



Real Capital Limited v Githina & 4 others (Environment & Land Case E095 of 2021) [2023] KEELC 20720 (KLR) (11 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20720 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E095 OF 2021**

BM EBOSO, J

OCTOBER 11, 2023

BETWEEN

REAL CAPITAL LIMITED PLAINTIFF

AND

EVALYNE WANJIRU GITHINA 1ST DEFENDANT

**SABINA N GITHINA (ADMINISTRATOR OF THE ESTATE OF CHARLES
GITHINA MWANGI) 2ND DEFENDANT**

GATHIMI PROPERTIES LIMITED 3RD DEFENDANT

LAND REGISTRAR – RUIRU LAND REGISTRY 4TH DEFENDANT

THE ATTORNEY GENERAL 5TH DEFENDANT

RULING

Introduction

1. Two applications fall for determination in this ruling. The first application is the plaintiff's notice of motion dated 31/1/2023, seeking an order extending the interlocutory preservative order that was issued by this court on 4/2/2022. The second application is the notice of motion by the 1st, 2nd and 3rd defendants dated 15/2/2023, through which they seek leave of the court to amend their pleadings to introduce a counter-claim. Before I dispose the issues that fall for determination in the two applications, I will briefly outline the gist of the dispute in the suit.

Plaintiff's Case

2. Through a plaint dated 3/9/2021, the plaintiff sought the following reliefs against the defendant: (i) a declaration that it is the legitimate proprietor of land parcel number Ruiru/Ruiru East Block 7/84 [the suit property]; (ii) an order cancelling entry numbers 7, 8, 9, 10, 11, 12, 13, 14 and 15 in the parcel



- register relating to the suit property; (iii) an order revoking the title issued to the 2nd defendant; (iv) a permanent injunction restraining the defendants in relation to the suit property; (v) an eviction order against the 1st defendant; (vi) general damages, among other reliefs.
3. The case of the plaintiff was that it was at all material times the legitimate registered proprietor of the suit property, having purchased it from the previous proprietor, Titus Alai, at Kshs 1,000,000 in the year 2000, and that the previous proprietor transferred the suit property to it on 19/10/2001. When it conducted a search on the suit property in the year 2007, with the intention of selling the property, it discovered that the relevant parcel register was reflecting one Charles Githina Mwangi [the deceased husband of the 2nd defendant and father of the 1st defendant] as the leasehold proprietor of the suit property. The register reflected that Charles Githina Mwangi was registered as proprietor after one James Kinyua Theuri transferred a leasehold interest in the suit property to him on 21/3/2006 yet the suit property was an absolute (freehold) title. It was the case of the plaintiff that the above registration were fraudulent.
 4. The plaintiff contended that upon discovering the alleged fraud, it lodged a complaint with the Land Registrar and at the same time reported the matter to the Directorate of Criminal Investigations [the DCI] at Thika. Further, it filed ELC Case No. 335 of 2008 against: (i) Charles Githina Mwangi; (ii) the Commissioner of Lands; and (iii) the Land Registrar, challenging Charles Githina Mwangi's title. The plaintiff added that investigations by the DCI established that registration of the suit property in the name of James Kinyua Theuri and subsequently in the name of Charles Githina Mwangi were procured fraudulently, adding that the 2nd page of the parcel register was fraudulently removed and replaced with a new page containing entry numbers 8 to 15 which introduced James Kinyua Theuri and Charles Githina Mwangi as successive proprietors. The plaintiff contended that investigations by the DCI further revealed that the plaintiff was the legitimate proprietor of the suit property.
 5. It was the case of the plaintiff that upon establishing that there was fraud, the Land Registrar published a notice in the Kenya Gazette and thereafter rectified the land register. The plaintiff added that the parcel register having been rectified, the plaintiff and Charles Githina Mwangi recorded a consent Thika ELC Case No. 335 of 2008 as withdrawn. The plaintiff thereafter enjoyed quiet possession until Charles Githina Mwangi died in 2015. However, upon the death of Charles Githina Mwangi, the 1st defendant trespassed onto the suit property. This prompted the plaintiff to file ELC Case No. 730 of 2017; *Real Capital v Evalyne Wanjiru Githina*, seeking an eviction order. On their part, the 1st and 2nd defendants filed ELC Petition Number 8 of 2017, challenging the procedure through which the parcel register was rectified to cancel the fraudulent entries, among other reliefs. The petition was heard and in a judgment rendered on 17/6/2021, Gacheru J found that the cancellation of the impugned entries in the parcel register was done unprocedurally and contravened the 2nd defendant's right to fair administrative action. Consequently, the impugned entries were reinstated. The plaintiff contended that the issue as to who was the legitimate proprietor of the suit property was not determined and remained undetermined.
 6. The plaintiff further contended that through due diligence, it established that the 2nd defendant initiated Succession Cause No. 2248 of 2015 and fraudulently caused the 3rd defendant to be designated in the Certificate of Confirmation of Grant as the beneficiary of the suit property. It further established that the 1st and 2nd defendants were directors of the 3rd defendant. The plaintiff contended that it was apprehensive that the defendants would dispose the suit property which it claimed to legitimately belonged to it.



Case of the 1st, 2nd, and 3rd Defendants

7. The 1st, 2nd and 3rd defendant filed a defence dated 4/10/2021 in which they denied the plaintiff's claim and contended that the 1st defendant was a daughter of the late Charles Githina Mwangi while the 2nd defendant was the widow of Charles Githina Mwangi (the deceased). They added that the 2nd defendant was a director of the 3rd defendant. It was their case that the late Charles Githina Mwangi [the deceased] was registered as proprietor of the suit property on 21/3/2006. In 2013, the Land Registrar rectified the land register relating to the suit property and cancelled the deceased's title without the knowledge of the deceased. In 2015, the deceased died. On 16/11/2016, the 1st to 3rd defendants discovered that the suit property had been granted to the plaintiff on 21/1/2013 through rectification of the land register. Consequently, the 1st and 2nd defendants filed Thika ELC Petition No. 8 of 2017. While the petition was pending, the plaintiff filed Thika ELC No 730 of 2017 against the 1st defendant, alleging that the 1st defendant had trespassed on the suit property. Subsequently, this Court [Gacheru J] rendered a Judgment in Petition No. 8 of 2017 in which it found that the rectification done to the land register in 2013 was effected unprocedurally and directed restoration of the entries. They added that this court issued a permanent injunction restraining any party from interfering with their ownership and possession of the suit property.
8. The 1st to 3rd defendants contended that the Judgment rendered by Gacheru J in ELC Petition No. 8 of 2017 rendered this suit res judicata and that this suit should be struck out. Secondly they contended that the exparte order issued by Cherono J on 3/9/2021 should be vacated because it was obtained through non-disclosure of material facts. They added that the Land Registrar had declined to enforce the judgment rendered in ELC Petition No 8 of 2017 due to the exparte order issued by Cherono J.
9. On 4/2/2022 this court rendered a ruling disposing the applications dated 3/9/2021 and 1/10/2021. Through the ruling, the court preserved the suit property in the following verbatim terms:
 1. The application by the 1st, 2nd and 3rd defendants is rejected for lack of merit.
 2. An interlocutory preservative order is hereby issued restraining all the parties in this suit together with the Land Registrar against disposing, alienating, transferring, charging or leasing the suit property, Ruiru/Ruiru East Block 7/84 pending the hearing and determination of this suit.
 3. All parties appearing in the land register post – 2001 shall be made defendants or interested parties in this suit.
 4. Costs of the two applications shall be in the cause.

Application dated 31/1/2023

10. Against the above background, the plaintiff brought the application dated 31/1/2023, seeking an order extending the preservative order issued on 4/2/2022. The application was supported by the affidavit of Stephen Gitau Kiarie sworn on even date. The case of the plaintiff was that on 4/2/2022, the court issued injunctive orders under Order 40 of the *Civil Procedure Rules* restraining all the parties in this suit from disposing, alienating, transferring, charging or leasing land parcel number Ruiru/Ruiru East Block 7/84 pending the hearing and determination of the suit. The plaintiff contended that Order 40 rule 6 of the *Civil Procedure Rules* provides that where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, then the injunction lapses unless, for any sufficient reason, the court orders otherwise. The plaintiff further contended that the interlocutory order in the suit was set to lapse on 4/2/2023 by



operation of the law, hence the need to extend the said order. The plaintiff added that there had been no inordinate delay in prosecuting the suit.

11. I have considered the application, the response to the application and the parties' submissions. I have also read the court record.
12. Upon rendering its ruling on 4/2/2022, this court listed this suit for pre-trial before the Deputy Registrar on 8/3/2022. The Deputy Registrar in turn listed the matter for substantive hearing on 5/10/2022. On 20/9/2022, thirteen days to the scheduled hearing date, the 1st, 2nd and 3rd defendants brought an application dated 9/9/2022 seeking leave of the court to amend their statement of defence. The court directed the 1st, 2nd and 3rd defendants to serve the application and attend court on 5/10/2022 for directions on the application. On 5/10/2022, Mr Kenneth Wilson, attended court on behalf of the 1st, 2nd and 3rd defendants and applied for an adjournment on the ground that his clients wanted to first dispose the application. Counsel submitted thus:

“The 1st, 2nd and 3rd defendants filed a notice of motion seeking leave to amend pleadings and introduce a counterclaim. The amendments include joinder of KENHA. We plead that the application be disposed first”.

13. The court gave directions on the application dated 9/9/2022, requiring parties to file and exchange responses and written submissions. The court listed the application for hearing on 16/11/2022. The court ultimately heard and disposed the application through a ruling rendered on 23/1/2023. The court struck out the application for being fatally defective. On the same day, the court set the suit down for hearing on 3/7/2023. On or about 15/2/2023, the three defendants brought a second application seeking leave to amend their pleadings to introduce a counterclaim. Come 3/7/2023, the hearing of the main suit could not take off because the three defendants' application seeking leave to amend their pleadings had to be disposed first.
14. From the above chronology of events, it is clear that the reason why this suit has not been disposed is that the three defendants, through their two successive applications, have occasioned adjournments. The plaintiff was not responsible for the adjournments.
15. In opposing the plaintiff's plea, the three defendants contended that the plaintiff was undeserving of the preservative order because they did not disclose to the court that the suit property was compulsorily acquired by KENHA. The court has reflected on the above argument. At this point, hearing of the suit has not commenced. The plaintiff has not led evidence. It is therefore premature to conclude that they have deliberately withheld relevant information from the court.
16. For the above reasons, this court would not have hesitated to grant the notice of motion dated 31/1/2023. However, a reading of the court's ruling rendered on 4/2/2022 reveals that the order issued in the said ruling was not an ordinary injunctive relief. It was a preservative order carefully crafted by the court to preserve the subject matter in this suit. Secondly, the court deliberately determined that the preservative order was to remain in force pending the hearing and determination of this suit. The order has not lapsed. It is still in force because the suit has not been heard and determined. The court order does not require another order extending it. The application dated 31/1/2023 was, to this extent, unnecessary. It stands to be struck out.

Application dated 15/2/2023

17. The application dated 15/2/2023 by the 1st, 2nd and 3rd defendants was supported by an affidavit sworn on 15/2/2023 by Sabina N. Githina. Their case was that they wished to amend their pleadings to introduce a counterclaim. They contended that the contemplated amendments had been necessitated by



demolitions of structures on the suit property and their recent discovery that part of the suit property had been compulsorily acquired by the Kenya National Highways Authority through the National Land Commission. They contended that it was necessary for the said institutions to be joined as co-defendants in the counterclaim.

18. I have considered the application. The law on amendment of pleadings is well-settled. The Court of Appeal outlined the relevant guiding principle in the case of *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR as follows:

“The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

19. Trial in this suit has not commenced. No proper reason has been advanced to demonstrate that the three defendants are undeserving of leave to amend their pleadings and bring a counterclaim at this stage of the proceedings. In the circumstances, I will grant them leave to amend their pleadings and ventilate their counterclaim.

Disposal Orders

20. In the end, the plaintiff's notice of motion dated 31/1/2023 and the notice of motion dated 15/2/2023 by the 1st, 2nd and 3rd defendants are disposed as follows:
- a. The plaintiff's notice of motion dated 31/1/2023 is struck out on the ground that the preservative order in relation to which an extension order was sought is still in force, hence the application was unnecessary.
 - b. The 1st, 2nd and 3rd defendants are granted leave to amend their pleadings and bring a counterclaim in terms of the draft amended defence and counterclaim. The amended defence and counterclaim shall be filed and served within 14 days.
 - c. Costs of the two applications shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 11TH DAY OF OCTOBER 2023

B M EBOSO

JUDGE

