



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**PETITION NO. 8 OF 2017**

**(FORMERLY PETITION NO. 153 OF 2017)**

SABINA NYAMBURA GITHINA.....1<sup>ST</sup> PETITIONER

EVALYN WANJIRU GITHINA.....2<sup>ND</sup> PETITIONER

**VERSUS**

THE LAND REGISTRAR, THIKA LAND REGISTRY...1<sup>ST</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....3<sup>RD</sup> RESPONDENT

ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

REAL CAPITAL LTD.....INTERESTED PARTY

**JUDGMENT**

By an Amended Petition dated 29<sup>th</sup> July 2019, the Petitioners sought for the following reliefs against the Respondents;

***a) A Declaration that the Petitioners right to property has been violated by the Respondents contrary to Article 40(1) of the Constitution.***

***b) A Declaration that the Respondents 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 Petitioners and without following the due, process set out by law have contravened the Petitioners' right to fair administrative action as enshrined under Article 47 of the Constitution of Kenya.***

***c) A Declaration that the 2<sup>nd</sup> Respondent did not conduct any investigation prior to the arrest of the 2<sup>nd</sup> Petitioner***

***d) A Declaration that the 3<sup>rd</sup> Respondent's action of prosecuting the 2<sup>nd</sup> Petitioner goes against the rules of natural justice and promotion of public confidence in the integrity of the office of the 3<sup>rd</sup> Respondent.***

***e) An order of mandatory injunction directed at the 1<sup>st</sup> Respondent to reverse the entry effected cancelling the entries numbers 7,8,9,10,11,12,13,14 and 15 on the register and an order to reinstate the deceased registered owner.***

***f) An order of permanent Injunction restraining the Respondents and any other party from interfering with the Petitioners rights of ownership and possession over Title Number Ruiru/Ruiru East Block 7/84.***

***g) An order to bring to the High Court quashing the trial of Criminal Case No. 1674 of 2015; Republic Vs Evalyn Wanjiru Githina.***

***h) General damages for breach of the Petitioners rights of ownership under Article 40 of the Constitution.***

***i) General Damages for contravention of the Petitioners' right to a fair administrative action as envisaged under Article 47***

*of the Constitution.*

**j) Exemplary damages for the 1<sup>st</sup> Respondent's arbitrary action of cancelling the Petitioners registration and the charge over Title Number Ruiru/Ruiru East Block 7/84.**

The Petitioners averred that by a sale agreement dated **8<sup>th</sup> August 2005**, the deceased **Charles Githina Mwangi**, purchased the suit property from **James Kinyua Theuri** for **Kshs. 500,000/=** after conducting the requisite search for title to the property and the attendant due diligence. That the deceased paid all the requisite charges and upon completion of the sale, the vendor handed **vacant possession** of the suit property to the deceased (**Charles Githina Mwangi**), and prior to his death, the deceased was issued with a title deed on **21<sup>st</sup> March 2006**.

That in the year **2008**, the **5<sup>th</sup>** Respondent filed a suit **ELC 355 of 2008** against **Charles Githina Mwangi**, claiming to be the owner of the suit property. That in **2014**, the parties filed a consent to have the suit withdrawn and the claim against the deceased stood abandoned and the Petitioners have been enjoying peaceful and quiet possession of the suit property. That on **25<sup>th</sup> February 2015**, the **1<sup>st</sup>** Petitioner's husband passed away and Petitioners remained in peaceful possession until **May 2015**, when the **2<sup>nd</sup>** Petitioner was arrested by the **2<sup>nd</sup>** Respondent and charged with the offence of forcible detainer. That the **3<sup>rd</sup>** Respondent provided the **2<sup>nd</sup>** Petitioner with witness statement and document it would rely on the case and amongst the witnesses is the **1<sup>st</sup>** Respondent who supports the claim that the suit property is registered in the name of the **5<sup>th</sup>** Respondent. That the Petitioners made several visits to **Thika Land Registry** and the official search revealed that the **5<sup>th</sup>** Respondent was the registered owner of the suit property.

That their Advocates requested for the Green Card from the **1<sup>st</sup>** Respondent and on **16<sup>th</sup> November 2016**, they were issued with a Green Card which confirmed that a title deed had been issued to the **5<sup>th</sup>** Respondent on **21<sup>st</sup> January 2013**, and the Deceased's title had been cancelled. That there had been no evidence adduced by the **1<sup>st</sup>** to **3<sup>rd</sup>** Respondents on how it was determined that there was a forgery of title necessitating cancellation. That the subject suit property has been at all material times registered in the Deceased's name who is the husband to the **1<sup>st</sup>** Petitioner. Further that the **1<sup>st</sup>** Respondent's action is illegal and unconstitutional and the same should be reversed.

It was contended that the Legal basis are **Articles 2(1), (4), 3(1), 20(1), 21, 22, 40(1), 47 of the Constitution, Sections 79 and 80 of the Land registration Act**. That the **3<sup>rd</sup>** Respondent's acts of prosecuting the **2<sup>nd</sup>** Petitioner is against the laid down principles as provided under **Section 4 of the Office of the Director of Public Prosecutions Act of 2013**.

The Petition was opposed and the interested party filed a Replying Affidavit dated **12<sup>th</sup> August 2020**, sworn by **Stephen Gitau Kiarie** its Director who averred that **Real Capital Limited**, is an Interested Party and not the **5<sup>th</sup>** Respondent. That not a single document attests that the deceased conducted due diligence. That there is no cause of action as against the interested Party and the interest of justice dictates that the Petition be dismissed.

The Petition was canvassed by way of written submissions and the Petitioners through the **Law Firm of Muriu Mungai Company Advocates** filed theirs on **24<sup>th</sup> February 2020**, and submitted that the **1<sup>st</sup>** Respondent arbitrarily cancelled the Deceased's title and issued a title to the **5<sup>th</sup>** Respondent without any justifiable cause. That it is trite law that a **Land Registrar** cannot cancel a title without a Court Order. They relied on the case of **R...vs... Registrar of Titles, Mombasa & others Ex parte A.K Abdulgani Limited (2018) eKLR**. It was further submitted that the **1<sup>st</sup>** Respondent does not have powers to cancel title. That the **1<sup>st</sup>** Respondent has powers to rectify a register. That the **1<sup>st</sup>** Respondent's actions denied the Petitioners a fair chance to defend the title.

It was further submitted that the **2<sup>nd</sup>** and **3<sup>rd</sup>** Respondents are usurping the role of the **Environment and Land Court** by using criminal proceedings to determine disputes of ownership. It was thus submitted that the **1<sup>st</sup>** Respondent acted beyond his powers, and it is just that the said action be quashed and the issue of ownership be determined in a civil matter. Further that the Petitioners are entitled to the orders sought.

The Interested Party filed an Answer to the Amended Petition dated **12<sup>th</sup> August 2020**, through the **Law Firm of Mwhia & Mutai and Company Advocates**. That the Petitioners would only refer to it as a Respondent if there was any Amendment, which was not there. That no Orders can be sought and granted against the Interested Party and the Orders sought against it cannot be granted. That it only withdrew case **ELC No. 355 of 2008**, after the **1<sup>st</sup>** Respondent made rectification of the land registrar recognizing it as a registered owner. That the Petitioners have never been in occupation or possession and that it is only between **27<sup>th</sup> March 2015 and 4<sup>th</sup> May 2015**, that the **2<sup>nd</sup>** Respondent began fencing the suit property giving rise to the criminal case. That the Deceased was aware that it was the registered owner of the suit property hence the withdrawal. Further, that there is no cause of action against the Interested Party. That the Petition is fatally defective as it seeks to enforce Constitutional reliefs against an Interested Party and therefore ought to be dismissed.

Further, that during his lifetime, the Deceased (**Charles Githina Mwangi**) was contended that the Interested Party was the registered proprietor and the Petitioners were not privy to the happenings that led to the consent and the Deceased was bound by the said Consent. That the Petitioners have not proved their relationship with the deceased. That the Interested Party has never been invited to take directions in this Petition. That the Court would only arrive at a proper decision if parties are allowed to take viva voce evidence and the Court cannot determine the dispute without hearing the parties. That it is only upon making a determination on ownership, that the Court can make such determination. That the Constitutional provisions invoked by the Petitioners do not link to the Interested Party. That their lamentations at paragraph 42 of the Petition is silent on who has illegally and unprocedurally deprived them of the subject matter.

The Court has carefully read and considered the Petition, the Affidavits, the written submissions and provisions of law and finds that the issues for determination are;

1. Whether this Court has jurisdiction to hear and determine all the Prayers sought.

2. Whether the Petitioners were afforded a Fair Administrative Action.

3. Whether the Petition is merited.

**1. Whether the Court has jurisdiction to her and determine all prayers sought**

The Court on its own motion has called into question its jurisdiction in determining various orders sought by the Petitioners in their Petition. In particular the Petitioners have sought for the following orders

a) A Declaration that the 2<sup>nd</sup> Respondent did not conduct any investigation prior to the arrest of the 2<sup>nd</sup> Petitioner

b) A Declaration that the 3<sup>rd</sup> Respondent's actions of prosecuting the 2<sup>nd</sup> Petitioner goes against the rules of natural justice and promotion of public confidence in the integrity of the office of the 3<sup>rd</sup> Respondent.

c) An order to bring to the High Court quashing the trial of Criminal Case No. 1674 of 2015 Republic Vs Evalyn Wanjiru Guthina.

The Jurisdiction of the Environment & Land Court has its root in **Article 162(2) (b) of the Constitution**, which provides as follows:-

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to: -

a. ....

b. The environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

To give effect to **Article 162 (2) (b) of the Constitution**, Parliament enacted the **Environment and Land Court Act Section 13** of the said Act which provides as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes relating to environment and land, including disputes-

a) Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other dispute relating to environment and land.

(3) –

(4) –

(5) –

(6) –

7) – In exercising of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including –

a) Interim or permanent preservation orders including injunctions;

b) Prerogative orders;

- c) Award of damages;
- d) Compensation;
- e) Specific performance;
- f) Restitution;
- g) Declaration; or
- h) costs.

From the above, it is thus not in doubt that this Court is only vested with jurisdiction to hear and determine disputes relating to ***The environment and the use and occupation of, and title to, land.***

From the prayers listed above, it is not in doubt that in determining whether the Petitioners rights were violated, the Court will not be called upon to determine a dispute that relates to **Environment & Land use**. Therefore the Court finds and holds as per the jurisdiction bequeathed to it by **Article 162(2)b**, it does not have jurisdiction to hear and determine disputes relating to Criminal investigations and violations of rights in relation to the said criminal investigations.

Consequently, this Court finds and holds that it does not have jurisdiction to hear and determine the said prayers and it will therefore down its tools with regards to the said 3 prayers. See the case of ***Owners of Motor Vessel 'Lilian S'...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR***, where the Court held that:-

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction.”***

However, with regards to the other prayers in the Petition, the same are well within the jurisdiction of this Court and the Court will proceed to

determine the same.

## **2. Whether the 1<sup>st</sup> Petitioner was accorded Fair Administrative Action.**

It is not in doubt that the 1<sup>st</sup> Petitioner is the Administrator of the Estate of **Charles Githina Mwangi**, who was the registered owner of the suit property. Further from the green card produced in evidence, the said **Charles Githina Mwangi** was registered as the owner of the suit property on **21<sup>st</sup> March 2006**. It is also not in doubt that there was a suit that was filed by the Interested Party challenging the Deceased's ownership of the suit property and vide a consent dated **25<sup>th</sup> September 2014**, in case ELC No. **355 of 2008**, the suit was marked as withdrawn.

Further from the Green Card produced in evidence, the court notes that on **28<sup>th</sup> May 2007**, a restriction was placed against the title and it was indicated that the same was as a result of suspicion of forgery. That on **8<sup>th</sup> January 2013**, the Interested Party was then registered as the owner of the suit property.

The 1<sup>st</sup> Petitioner contends that the cancellation of the Deceased as the owner of the suit property and the subsequent registration of the Interested Party as the registered proprietor is violations of her rights as the registered owner of the suit property as she is the Administrator of the Deceased's estate. Though the Interested Party has contended that it withdrew **suit No. 355 of 2008**, upon the recognition of it as the registered owner and the cancellation of the said **Charles Githina Mwangi** as the proprietor of the suit property, the Court has seen the **Consent Order** filed in Court dated **25<sup>th</sup> September 2014**. In the said Consent, there is no indication that the suit was withdrawn pursuant to an agreement that the Interested Party would be or was registered as the owner of the suit property. The Consent only stated that the suit be withdrawn and each party to bear its own costs.

The Deceased being the registered owner of the suit property was entitled to a **Fair administrative action** and further entitled to Rules of **natural justice** before the cancellation of the title in his favour. There is no evidence produced in Court that before the registration of the Deceased was cancelled, he was given a chances to be heard. Further, there is no evidence that the Deceased was subjected to due process before his registration was cancelled or that the cancellation was done by a competent authority. There is no doubt that a Land Registrar has no power to cancel registration of a person's title and the same can only be done by a Court of law or competent tribunal. Purporting to cancel any registration therefore is acting **ultra vires**. As a party has the right under the Constitution to be afforded **fair administrative action**, that is fair, reasonable and be given prior **Notice**, the Court finds and holds that the 1<sup>st</sup> Petitioner was not afforded a fair administrative action.

In the absence of any further evidence to show that the consent was entered into subject to the deregistration of the deceased's as the proprietor of the suit property, the Court finds and holds that the Petitioners were condemned unheard which is against the cardinal rule of natural justice. See **Halbury Law of England, 5<sup>th</sup> Edition 2010 Vol.61 at para 639**, which states:-

***“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”***

Fair administrative action is described in **Article 47 of the Constitution** as follows:

***“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

**Article 47** of the **Constitution** requires just fair administrative action should be lawful reasonable and procedurally fair. This Court finds that it is clear that the 1<sup>st</sup> Petitioner was never given an opportunity to ventilate her issues and therefore her right to fair administrative action, was breached thereby making the actions by the 1<sup>st</sup> Respondent unconstitutional as the 1<sup>st</sup> Petitioner was not issued with a Notice before the title was revoked. Further in the case *In the case of Sceneries Limited v National Land Commission (2017) eKLR*, the Court held that;

***“the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. these includes, the individual being informed of the case against her/him, the individual being given an opportunity to present/her/his side of the story or challenge the case against her/him and the individual having the benefit of a public hearing before a court or other independent and impartial body.”***

Without a proper process through which the revocation would have taken place, the Court finds and holds that the said revocation contravened the cardinal rules of Natural Justice, as the proper process ought to have been followed. See the case of *Republic ... Vs... Registrar of Titles Mombasa & 4 others Ex-Parte A.K. Abdulgani Limited [2018] eKLR*, where the Court held that;

***“what was the right procedure to follow in asserting the Respondent’s and interested parties’ interest in the suit land? Surely, not by ultra vires action of revocation of grant of title, but by suitable judicial proceedings in that behalf.***

Therefore, this Court finds and holds that the 1<sup>st</sup> Petitioner was not accorded a **fair administrative action** as she is the Administrator of the Deceased’s Estate. The 1<sup>st</sup> Respondent however, had no obligation to notify the 2<sup>nd</sup> Petitioner of its actions and the Court finds and holds that since no duty was owed to her, there were no violation of her rights.

### **3. Whether the Petition is merited**

The Petitioners have sought for various declarations and orders in their Petition. The Court has already held above that the 1<sup>st</sup> Respondent acted illegally and against the rules of Natural Justice in failing to give the 1<sup>st</sup> Petitioner an opportunity to be heard and cancelling the 1<sup>st</sup> Petitioner’s title to the suit property. Therefore, it follows that its actions are unconstitutional and cannot be left to stand. See the case of *Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553* where the Court held that:

***“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialization of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.***

Given that the 1<sup>st</sup> Petitioner’s rights were violated, it therefore follows that the orders ought are merited. The Petitioners have also sought for damages for violation of their rights. The Court has already held that the 1<sup>st</sup> Petitioner’s rights were violated, and is therefore entitled to damages .

In the case of *Reuben Njuguna Gachukia & another ...Vs...Inspector General of the National Police Service & 4 others [2019] eKLR* the Court held that:-

***56. The Petitioners sought damages for the violation of constitutional rights. Article 23 (3) of the Constitution empowers this court to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. What amounts to "appropriate relief" was discussed by the South African Constitutional Court in Minister of Health & Others vs. Treatment Action Campaign & Others(2002) 5 LRC 216 at page 249 as follows:-***

*"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."*

Further In the case of *Mikidadi vs. Khaigan & Another [2004] eKLR*, the court listed the circumstances under which exemplary damages can be awarded as follows:

**"Exemplary damages are only to be awarded in limited instances namely. (a) Oppressive arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute."**

The Court therefore finds and holds that the 1<sup>st</sup> 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 1<sup>st</sup> Petitioner's right to property has been violated by the 1<sup>st</sup> Respondent contrary to Article 40 (1) of the Constitution.***
- b) A Declaration be and is hereby made that the 1<sup>st</sup> 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 1<sup>st</sup> Petitioner and without following the due process set out by law have contravened the 1<sup>st</sup> 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 1<sup>st</sup> Respondent to reverse the entry effected cancelling the 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 1<sup>st</sup> Petitioner's rights of ownership and possession over Title Number Ruiru/Ruiru East Block 7/84.***
- e) The 1<sup>st</sup> Petitioner is awarded Damages of Kshs. 100,000/= payable by the 1<sup>st</sup>, and 4<sup>th</sup> Respondents respectively.***

The Interested party is at liberty to pursue the proper process for the challenging of the 1<sup>st</sup> 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.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 17TH DAY OF JUNE 2021.**

**L. GACHERU**

**JUDGE**

**17/6/2021**

**Court Assistant - Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Kenneth Wilson for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners**

**M/s Fatma for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents**

**M/s Mboha for the Interested Party**

**L. GACHERU**

**JUDGE**

**17/6/2021**