



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO E095 OF 2021

REAL CAPITAL LIMITEDPLAINTIFF

VERSUS

EVALYNE WANJIRU GITHINA1ST DEFENDANT

SABINA N GITHINA (Administrator of the estate of CHARLES GITHINA

MWANGI.....2ND DEFENDANT

GATHIMI PROPERTIES LIMITED3RD DEFENDANT

LAND REGISTRAR – RUIRU LAND REGISTRY.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

Background

1. 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 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.

2. Together with the plaint, the plaintiff filed a notice of motion dated 3/9/2021, seeking a temporary order of injunction restraining the defendants against disposing, alienating, transferring or in any way dealing with the suit property, pending the hearing and determination of the suit. The application was supported by the affidavit of **Stephen Kiarie**, sworn on 3/9/2021. The said application is one of the two applications falling for determination in this ruling.

3. The second application falling for determination in this ruling is a notice of motion by the 1st, 2nd and 3rd defendants, dated 1/10/2021, in which the three defendants seek an order setting aside the *ex parte* order issued in this suit on 3/9/2021 by Cherono J. The said application dated 1/10/2021 was supported by an affidavit sworn on 30/9/2021 by **Sabina N. Githina** [the 2nd defendant]. The parallel applications were canvassed and contested through written submissions which I have duly read. I have also read the authorities cited by the parties' respective advocates.

Plaintiff's Case

4. The case of the plaintiff is that it is 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 the company conducted a search on the suit property in the year 2007 with the intention of selling the property, it discovered that the 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 is an absolute (freehold) title.

5. The plaintiff contends 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 **Charles Githina Mwangi**; the Commissioner of Lands; and the Land Registrar, challenging Charles Githina Mwangi's title. The plaintiff adds 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, in that the 2nd page of the parcel register was 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 contends that investigations by the DCI further revealed that the plaintiff was the legitimate proprietor of the suit property.

6. It is 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 register. It is the case of the plaintiff that the parcel register having been rectified, the plaintiff and Charles Githina Mwangi recorded a consent marking **ELC No. 335 of 2008** as withdrawn. The plaintiff thereafter enjoyed quiet possession until Charles Githina Mwangi died in 2015. 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 contends that the issue as to who is the legitimate proprietor of the suit property was not determined and remains undetermined.

7. The plaintiff further contends that through due diligence, it has 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 has further established that the 1st and 2nd defendants are directors of the 3rd defendant. The plaintiff contends that it is apprehensive that the defendants will dispose the suit property which it claims to be the legitimate owner.

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

8. The 1st, 2nd and 3rd defendants opposed the plaintiff's application dated 3/9/2021 through grounds of opposition dated 30/9/2021 in which they contend that: (i) the ex parte orders of 3/9/2021 were obtained through non-disclosure of material facts and should not have been issued because in ELC Petition No. 8 of 2017, this court had granted the 2nd defendant herein a permanent injunction restraining the respondents in the petition and any other party against interfering with the 2nd defendant's ownership of the suit property; (ii) the plaintiff has embarrassed this court by causing it to issue conflicting orders; (iii) the application is *res judicata* because the court had determined the dispute in Petition No. 8 of 2017; (iv) the application offends Articles 162, 163 and 165 of the Constitution; (v) the application does not satisfy the criteria for grant of a permanent injunction (*sic*); and (vi) the application is unmeritorious.

9. Besides responding to the plaintiff's application, the 1st, 2nd and 3rd defendants filed a notice of motion dated 1/10/2021 seeking: (i) an order setting aside the ex parte order of 3/9/2021; and (ii) an order striking out this suit. The application was supported by an affidavit sworn on 30/9/2021 by Sabina N. Githina [the 2nd defendant].

10. The case of the 1st, 2nd and 3rd defendants in the said application is that the 1st defendant is a daughter of the late Charles Githina Mwangi while the 2nd defendant is the widow of Charles Githina Mwangi (the deceased). The 2nd defendant is a director of the 3rd defendant. The late Charles Githina Mwangi 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 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 add that this court issued a permanent injunction restraining any party from interfering with their ownership and possession of the suit property.

11. The 1st to 3rd defendants contend that the judgment rendered by Gacheru J in ELC petition No. 8 of 2017 renders this suit *res judicata* and that this suit should be struck out. Secondly they contend that the ex parte order issued by Cheron J on 3/9/2021 should be vacated because it was obtained through non-disclosure of material facts. They add that the Land Registrar had declined to enforce the judgment rendered in **ELC Petition No 8 of 2017** due to the ex parte order issued by Cheron J.

Submissions

12. The plaintiff filed written submissions dated 25/10/2021 through the firm of *Mwaniki Gachoka & Company Advocates*. They identified the following as the three key issues falling for determination in the two applications: (i) *Whether this suit ought to be struck out on the basis that it is res judicata*; (ii) *Whether the ex parte orders obtained herein ought to be set aside on account of material non-disclosure*; and (iii) *Whether the plaintiff is entitled to an order of temporary injunction pending the hearing and determination of this suit*.

13. The 1st, 2nd, and 3rd defendants filed written submissions dated 18/10/2021 through the firm of *Muriu Mungai & Company Advocates LLP*. They identified the following as the three key issues falling for determination in the two applications: (i) *Whether the ex parte orders should be set aside*; (ii) *Whether the plaintiff has satisfied the legal requirements for grant of an injunction*, and (iii) *Whether the plaintiff's suit should be struck out*. I have read the two sets of rival submissions.

Analysis and Determination

14. I have considered the two applications. Because the application brought by the three defendants [dated 1/10/2021] raises the issue of *res judicata* which is a jurisdictional question, I will dispose it first. Two issues fall for determination in the said application. The first issue is whether this suit is *res judicata* by dint of the fact that Thika ELC Petition No. 8 of 2017 was heard and determined by this court. The second issue is whether the ex parte orders issued on 3/9/2021 should be vacated. I will make brief sequential pronouncements on the two

issues in the above order.

15. The judgment rendered by Gacheru J in Thika ELC Petition No. 8 of 2017 was exhibited by the rival parties. The court identified and determined the following verbatim issues in the said judgment: (i) Whether the court had jurisdiction to hear and determine all the prayers sought in the petition; (ii) Whether the petitioners were afforded a fair administrative action; and (iii) Whether the petition was merited. The court pronounced itself on the above issues and made the following findings: (i) the court did not have jurisdiction to hear and determine disputes relating to criminal investigations and violation of rights in relation to criminal investigations but it had jurisdiction to hear and determine the other prayers in the petition; (ii) the 1st petitioner [Sabina Nyambura Githina - representing the estate of Charles Githina Mwangi] was not accorded a fair administrative action in the rectification of the land register; and (iii) given that the Land Registrar violated the rights of the 1st petitioner, she was entitled to the orders sought in the petition [except those orders over which the court lacked jurisdiction to grant].

16. Consequently, the court made the following verbatim disposal orders in the petition:

“The court therefore finds and holds that the 1st petitioner is entitled to damages of Kshs. 100,000/-. Consequently the court makes the following orders:-

a. A declaration be and is hereby made that the 1st petitioner’s right to property has been violated by the 1st respondent contrary to Article 40(1) of the Constitution.

b. A declaration be and is hereby made that the 1st respondent’s actions resulting in the cancellation of entries numbers 7, 8, 9, 10, 11, 12, 13, 14 and 15 on the register in respect of Title Number Ruiru/Ruiru East Block 7/84 without notice to the 1st petitioner and without following the due process set out by law have contravened the 1st petitioner’s right to fair administrative action as enshrined under Article 47 of the Constitution of Kenya.

c. That an order be and is hereby made of mandatory injunction directed at the 1st respondent to reverse the entry effected cancelling entries numbers 7, 8, 9, 10, 11, 12, 13, 14 and 15 on the register and an order to reinstate the deceased registered owner.

d. An order of permanent injunction be and is hereby issued restraining the respondents and any other party from interfering with the 1st petitioner’s rights of ownership and possession over Title Number Ruiru/Ruiru East Block 7/84.

e. The 1st petitioner is awarded damages of Kshs. 100,000/- payable by the 1st, and 4th respondents respectively.

The interested party is at liberty to pursue the proper process for the challenging of the 1st petitioner’s title over the suit property. The petitioners did not seek for costs and since parties are bound by their pleadings, each party will bear its own costs of the petition. It is so ordered.” [emphasis mine].

17. It is clear from the above verbatim excerpt from the judgment of Gacheru J that she did not determine the dispute relating to the deceased’s title to the suit property. The court directed the plaintiff herein [the interested party in the petition] to pursue a proper process for challenging the estate’s title. That is what the plaintiff has done in this suit. I do not therefore agree with the contention by the 1st to 3rd defendants that the judgment in Petition No. 8 of 2017 renders this suit *res judicata*. It is therefore my finding that this suit is not rendered *res judicata* by the judgment in Petition No. 8 of 2017.

18. The second issue in the application dated 1/10/2022 is whether the *ex parte* order issued on 3/9/2021 [by Cheron J] should be set aside on the ground that they were obtained through non-disclosure of material facts. First, the *ex parte* order granted by Cheron J was to be in force pending the interpartes hearing of the application. The application was heard and now falls for determination in this ruling. On that ground alone, the issue is rendered redundant. Secondly, the aspect of non-disclosure alluded to by the applicants is the judgment rendered by Gacheru J in Petition No. 8 of 2017. A perusal of the notice of motion dated 3/9/2021 reveals that the plaintiff made detailed disclosure relating to Petition No. 8 of 2017 in ground numbers 20 to 24 in the notice of motion. Similarly, the plaintiff made detailed disclosure relating to Petition No. 8 of 2017 in paragraphs 20 to 23 of the supporting affidavit. Thirdly, the plaintiff exhibited the Judgment in Petition No. 8 of 2017 as **Exhibit No. SK-15**. It is therefore not true that the *ex parte* orders obtained on 3/9/2021 were obtained through non-disclosure of material facts. Consequently, my finding on the issue as to whether or not the *ex parte* order made on 3/9/2021 should be set aside is that, first the issue is redundant; and secondly, there was adequate disclosure by the plaintiff.

19. The result is that I find no merit in the 1st to 3rd defendants’ application dated 1/10/2021. The same is dismissed. Costs shall be in the cause. I now turn to the plaintiff’s application.

20. The single question falling for determination in the plaintiff’s application dated 3/9/2021 is whether the plaintiff has satisfied the criteria upon which a trial court exercises jurisdiction to grant an interlocutory injunction. The criteria was set out in ***Giella v Cassman Brown Co. Ltd [1973] E.A. 358***. First the applicant is required to demonstrate a prima facie case with a probability of success. Secondly, the applicant is required to demonstrate that if the injunctive relief is not granted, he will stand to suffer irreparable damage that may not be adequately indemnifiable through an award of damages. Thirdly, if the court is in doubt regarding the above requirements, the application is to be decided on the balance of convenience. At this interlocutory stage, the trial court does not make any conclusive or definitive pronouncements or findings on the substantive issues in the suit.

21. The dispute in this suit relates to the legality of the registration that changed the title to the suit property from the name of the plaintiff. The plaintiff contends that the said registration and all the subsequent registrations were acts of fraud. The plaintiff contends that they made a report to the Directorate of Criminal Investigations [the CID] and investigations revealed that there was fraud. The plaintiff adds that

during the lifetime of the deceased, the deceased conceded to that fact; acceded to the rectification of the land register; and they agreed to mark as settled the suit which the plaintiff had filed against the deceased, only for the estate of the deceased to initiate post-humous proceedings challenging the rectification that was done to the parcel register during the deceased's lifetime.

22. It has been demonstrated that the 2nd defendant has caused the suit property to be distributed as part of the assets of the deceased and there is real danger that it may be disposed while this suit is pending. Whether or not there was fraud as alleged by the plaintiff; and whether or not there are sufficient grounds for successfully impeaching the title held in the name of the deceased are questions to be answered during trial. What is clear is that the suit property was registered in the name of the plaintiff as from 19/10/2001. At this point, no evidence has been presented to the court to show that the plaintiff disposed the suit property through sale, gift or otherwise. The reinstated registrations bear the deceased as the current proprietor.

23. In the above circumstances, the court forms the view that this is an application to be decided based on the balance of convenience. Informed by the above circumstances, the balance of convenience would be to preserve the suit property, pending the hearing and determination of this suit. Costs of the plaintiff's application shall similarly be in the cause.

Disposal Orders

24. In light of the above findings, the plaintiff's application dated 3/9/2021 and the application by the 1st, 2nd and 3rd defendants dated 1/10/2021 are disposed in the following 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.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 4TH DAY OF FEBRUARY, 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Mbaabu for the plaintiff

Kenneth Wilson for the 1st, 2nd, and 3rd for the Defendants

Court Assistant: Lucy Muthoni