



**Motiga & another (Suing as Administrators of the estate of Moses Harry Motiga) v
Gitangu & 6 others (Sued as Administrators of the estate of Elizabeth Wanjiru Gitangu)
(Environment & Land Case E071 of 2020) [2022] KEELC 2391 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E071 OF 2020**

**BM EBOSO, J
MAY 26, 2022**

BETWEEN

**JAYNE MUGECHI MOTIGA 1ST PLAINTIFF
MARY MOTIGA WANJIKU BESZELZEN 2ND PLAINTIFF
SUING AS ADMINISTRATORS OF THE ESTATE OF MOSES HARRY MOTIGA**

AND

**MARGARET GATHONI GITANGU 1ST DEFENDANT
MARGARET GATHONI GITANGU 2ND DEFENDANT
PATRICK KINYANJUI NJOGU 3RD DEFENDANT
ANTHONY MWANGI GITANGU 4TH DEFENDANT
KENYA COMMERCIAL BANK 5TH DEFENDANT
DISTRICT LAND REGISTRAR 6TH DEFENDANT
ATTORNEY GENERAL 7TH DEFENDANT
SUED AS ADMINISTRATORS OF THE ESTATE OF ELIZABETH WANJIRU
GITANGU**

RULING

1. The land subject matter of this suit is what was previously registered as land parcel number Ngenda/Githunguchu/T.25. The land was registered in the name of the late Moses Motiga [hereinafter referred to as “the deceased”]. Prior to closure of the land parcel register, three charges were registered in the encumbrances section of the parcel register between 1969 and 1971. The last of the charges was registered on 31/3/1971 in favour of KCB Limited to secure a sum of Kshs 50,000.



2. It is contended by the plaintiffs that the deceased died on 2/9/1998 aged 70 years. It does emerge from the evidential materials presented to the court that parallel succession proceedings were initiated in respect of the estate of the deceased. One of the succession causes is Nairobi High Court Succession Cause Number 2245 of 1998 in which the plaintiffs were appointed as administrators of the deceased's estate and the assets of the deceased were distributed to the 1st plaintiff and to one Rose Njeri Motiga. The other succession cause is Thika CMC Succession Cause No 580 of 2010, initiated by one Elizabeth Wanjiru Gitangu, in which the said petitioner contended that the deceased died on 25/6/1995, aged 50 years.
3. On 21/5/2012, the land was registered in the name of Elizabeth Wanjiru Gitangu as administrator of the estate of the deceased, pursuant to succession orders made in Thika CMC Succession Cause No 580 of 2010. On the same day, the land was transferred into the name of Elizabeth Wanjiru Gitangu as absolute proprietor. On 2/7/2012, a title deed was issued to Elizabeth Wanjiru Gitangu. On 17/7/2017, the land was registered in the name of Margaret Gathoni Gitangu pursuant to succession orders issued in Gatundu PMC Succession Cause No 84 of 2016 [the succession cause is expressed as relating to the estate of the late Elizabeth Wanjiru Gitangu].
4. On 12/1/2018, the parcel register was closed and two new registers were created following subdivision of the land. The two new parcel registers are Ngenda/ Githunguchu/ T.574 and Ngenda/ Githunguchu/ T.575 respectively. The two subdivisions were registered in the names of Patrick Kinyanjui Njogu [3rd defendant] and Anthony Mwangi Gitangu [4th defendant] respectively. The encumbrances section of the parcel register relating to Ngenda/Githunguri/T.25 shows that the charge to KCB Ltd was discharged on 21/5/2012, the same day that the land was registered in the name of Elizabeth Wanjiru Gitangu as administrator pursuant to succession orders issued in Thika CMC Succession Cause No 580 of 2010 and subsequently as absolute proprietor of the land.
5. The entries made in the parcel register from 21/5/2012 are at the centre of the dispute in this suit. The plaintiffs contend that the entries are fraudulent. The case of the plaintiffs is that they are the genuine administrators of the estate of the late Moses Motiga and that they have neither retrieved the title to the suit property from Kenya Commercial Bank Ltd nor procured a discharge. They contend that the transfer to Elizabeth Wanjiru Gitangu was procured fraudulently, through collusion, and by a person who had no authority to deal with the suit property.
6. As against Kenya Commercial Bank Ltd [5th defendant], they contend that they failed to establish methods of prudent customer identification, record keeping and identification of suspicious activities contrary to their mandate as set out in the *Banking Act* and Central Bank of Kenya Prudential Guidelines. They further contend that the 5th defendant failed to establish or maintain adequate internal control measures which could have assisted in the prevention and detection of suspicious activities relating to the deceased's account. They fault the 5th defendant for allowing the 1st defendant to process the discharge of charge.
7. As against the 5th defendant, they seek the following reliefs:
 - “f. Permanent injunction to restrain the 1st, 2nd, 3rd, 4th and 5th defendants, whether by themselves, tier agents and their servants from trespassing and or interfering with ownership, use and possession by the plaintiff or encroaching and trespassing on the suit properties;
 - g. An order that the 4th and 5th defendants at their own cost remove any structures now on the suit land;



- h. Eviction orders to expel the defendants whether by themselves, their agents and their servants occupying the suit premises including demolition of all structures erected upon the land;
 - i. Exemplary damages of Kenya shillings three million (Kshs 10,000,000/=).”
8. Aggrieved by the plaintiffs’ decision to join it as a defendants in this suit, the 5th defendant [Kenya Commercial Bank Limited] brought a notice of motion dated 22/11/2021 seeking to be removed from the suit. Their case is that their interest in the suit property was merely that of a financier in whose favour a charge was registered as security for moneys borrowed, the collateral being the title to the suit property. They contend that their interest was extinguished upon discharge of the charge in 2012, hence they are not a necessary party in this suit.
 9. The plaintiffs opposed the application through a replying affidavit sworn on 19/1/2022 by the 2nd plaintiff, Mary Motiga Wanjiku Beszelzen. She deposed that at all material times the original title to the suit property was with the 5th defendant in its capacity as the chargee and that the questions relating to the circumstances under which the title was released and discharged can only be answered by the 5th defendant. They contend that they have a legitimate cause of action against the 5th defendant founded on fraud and collusion with the 1st defendant. They urge the court to dismiss the application.
 10. The application was canvassed through written submissions dated 3/2/2022, filed by the firm of Njoroge-Kugwa & Co Advocates. The plaintiffs opposed the application through written submissions dated 22/2/2022, filed by the firm of Kilomenn Advocates. I have considered the rival submissions. The single issue falling for determination in the application is whether Kenya Commercial Bank Ltd is an unnecessary party in this suit.
 11. The principle which guides our trial civil courts when disposing questions relating to joinder and non-joinder of parties to civil suits is contained in Order 1 rule 10(2) of the *Civil Procedure Rules* which provides as follows:

“ 10(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
 12. The plaintiffs have made serious allegations of fraud and collusion against the 5th defendant. The plaintiffs have specifically faulted release of the original title to Elizabeth Wanjiru Gitangu. They have similarly faulted the processing of the discharge of charge by the 5th defendant together with Elizabeth Wanjiru Gitangu. The 5th defendant looks at the claim from a different perspective. Their position is that they discharged the title and they have no other interest in the suit property.
 13. My understanding of the plaintiff’s claim against the 5th defendant is that they allege that the 5th defendant was privy to the fraud and collusion which culminated in the impugned entries. Whether or not there was fraud or collusion on part of the 5th defendant is a question to be answered after trial.
 14. The view I make out of the pleadings, the interlocutory evidence, and the parties’ submissions, is that the 5th defendant is a necessary party in enabling the court to effectually and completely adjudicate upon and settle questions relating to the release of the original title and the discharge of the charge which subsisted in their favour. In the absence of the 5th defendant, the court may not be able to



effectually and completely adjudicate upon and settle those specific questions. I will for this reason decline to grant the plea sought in the Notice of Motion dated 22/11/2021.

15. Before I pronounce my final order, I have observed that the plaintiffs are, in essence, challenging the validity of succession orders made by a succession court within the framework of the *Law of Succession Act* in Thika CMC Succession Cause Number 580 of 2010. It is not clear if an appropriate application has been made in the said succession cause to set aside the impugned succession orders. Without making any conclusive or definitive pronouncement on the issue, I would observe that parties to this suit may wish to reflect on the jurisdiction of the Environment and Land Court to grant orders that, in essence, review succession orders made by a succession court within the framework of the *Law of Succession Act*.
16. Finally, my ultimate order is that the Notice of Motion dated 22/11/2021 is rejected. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 26TH DAY OF MAY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Opiyo for the plaintiff

Mr Kahiga for the 2nd and 4th Defendant

Mr Mwangi for the 3rd Defendant

Ms Waigwa for the 5th Defendant

Court Assistant: Ms Lucy Muthoni

