



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 784 OF 1990**

**IN THE MATTER OF THE ESTATE OF MWAURA GITACHU (DECEASED)**

**TERRY WAIRIMU WAINAINA.....APPLICANT/INTERESTED PARTY**

**VERSUS**

**TERESIA WANGUMO MWAURA.....1<sup>ST</sup> RESPONDENT**

**DR. JOSHUA GITACHU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Through the Notice of Motion dated 9<sup>th</sup> January 2017 the applicant brought the present application seeking that the court reviews and vacates, or sets aside its orders dated 4<sup>th</sup> April 2016. The application was based on the ground that the orders of the court were made without the applicant being informed and or being offered an opportunity to be heard; that the orders affect her right over land parcel No. Thika Municipality Block 20/2555 which belongs to her; and that the court's cancellation /revocation of transfer of the said parcel of land was prejudicial to her.

2. The application was supported by the affidavit of the applicant in which she stated that on or about 14<sup>th</sup> February 2013 she entered into a sale agreement with the 2<sup>nd</sup> respondent for the sale of land parcel No. Thika Municipality Block 20/2555 which belonged to him and paid a consideration of Kshs.2,400,000/=. It was her case that she did due diligence and made a search on the particular parcel of land and found out it belonged to the 2<sup>nd</sup> respondent, obtained the requisite consents and effected transfer of the said parcel of land to hers names after which she was issued with a valid title deed. She contended that it was wrong for the court to grant the *ex-parte* orders dated 4<sup>th</sup> April 2016 without affording her an opportunity to be heard; and that the orders granted were of a substantive nature hence prejudicial to her.

3. The application was opposed by the 1<sup>st</sup> respondent Teresia Wangumo Mwaure who filed her replying affidavit on 17<sup>th</sup> February 2017. She stated that she was the deceased's daughter hence a beneficiary of his estate. She disputed the applicant's alleged ownership of land parcel No. Thika Municipality Block 20/2555 which she stated belonged to the estate of the deceased. She further stated that the deceased died having left a Will which had appointed the 2<sup>nd</sup> respondent as the executor for the 1<sup>st</sup> house to hold the property allocated to the 1<sup>st</sup> house in trust for himself and for his siblings. She accused the 2<sup>nd</sup> respondent of having transferred most of the properties to himself as a sole beneficiary instead of registering them in trust for himself and his siblings, and stated that the property was transferred without the consent of the beneficiaries for the 1<sup>st</sup> house. The beneficiaries had moved to court seeking the preservation of the properties bequeathed to the 1<sup>st</sup> house. She indicated that the applicant was an intermeddler in collusion with the executor of the Will for the 1<sup>st</sup> house; and that she was not a dependent, of the deceased and therefore lacked *locus standi* to move the court in relation to the estate of the deceased.

4. The parties and some beneficiaries of the estate filed written submissions which I have considered.

5. I note that the applicant is a registered owner of land parcel No. Thika Municipality Block 20/2555 following the purchase which is acknowledged by the 1<sup>st</sup> respondent. There is the issue surrounding the validity of her title over land parcel No. Thika Municipality Block 20/2555. This, however, is not the place to discuss the merits of the claim. What is important to note is that the title is in her name and she has a right to be heard before any adverse orders are made in respect thereof. It is trite law that an order cannot issue against a party taking away his interest in an issue without according him his right to be heard. In **Mbaki & Others v. Macharia & Another (2005) 2 EA 206**, the Court of Appeal stated as follows:

**“The right to be heard is a valued right . It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”**

In view of the foregoing, I find that the applicant has a legitimate claim to be heard.

6. The consequence is that I review the orders dated 4<sup>th</sup> April 2016 issued in respect of land parcel No. Thika Municipality Block 20/2555 to allow the applicant to be heard on the same. I direct all parties to be at liberty to file and exchange any further affidavits and/or written submissions on the applicant’s claim to land parcel No. Thika Municipality Block 20/2555 within 30 days following which the matter shall be set down for hearing. Each party to bear their own costs.

**DATED and SIGNED at NAIROBI 11<sup>TH</sup> OCTOBER 2018**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI 17<sup>TH</sup> OCTOBER 2018**

**J.N. ONYIEGO**

**JUDGE**