



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.MISC.APPL.58 OF 2017

ELIZABETH WAMBUI KAMICHAR.....1ST APPLICANT/RESPONDENT

NELSON THIONG'O MUKUNA.....2ND APPLICANT/RESPONDENT

VERSUS

THIKA LAND REGISTRAR.....RESPONDENT

AND

CECILIA WAMAITHA MWANGI.....INTENDED INTERESTED PARTY/APPLICANT

RULING

The *Intended Interested Party* herein *Cecilia Wamaitha Mwangi* has brought this *Notice of Motion* application dated *23rd March 2018*, and has sought for these orders:-

- 1) *That this Honourable Court be pleased to enjoin the Intended Interested Party or in such other capacity as the Honourable Court may deem fit and the Law Firm of Kabathi & Co. Advocates be granted leave to represent her.*
- 2) *That the Honourable Court be pleased to vacate and or set aside the Orders issued on 23rd February 2018.*
- 3) *That the Honourable Court do grant any other or further orders that may favour the cause of justice.*
- 4) *That costs of this application be provided for.*

The application is premised on the grounds that:-

- a) *The Intended Interested Party is the rightful owner and in actual possession of land parcel known as Thika Municipality Block 9/430.*
- b) *The Applicants obtained the Certificate of Lease to the subject parcel of land for which she has been charged before the Thika Chief Magistrate's Court, Criminal Case No.5143 of 2017.*
- c) *The fraudulent Certificate of Lease to the subject parcel of land was obtained after the Intended Interested Party surrendered the title issued under the Registration of Titles Act after which the parcel file disappeared from the Lands Offices.*
- d) *There is need to have restriction placed on the subject parcel of land to prevent any party from dealing with the same pending the determination of the ownership thereof.*
- e) *The Applicants may dispose of the subject parcel of land thus complicating matters further by introducing an innocent purchaser for value.*

f) Neither the Intended Interested Party nor the Directorate of Criminal Investigations were parties to the current proceedings.

The Application is also supported by the **Affidavit**, of **Cecilia Wamaita Mwangi**, who averred that she has recently learnt that the 1st and 2nd Applicants moved this Court vide a **Notice of Motion** application dated **18th August 2017**, and failed to make material disclosure before obtaining the Orders issued on **23rd February 2018**. In the said Order, the **Land Registrar, Thika** was ordered to **remove the restrictions** lodged against **LR.No.Thika Municipality Block 9/430**, which land rightfully belongs to the **Intended Interested Party** and who is in actual possession. She averred that she was allocated this parcel of land by the **Commissioner of Lands** on **10th August 1998**, as is evident from **annexure CWM-1**.

It was her contention that the land then was governed under the **Registration of Titles Act (RTA)** and the suit property was referred to as **4953/1925**. However, in the **year 2015**, she surrendered the **Registration of Titles Act**, title deed as she was to be issued with a **Certificate of Lease** in conformity with the repealed **Registered Land Act (Cap 300)** and the suit property was given the current number being **Thika Municipality Block 9/430**. It was her further contention that before she could be issued with the Lease from the Lands Office, she discovered that the parcel of land was missing and so she decided to follow up with the relevant authorities.

However, she learnt that **M/S Elizabeth Wambui Kamichar**, the 1st Applicant had fraudulently obtained documents of title to the subject parcel of land and had the same registered in the joint names of herself and her son as evident from **CWM-3**. She contended that she made a complaint to the Police and upon the Police carrying out investigations, it was established that she was the owner of the subject parcel of land while the 1st Applicant was holding a **fake Certificate of Lease**. Therefore the said **Elizabeth Wambui Kamichar** was charged with a **Criminal Case no.5143 of 2017** and a **Charge Sheet** was annexed as **CWM-4**. Thereafter, the **Director of Criminal Investigation (DCI)** placed a restriction on the said parcel of land to prevent any transactions on it pending the hearing and determination of the Criminal case.

It was her contention that since she is a **Complainant in Criminal Case No.5143 of 2017**, then she is a relevant party in this proceedings. Further it was her contention that the Applicants did not come to court with clean hands. Again that the Applicant did not file an application before the Thika Land Registry to have the restriction removed before filing the current suit. It was her further contention that if the restriction is removed, then the Applicants may dispose off the subject parcel of land without her knowledge and thus deny her right to property.

The application is opposed and **Elizabeth Wambui Kamichar**, swore her **Replying Affidavit** on **18th April 2018** and averred that the application herein is **incompetent, misconceived** and an **abuse** of the court process. She averred that the **Intended Interested Party** is seeking to be enjoined in this Miscellaneous Application which is already finalized and final Orders given. That it is legally incompetent for one to seek to be enjoined in a finalized suit.

Further, that the **Intended Interested Party** cannot seek for **Stay of Execution of Orders** which were not issued against her. She also averred that the application is an abuse of the court process as only the **Land Registrar** can make a decision to put a restriction on a suit property and not any Applicant.

It was her contention that the Applicant, is at liberty to file and register a **Caution** or **Inhibition** as provided by the law and should not be encouraged to re-open an already finalized and/or concluded suits. She urged the Court to dismiss the instant application with costs.

The **Intended Interested Party** filed a **further Affidavit** and averred that any adverse orders made with respect to the suit property would affect her since she is claiming ownership of the subject parcel of land. Further that the **Director of Criminal Investigation (DCI)** had not been made a party to the current proceedings. She also contended that the court has powers to review Orders that were procured through material non-disclosure and she had a right to protect her interest in the suit property.

This application was canvassed by way of written submissions which this Court has carefully read and considered. The application is hinged under **Sections 3, 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules** and any other enabling provisions of law.

It is not in doubt that the 1st and 2nd Applicants filed this **Miscellaneous Application** and vide a **Notice of Motion** application dated **18th August 2017**, sought for orders that the Respondent thereon – **Land Registrar, Thika** be directed to remove the restriction lodged against land parcel **No.Thika Municipality 9/430**, wherein the Applicants alleged belonged to them. There is also no doubt that the Respondent in the said **Notice of Motion** being the **Land Registrar, Thika** did not file any Response to be said application. Further by a **Ruling** delivered on **23rd February 2018**, the Court allowed the Applicants said **Notice of Motion** dated **18th August 2017**, basically on the grounds that the Land Registrar did not oppose the application and also on the fact that the Applicant had attached a Certificate of title in her name and the court proceedings wherein, she had been acquitted under **Section 215** of the **Criminal Procedure Code**.

However, the Applicants had failed to disclose to the court that there was another **Criminal Case No.5143 of 2017**, wherein the said **Elizabeth Wambui Kamichar** is charged with an offence of **Obtaining Registration by False Pretence contrary to Section 320 of the Penal Code**. The said registration is over **Certificate of Lease** for **Thika Municipality Block 9/430**, which is the subject parcel of land. The Complainant in the said **Criminal Case** is **Cecilia Wamaita Mwangi**, and is the **Intended Interested Party** herein. The said matter had been investigated by the **Director of Criminal Investigation, Thika** and it is evident the said **Director of Criminal Investigation** is not a party to this suit. It is evident that with the removal of restriction, the Applicants are at liberty to deal with the suit property as they so wish including disposing off, charging and/or even subdividing the same. If that would happen, then the **Criminal Case NO.5143 of 2017**, would be at jeopardy and the Complainant therein might be disadvantaged in the event the said matter is decided in her favour.

The **Intended Interested Party** has sought to be enjoined in the suit herein. It is trite that **Order 1 Rule (2)** grants the court discretion to add parties to the proceedings at any stage provided their presence is necessary. It provides:-

“Where it appears to the court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the court may either on the application of any party or of its own motion

put the plaintiffs to their election or order separate trials or make such other order as may be expedient.”

Further, the application is anchored under **Section 3A** of the **Civil Procedure Act**, which grants the court inherent power to make such orders that are necessary for the ends of justice to be met and/or to prevent abuse of the court process.

It is not in doubt that the Applicants came to court and sought for removal of restrictions. It is not in doubt that they did not give full disclosure of the matters on the ground. It is evident that the **Intended Interested Party**, was issued with a letter of allotment of suit property on **10th August 1998**. The Applicants and the **Intended Interested Party** are battling over the issue of registration of the **Applicants' Certificate of Lease** in a **Criminal Case No.5143 of 2017**. This Court cannot predict the outcome of the said Criminal Case at this stage. However, the Intended Interested Party has an interest in the subject parcel of land and any adverse orders or action on the said parcel of land might affect her interest.

As was held in the case of **Constitutional Petition No.37 of 2017 as consolidated with Petition No.49 of 2017, Kenya Medical Laboratory & Technologists Board & Others...Vs....The Hon. Attorney General & Others:-**

“A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights”.

The **Intended Interested Party** alleged that the suit property herein, **Thika Municipality Block 9/430**, belongs to her and **Elizabeth Wambui Kamichar** was fraudulently registered as the proprietor thereon. Certainly, the **Intended Interested Party** has a legal interest on the subject parcel of land wherein orders have been issued in favour of **Elizabeth Wambui Kamichar**.

The Court finds that the **Intended Interested Party** is a **necessary party** herein **to enable this Court to effectively and completely adjudicate upon and settle questions involved in the suit.**

The Court did Stay its Orders that were issued on **23rd February 2018**. The next question is whether the said Orders should be vacated or set aside. It is evident that the proceedings that gave rise to the **Ruling of 23rd February 2018** were exparte. It is not in doubt that the Applicant anchored her application also on all other enabling provisions of law.

The Court finds that **Order 12 Rule 7** grants the court discretion to set aside or vary any Judgment or Order that have been issued exparte upon such terms. Further, it is trite that the main concern of the court is **to do justice** to the parties. The **Intended Interested Party** has alleged that the Applicants failed to give full material disclosure of the matter and thus obtained orders in their favour. However, the Applicants who are Respondents herein have alleged that the matter is finalized and therefore there is nothing to Stay or set aside.

However, as the Court has noted above, the concern of the court is to do justice. It is evident that the 1st Applicant in this Miscellaneous Application and who is the Respondent herein, is facing a Criminal Case over the suit property. She had alleged in her **Affidavit in Support of Notice of Motion** dated **18th August 2017**, that she had been discharged by the court. However, she failed to disclose that there is another **Criminal Case No.5143 of 2017**, wherein she has been charged with **Obtaining Registration of Certificate of Lease**, over the subject parcel of land. The **Intended Interested Party** has alleged that she is in possession of the suit property. The restriction over the suit property was placed at the instigation of the **Director of Criminal Investigation (DCI)**. The Criminal case is still on-going. Therefore, the suit property needs to be **preserved** and the same can only be preserved **by retaining the restriction already placed earlier**. The Court has considered the factors prior to issuing the **Ruling of 23rd February 2018**, and finds that **there was material non-disclosure** and for that reason, **it would not hesitate to vacate and/or set aside the said Orders issued thereon**. See the case of **Kenya Ports Authority...Vs...Kushon (K) Ltd, Civil Appeal No.142 of 1995**, where the Court held that:-

“In setting aside Judgment, the court looks at the facts and the circumstances both prior and subsequent and the material factor which appeared to have entered into passing the Judgment which would not have been present had the Judgment not been exparte”.

Having now carefully considered the instant **Notice of Motion** dated **23rd March 2018**, the **Court finds it merited and it is allowed entirely in terms of prayers No.3 and 5**. Further, the **Court directs the Intended Interested Party to file her Response** to the **Notice of Motion** dated **18th August 2017** within a period of 14 days from the date of this **Ruling**.

Again, the **Director of Criminal Investigation, Thika** to be **made a party to this Miscellaneous Application and be served with the pleadings herein**.

The Court finds that since the Applicants who are the Respondents herein failed to give full material disclosure before obtaining the Orders of **23rd February 2018**, then **they should bear costs of this application**

It is so ordered.

Dated, Signed and Delivered at Thika this 29th day of March 2019.

L. GACHERU

JUDGE

29/3/2019

In the presence of

No appearance for Applicants/Respondents

No appearance for Respondent

No appearance for Intended Interested Party/Applicant

Lucy - Court Assistant

Court – Ruling read in open court.

L. GACHERU

JUDGE

29/3/2019