



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC MISC. APPL. NO. 16 OF 2016

**THE REGISTERED TRUSTEES OF THE NATIONAL COUNCIL OF
CHURCHES OF KENYA.....APPLICANT**

-VERSUS-

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE LAND REGISTRAR, NYERI.....2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

RULING

1. The Plaintiff/Applicant herein filed their Notice of Motion amended on the 10th September 2019 where they sought that the Court orders the Defendant/Respondents to remove and/or lift the restrictions lodged against L.R Nyeri Municipality Block 1/1280 and for costs of the Application.

2. The said Application, which was brought under the provisions of Section 138(1) of the Registered Land Act (repealed), Section 78(2) of the Land Registration Act, 2012 and Section 3A and 63(e) of the Civil Procedure Act, was premised on the grounds on its face as well as the sworn supplementary affidavit of Reverend Canon Peter Karanja, the Applicant's Secretary, sworn on the 10th September 2019.

3. On the 21st November 2019, by consent parties agreed to have the Application disposed of by way of written submissions and thereafter highlight on the same.

4. On the 11th March 2020 when the matter came up for highlighting, there was no appearance for the 1st and 2nd Respondents. The Court was informed that despite all documents having been served upon the office of the Hon. Attorney General representing the 1st and 2nd Respondents, there had been no response received from them.

5. The matter proceeded for highlighting, the absence of the office of the Hon Attorney General notwithstanding, where the Applicant submitted that their amended Notice of Motion of the 10th September, 2019 had sought for an order directing the Respondents to remove and/or lift the restriction placed on the land Ref. No. Nyeri/Municipality block 1/280.

6. The Applicant framed their issues for determination as follows:

- i. Whether the Respondents complied with the law in registering/placing the restriction against land reference No. Nyeri/Municipality Block1/1280
- ii. Whether there was a valid restriction by the 1st and 2nd Respondents against land reference No. Nyeri/Municipality Block1/1280
- iii. Whether the Respondents had violated the Applicant's right to property under Article 40 of the Constitution.
- iv. Whether the action by the Respondent in filing Ethics and Anti-Corruption Commission vs Kaitui enterprises Company Limited & 3 Others (ELC Case No. 29 of 2019) provided a basis which could be relied upon to resist the instant Application.

7. To answer the said issues for determination, the Applicant submitted that their Application was duly supported by the relevant affidavit whereby they wished to highlight on two issues namely;

(i) **Due process;**

8. That due process was not followed when placing the restriction, which was placed pursuant to the provisions of Section 136 of the Registration of Land Act (repealed) which provision subsists under the Land Registration Act.

9. That Section 76 and 77 of the said Act provided for the procedure to be followed before a restriction could be placed. That there had to be an inquiry and notice served on the proprietor of the suit land wherein upon after hearing both parties, the Registrar could then place the restriction.

10. That the Applicant had received no such notice and neither had they been invited for a hearing by the Registrar prior to placing the restriction.

11. Counsel for the Applicant further submitted that despite the fact that the Registrar had been duly served, they had not received any evidence from the Registrar alluding to the fact that the due process had been followed.

12. They relied on the provisions of Article 10, 47 and Section 4(3) of the Fair Administration Act which provision provided for the rule of law that there ought to be an opportunity for persons to be heard if they were likely to be affected by a decision. Their submission was that this procedure was not followed by the Respondents. They relied on the decided case in **Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR** to buttress their submission.

13. That they had written severally to the Registrar requesting to be explained to the reasons why there had been a restriction placed on their suit land and to get the restriction lifted, in vain. That the action by the 2nd Respondent of unilaterally placing the restriction on the suit subject was in illegal and against the established principles of natural justice and therefore such a decision would not stand in law and was incapable of being appealed/challenged as per the provisions of Section 150 of the Registered Land Act (repealed) because the Appeal process provided for under Section 150 of the Registered Land Act (repealed) had not been incorporated into the Land Registration Act. In so submitting, they relied on the decided case in **Republic vs. Chairman Suneka Land Disputes Tribunal & 2 Others Ex-parte Ombeta Ombeta & Another [2013] eKLR**.

14. The Applicant further submitted that under the provision of Section 78(2) of the Land Registration Act, the Court had powers to adjudicate on this issue and direct the removal of the restriction placed on the suit land.

15. That in placing the restriction on the suit property, there had been the issue of the infringement of Applicant's rights to property as provided for under Article 40 of the Constitution which issue could only be determined by a Court of competent jurisdiction and not by the 1st and 2nd Respondents.

16. That although the 3rd Respondent had submitted that in order to protect public interest and for perpetual protection of the said public land, the restriction ought to remain in place pending the hearing and determination of the civil suit No. 29 of 2019 which they had filed for the recovery of the suit land, yet the greatest public interest lay in the rule of the law as per the provisions of Article 10 of the Constitution which were in their favour.

17. The Applicants relied on a myriad of decided cases including but not limited to;

- i. **Multiple Hauliers East Africa Limited vs. Attorney General & 9 Others [2015] eKLR.**
- ii. **Daniel Piranto Ole Nehani vs Deputy County Commissioner Kajiado Hon Wambugu & 4 Others [2018] eKLR**
- iii. **Matayo vs Standard Chartered Bank(K) Limited & Others [2003] 1EA 140**

18. The next issue they sought to highlight was that (ii) the Ethics and Anti-Corruption Commission (EACC) had subsequently filed a case being No. 29 of 2019 Ethics and Anti-Corruption Commission -vs- Kaituyi Enterprises Limited where the Applicants had been enjoined.

19. That although the Ethics and Anti-Corruption Commission herein referred to as EACC was within its mandate to file suit for recovery of the subject suit herein, yet with regard to the restriction placed on the property, the said suit could not sanitize the process. That the procedure for recovery of suspect property by EACC was provided for under Section 56(1) and 56(4) of the Anti-Corruption and Economic Crimes Act (ACECA) which procedure was not followed.

20. It was therefore their submission that the EACC could not circumvent mandatory provisions of the law by hiding behind the case they had filed. The Applicants relied on the cases of;

i. Samuel Cheruiyot Arap Langat vs Republic [1982] eKLR

ii. R vs Anti-Counterfeit Agency Ex-parte Caroline Mangala T/A now Hair Works Salon [2019] eKLR in support of their filed submissions.

21. In response and in opposition to the Applicant's Application, the 3rd Respondent filed their issues for determination as follow;

- i. Whether the procedure was followed in placing the restriction.
- ii. Whether it is in public interest to remove the restriction.
- iii. The implication of the removal of restriction in view of the outcome of the investigation.

22. Counsel for the 3rd Respondent sought that the Court considers their filed written submissions in response in light with their highlight to wit that there was no wrong doing on the part of the 3rd Respondent in requesting that the restrictions be placed against any dealing in the suit property.

23. That under the provisions of Section 136 of Registration of land Act (repealed) the EACC could place restrictions so as to preserve the property whilst it carried out its investigations.

24. That the duty to place the restrictions was on the Land Registrar and therefore the 3rd Respondent was not in a position to comment on whether or not the Land Registrar performed his duty under the Section of the law.

25. That under Section 156 of the Registration of Land Act, the law provided for a procedure of challenging the decision of the Land Registrar by an aggrieved party which procedure was not followed by the Applicant before they moved the Court.

26. Further that Section 107 of the Land Registration Act was still applicable and Section 86 of the same Act also provided the procedure for challenging the Land Registrars Actions.

27. That the Applicant had not exhausted the procedure provided for by the law in challenging the decision of the Land Registrar. That further, the filing of the restriction was a means to an end subject to the outcome of the investigations the EACC was to undertake.

28. That investigations had since been completed wherein it had been determined that the suit property was public land which had been illegally alienated in favour of the Applicants. That it would therefore not be in public interest to remove the restriction. The title that the Applicant held was unlawful ab initio and that in accordance to the provisions of Article 46 of the Constitution, the Applicant could not be allowed to enjoy property rights over the same. In support of their submission, they relied on the decided cases in;

i. Kenya Guards Allied workers Union vs Security Guards Services & 38 Others Misc 1159 of 2003.

ii. Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR

iii. Republic vs Minister for Transport and Communication & 5 Others Ex-parte Waa Ship Garbage Collector & 15 Others Mombasa [2006]1KLR (E& L) 563

29. That they had now moved to Court and filed suit for recovery for the suit property which suit was pending before the Environment and Land Court herein. That even if there had been procedural breaches, it would not be in the public interest to lift the restrictions as it would interfere with the substratum of the suit. Reliance was placed on the decided case in **Sonia Kwamboka Rasugu vs Sandalwood Hotel and Resort Limited & Others [2013] eKLR**

Determination.

30. I remind myself that despite service having been effected upon the office of the Hon. Attorney General for the 1st and 2nd Respondents, there had been no response received therein to the Application.

31. The Applicants herein seek for an order of removal and/or lifting of the restrictions lodged against Nyeri Municipality Block 1/1280 placed therein on the 8th February 2012 by the 1st and 2nd Respondents, for reason that they were the registered owners of the suit land having purchased the same and thereafter having been issued with a title to the same.

32. The Applicant further states that the said restrictions, which had been instigated by the 3rd Respondents, were illegal and unlawful as there had been no prior Notice, and as such, they had been denied an opportunity to be heard. That despite requests to have the restrictions removed, the 1st and 2nd Respondents had failed, neglected and/or refused to respond to their request.

33. The 3rd Respondent submitted that the Restriction had been placed in the suit land at their request to prevent any form of fraud and/or improper dealing with the suit land pending investigations and this had been pursuant to the provisions of Section 136 of the Registered Land Act (now repealed). That the Applicant had been made aware of the restriction wherein they had written to the 3rd Respondent inquiring into the status of the investigations.

34. I have considered the instant Misc. Application herein. The provisions of Section 76 of the Land Registration Act, 2012 provides as follows:

“(1) 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, 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 or the 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”.

35. From a reading of the above, it is clear that the Register of Lands has power to register a restriction on land in three instances;

i. for the prevention of fraud;

ii. or to curb improper dealings on land;

iii. or for any sufficient cause.

36. The law is also clear that the Registrar may be moved suo moto or on Application of any persons interested in the land. In an instance where (s)he receives an Application then (s)he is duty bound to direct inquiries to be made, notices to be served and hear such persons as he considers fit, thereafter to make an order prohibiting or restricting dealings with any land. The restriction may be for a particular period, until the occurrence of a particular event or until a further order is made. The Registrar shall give notice in writing of a restriction to the proprietor effected by the restriction.

37. In the present case and upon perusal of the green card to the suit land, it is clear that the Restriction was placed on the suit land pursuant to an Application to the Registrar by the 3rd Respondent, pending investigation.

38. In the decided case in David Macharia Kinyur Vs District Land Registrar, Naivasha & Another, Nakuru ELC Misc. Appl.No.331 of 2016, the Court held that:-

“.....the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance as the underlying issue leading to the restriction is being resolved; since restriction by itself does not solve a dispute....”

39. It is therefore clear that restrictions are placed on a parcel of land for purposes of prevention of *fraud* or *improper dealing* wherein the Registrar may either on his own or by an Application brought by any person interested in the land make an order of restriction.

40. In the case of **Matoya Vs Standard Chartered Bank (K) LTD & others (2003) I EA 140** the Court held that;

“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an Application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented”.

41. It has not been denied that indeed after the restriction had been placed, there were investigations conducted by the Kenya Anti-Corruption Commission who found that the suit land was public land wherein after they filed a suit being ELC No. 25 of 2019 seeking to recover the same.

42. The circumstances of this case is that the suit land is registered in the name of the Applicant, however the 3rd Respondent has laid a claim that the same was procured irregularly, illegally and fraudulently. Whether or not they will prove their case is not for determination at this stage. However of importance at this stage is the protection of the suit land by letting the restriction remain in place pending the hearing and determination of ELC No. 25 of 2019.

43. In the case of *Films Rover International Limited v Cannon Film Sales Limited (1986) 3 ALL ER 772* at page 780 the court held that

‘a Court should take whichever course appears to carry a lower risk of injustice should it turn out to have been ‘wrong’.

44. Indeed although there has been no evidence placed before the Court that upon an application by the 3rd Respondent to the Land Registrar to place a restriction on the suit land, there had been notices served upon the Applicant herein who held title to the suit land and further that there had been no hearing of such persons as the Registrar considered fit, yet given the facts and circumstances of the matter in issue and more so the outcome of the 3rd Respondents’ investigation that the suit land was public land which had been unlawfully registered to the Applicant, **I find that there is no reason why the said restriction should be removed and/or lifted so as to curb improper dealings on the same.**

45. The upshot of the foregoing is that the Applicants have not made up a case for being granted the orders so sought, the *Notice of Motion amended on the 10th September 2019* is herein dismissed with costs to the 3rd Respondent.

Dated and delivered at Nyeri this 15th day of May 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE



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