



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.64 OF 2019(OS)

FRANCIS GITHOGE KARUGU.....1ST APPLICANT

DORAH NJOKI KARUGU 2ND APPLICANT

VERSUS

THE LAND REGISTRAR, THIKA.....RESPONDENT

JUDGMENT

By an **Originating Summons** dated 4th April 2019, the Applicants herein have sought for the following orders:-

- a. That this Honourable Court be pleased to issue an order of declaration that the Applicants are the bona fide, legal and lawful registered owners of the suit land Title **No.Ruiru East/Juja East Block 2/1933**.
- b. That this Honourable Court be pleased to issue an order compelling and/or directing the Respondent to close/or rectify the register so as to remain with only one register of title **No.Ruiru East/Juja East Block 2/1933**, which belongs to the Applicants and the other register of **Mr. Nganga Gachege** who apparently does not exist to be closed and/or destroyed.
- c. That this Honourable Court be pleased to issue an order compelling and/or directing the Respondent to cancel the register of one **Mr. Nganga Gachege**.
- d. The Applicants to be granted costs of the suit with interests at court rates thereof.

The **Originating Summons** is premised on the following grounds:-

- i. That the Applicants are the absolute proprietors and registered owners of the parcel of land namely title **No.Ruiru East/Juja East Block 2/1933**, having purchased the same from one **Jonah Muasya Mwanika** the original owner.
- ii. That on or about 23rd July 1992 the Applicants paid registration fees for Title **No.Ruiru East/Juja East Block 2/1933**, and did successful transfer of **No.Ruiru East/Juja East Block 2/1933** from the initial and/or original owner **Jonah Muasya Mwanika**, to themselves on 28th August 1992.
- iii. That a title deed was issued by the Land Registrar, Thika the Respondent herein on 17th September 1992, after the Applicants had followed the legal and lawful process to get the title deed of **Ruiru East/Juja East Block 2/1933** issued in their names.
- iv. That a Green Card to the land parcel **Ruiru East/Juja East Block 2/1933**, was also issued by the Land Registrar, Thika the Respondent herein.
- v. That on or about January 2015, whilst carrying out a search at the Thika Registry, the Applicants established that the title **No.Ruiru East/Juja East Block 2/1933**, had another Green Card and title deed issued by the Land Registrar, Thika to one **Mr. Nganga Gachege ID No.2571342**, on or about the year 1991.
- vi. That the name **Mr. Nganga Gachege** and **ID.No.2571342**, was forwarded to the Ministry of Interior and Co-ordination of National Registration Bureau Headquarters for confirmation whether their database consist of such identification number and person for purpose of initiating a suit against him.

vi. That the Ministry of Interior and Co-ordination of National Bureau through their database confirmed clearly that the identification No.2571342 did not exist meaning that there is no person like Mr. Nganga Gachege the apparent owner of the land parcel Ruiru East/Juja East Block 2/1933.

viii. That the Applicants' effort to have the Land Registrar, Thika the Respondent herein rectify the register so as to remain with only one register of title No.Ruiru East/Juja East Block 2/1933, which belongs to the Applicants and the other register of Mr. Nganga Gachege who apparently does not exist to be closed and/or destroyed has been futile.

ix. That Respondent's actions are unlawful, illegal and have continued to infringe upon the Applicants' right of possession, peaceful occupation and enjoyment of the suit land parcel Ruiru East/Juja East Block 2/1933.

The **Originating Summons** is also supported by the **Supporting Affidavit** of **Francis Githoge Karugu**, the 1st Applicant who averred that the 2nd Applicant is his wife and that both of them are the absolute and registered proprietors of **LR.No.Ruiru East/Juja East Block 2/1933**, having purchased the same from one **Jonah Muasya Mwanika**, who was the original owner. He contended that on **23rd July 1992**, they paid the registration fees for the suit property as is evident from **annexture FGK-1**. Further that a successful transfer over **LR.No.Ruiru East/Juja East Block 2/1933** was done from the original owner **Jonah Muasya Mwanika**, to the Applicants on **28th August 1992**, as per **annexture FGK-2**. Further that a title deed was issued in their favour by the Land Registrar, Thika on **17th September 1992**, after the legal and lawful processes were followed as is evident from **annexture FGK-3**. He also averred that a Green Card in respect of the suit property was issued by the Land Registrar as per **annexture FGK-4**. However in **January 2015**, whilst carrying out a search at Thika Lands Registry, they established that the suit land had another Green Card and a title deed issued also by the Land Registrar, Thika to one **Mr. Nganga Gachege** of **ID No.2571342**, on or about **July 1991** as per **annexture FGK-5**. He further averred that the name **Nganga Gachege** of **ID No.2571342**, was forwarded to the Ministry of Interior and Co-o-Ordination, Department of National Registration Bureau for confirmation and the said National Registration Bureau confirmed that **ID No.2571342**, did not exist and therefore there was no person known as **Nganga Gachege**, who is apparently holding a duplicate title deed for **LR.No.Ruiru East/Juja East Block 2/1933**, alongside the Applicants as can be discerned from **annexture FGK-6**. He deponed that their effort to have the Land Registrar Thika, rectify the register so as to remain with only one register which bears their name and the one bearing the name of **Nganga Gachege**, who does not exist closed or destroyed have borne no fruits. It was his contention that the Respondent's actions are unlawful, illegal which actions have infringed upon the Applicants' right of possession and peaceful enjoyment of the suit land. That they cannot fully utilize the land while there is another register bearing the name of **Nganga Gachege**, who apparently does not exist. He urged the Court to allow the Originating Summons for the interest of justice.

Though the Respondent was served with Summons as per the **Affidavit of Service** of **Francis N. Ongati**, dated **10th April 2019**, it failed to enter appearance nor file any response to the instant Originating Summons.

However, on **15th July 2019**, **M/S Ndundu**, for the Attorney General on behalf of Respondent appeared in court and sought for service of the said **Originating Summons** upon the office of the Attorney General.

The Court granted the said prayer and directed the Attorney General to file its response within a period of **30 days** from the date thereof together with written submissions. However, on the next mention date of **13th November 2019**, the Attorney General had not entered appearance nor filed any response to the Originating Summons herein. Therefore the **Originating Summons** is not contested.

The court has carefully considered the instant Originating Summons and the annexures thereto. The Court too has considered the written submissions and the cited authorities and makes the following rendition;

The issue for determination is whether the Applicants are deserving of the orders sought in the **Originating Summons**.

There is no doubt that **Francis Githoge Karugu** and **Dorah Njoki Karugu**, the Applicants herein are holders of title deed **No.Ruiru East/Juja East Block 2/1933**, which was issued in their favour on **17th September 1992**. This is evident from **annexture FGK-3** which is annexed to the affidavit in support of the Originating summons. Further, it is evident that the said suit property was transferred to the Applicants on **28th August 1992**, by one **Jonah Muasya Mwanika**, who was the original owner of the suit property. The said transfer bears the relevant Government Stamps and was not controverted by the Respondent.

The Court holds that **Jonah Muasya Mwanika** was the original owner based on the copy of the **Green Card FGK-4**, which was produced by the

Applicants herein. From the said Green Card, it is evident that this land parcel was first registered on **5th November 1990**. The said Green Card has not been disputed by the Respondent since it failed to appear in court.

Further there is no doubt that another Green Card over the suit property **Ruiru East/Juja East Block 2/1933**, was opened on **5th July 1991**, a few months after the initial one was opened. Then a title deed was issued in favour of **Nganga Gachege ID No.2571342/65**, on the same date **5th July 1991**. By this time the suit property was still registered in favour of **Jonah Muasya Mwanika**. The suit land was registered under **'The Registered Land Act, Cap 300 (now repealed)** and under **Section 27(a)** of the said Act, the registered owner bore all the rights appurtenant thereto. It states as follows:-

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

Further under **Section 28** of the same Act, these rights could not be defeated except by operation of law. It states:-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever”

However, it is evident that the Land Registry registered the suit land in the name of **Nganga Gachege**, while the same was still registered in favour of **Jonah Muasya Mwanika**. That was a contravention of **Section 28** of the repealed **Cap 300**.

It is further evident that the said **Jonah Muasya Mwanika**, who held a lawful title document as per the Green Card transferred the suit land to the Applicants. A formal transfer was effected and registered which is **annexture FGK-2**. Thereafter the Applicants acquired a title deed **FGK-3** under Cap 300 and they became the absolute owners and held all the rights appurtenant thereto. From the available evidence, the Applicants acquired the suit land lawfully and through an ascertained legal process.

Though there is a second Green Card in favour of one **Nganga Gachege**, whom the Applicants have alleged does not exist, it is apparent that the second registration was done while the suit land had already been alienated to another person. The said suit land was therefore not available for a second alienation. The Green Card in respect of the Applicants’ suit property was the first in time and even if there was a mistake or double allocation, the Applicants’ registration was the first in time. The following maxim of equity is relevant in the instant case. **‘If two equities are equal, the first in time prevails’**. See the case of **Gitwany Investment Ltd & 3 Others..Vs..Commissioner of Lands, HCCC No.1114 of 2002**, where the Court held that:-

“The first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail”.

It is evident that there are two Green Cards in existence herein over the suit property **Ruiru East/Juja East Block 2/1933**. The Land Registrar, Thika did not appear in court to explain the reason for such anomaly. The Applicants’ Green Card was the first to be opened and therefore the Court finds that it should prevail. **Section 143(1) of Cap 300 (repealed)** provided a panacea for a situation like the current one. This Section has been repeated in **Section 80(1) of the Land Registration Act No.3 of 2012**. **Section 143(1) of Cap 300** reads as follows:-

“Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake”.

From the above provisions of law, it is evident that the Court has power to order for rectification of a register in instances where such registration was done through fraud, omission or mistake. The Court finds that **Section 143(1) of Cap 300 (now repealed)** comes into play herein.

Having found that the Applicants averments remained uncontroverted, this Court finds that the Applicants have proved their case on the required standard of balance of probabilities.

For the above reasons, the Court enters Judgment for the Applicants against the Respondent as prayed in the instant Originating Summons and consequently, allows **prayers No.(a), (b), (c) and (d)**.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of January 2020.

L. GACHERU

JUDGE

23/01/2020

In the presence of

Mr. Oigara holding brief for Mr. Onsembe for Applicants

No appearance for Respondent

Lucy - Court Assistant.

L. GACHERU

JUDGE

