



Mwangi v Machakos County Land Registrar (Environment and Land Miscellaneous Application 19 of 2022) [2023] KEELC 15938 (KLR) (22 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15938 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 19 OF 2022
A NYUKURI, J
FEBRUARY 22, 2023**

BETWEEN

JOHN MUSYOKA MWANGI APPLICANT

AND

MACHAKOS COUNTY LAND REGISTRAR RESPONDENT

RULING

1. The applicant instituted this suit by way of notice of motion dated March 30, 2022 seeking the following orders;
 - a. That an order do issue directing the Machakos County land registrar to remove the restriction registered on the parcel of land known by Title No Donyo Sabuk/Komarock Block 1/22511.
 - b. That the cost of this application be borne by the respondent.
2. The application was anchored on the grounds on its face together with the supporting affidavit sworn by the applicant on March 30, 2022. It was the applicant's case that he was the registered proprietor of parcel No Donyo Sabuk/Komarock Block 1/22511 (suit property) and that on March 10, 2013, the respondent unlawfully registered a restriction against his title without any reasonable cause or lawful justification hence preventing the applicant from dealing with the suit property in any manner deemed fit.
3. The applicant complained that at the time of registration of the restrictions, the applicant was never served with any requisite statutory notices, thereby condemning the applicant unheard.
4. Despite service, no response was filed against the notice of motion. On May 10, 2022, the applicant sought for leave of three days to enable him file pleadings in respect of Machakos Succession Cause No 195 of 2008. However, none was filed.



Analysis and determination

5. I have carefully considered the application and the affidavit in support. The sole issue that arise for determination is whether the restriction placed on the suit property ought to be removed.
6. The applicant swore that on March 10, 2013, the Machakos County land registrar unlawfully registered a restriction against the suit property. I have looked at the search in respect of the suit property. The same was registered on November 16, 2009 in the name of John Musyoka Mwangi (for himself and as trustee for Monica Masendi and Antony Mwanzia Kinya).
7. The second entry on the search is a restriction which is indicated as follows;

' 2.10.3.2010 restriction no further dealings until the authenticity of subdivision of No 336 is established Succession Cause No 195/2008 HC of Kenya Machakos.'
8. Therefore although the applicant stated that the restriction was placed on his title on March 10, 2013, the search clearly shows that the same was registered on March 10, 2010, just about four months after the applicant's registration.
9. The applicant informed court on May 10, 2022 that he needed to file pleadings in respect of the Machakos Succession Cause No 195 of 2008, but none were filed. While it is true that the land registrar did register a restriction on the title of the suit property on March 10, 2010, the search shows the basis of the restriction which is to ascertain the authenticity of subdivision of No 336 and this is in regard to Machakos HCC Succession Cause No 195 of 2008. It is therefore not true that there was no basis for registration of the restriction. The land registrar must have acted on instructions/instrument ensuing from Machakos HCC Succession Cause No 195 of 2008.
10. The applicant has approached court seeking orders to remove a restriction. The application is ex parte as no response was filed. The applicant has however failed to make material disclosure as he has not disclosed the parties in Succession Cause No 195 of 2008 nor the link between the suit property and the subdivision of No 336 as indicated in entry No 2 on the search. It is trite law that where a party is heard ex parte, they must make full and frank disclosure of material facts and demonstrate good faith.
11. The need to make full disclosure of material facts was discussed by the Court of Appeal in the case of *Bahadurali Ebrahim Shamji vs Al Noor Jamal & 2 Others Civil Appeal No 210 of 1997* as follows;

It is perfectly well settled that a person who makes an ex parte application to court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, when an Applicant comes to the court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not, misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement. In considering whether or not there has been relevant non disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to



the issues in these appeals appear to include, (i) the duty of the applicant is to make full and fair disclosure of the material facts (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materially is to be decided by the court and not the assertions of the applicant or his legal advisors (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) the extent of the inquiries which will be held to be proper, and therefore necessary must depend on all the circumstances of the case.'

12. While the applicant chose to only sue the land registrar for his role in registering the restriction, he has not sued any other person who availed information to the land registrar concerning the subdivision of No 336 and the matters in Machakos HCC Succession Cause No 195 of 2008. It appears therefore that the restriction has a bearing or emanated from the said succession cause. But this court knows nothing about subdivision of No 336 or matters in Machakos HCC Succession Cause No 195 of 2008. Therefore, the applicant was duty bound to make full and frank disclosure of all the matters surrounding the restriction and not just file suit against a land registrar who comes at the tail end of everything in his role as the registrar of dealings/instruments on registered land.
13. By reason of the above, it is my finding that the applicant has deliberately failed to make full and frank disclosure of material facts in respect of the restriction placed on his title. This court cannot issue orders blindly without interrogating all the facts in issue and therefore, as the applicant has denied the court the relevant facts to enable the court to make decisions based on all the material facts, he cannot benefit from his mischief of non disclosure of material facts.
14. Ultimately, I find and hold that the application dated March 30, 2022, lacks merit and the same is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

No appearance for the Applicant

No appearance for the Respondent

Josephine – Court Assistant

