the petitioners' right to be heard before any administrative action is taken. Article 47 of the [Constitution of Kenya 2010](#) has constitutionalized the right to be given written reasons for administrative actions and decisions. The same has been set out in sections 4 and 6 of the [Fair Administrative Action Act, 2015](#). The court finds that the entry of restriction and revocation of title was shrouded with procedural impropriety contrary to article 10 and 47 of the [Constitution of Kenya](#). In [Judicial Service Commission v Mbalu Mutava & another](#) the Court of Appeal held that:-

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of



constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

26. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of *President of the Republic of South Africa and others v South African Rugby Football Union and others* where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African *Constitution*:-

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

27. However, the act of registration of the restriction on the title, per se did not breach the property rights of the petitioners as provided for in article 40 (2) of the *Constitution of Kenya* as the same was merely investigative and not a takeover of the property.
28. The upshot of the above is that the petition succeeds and I do grant a declaration that the actions of the respondents in placing a restriction on the petitioners property without the due process of the law are illegal unconstitutional, and in breach of the fundamental rights and freedoms of the petitioners. The court further grants a mandatory injunction compelling the 1<sup>st</sup> respondent to remove the restriction registered on March 28, 2017 against title to the property described as Land Registration Number Kisumu Municipality/ Block 12/306. I do decline to grant damages as the same have not been proved. Cost of petition to the petitioners.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**AO OMBWAYO**

**JUDGE**

