



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC. PETITION NO.789 OF 2017

(FORMERLY CONSTITUTIONAL PET. NO.503 OF 2017-NAIROBI)

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(2), 10, 12(1)(a), 20, 21, 22, 23, 27, 28, 31 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 2, 3, 4, 11, 20 AND 24(1) OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013.

BETWEEN

CHARLES KIMANI KURIA.....PETITIONER/APPLICANT

-VERSUS-

THE DIRECTOR OF SURVEYS.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated 9th October 2017, brought by the Petitioner/Applicant herein under various provisions of law and has sought for these orders:-

1) Spent

2) That in view of the Respondents total disregard of Sections 15,16,19,23,24,25,26,34,35,80,86 and 87 of the Land Registration Act, 2012 in proceeding to delete the Petitioner's title Nos.Thika Municipality Block 7/186 and Thika Municipality Block 8/187 which is a prelude to cancelling the Petitioner's said titles, the Honourable Court be pleased to issue an interlocutory mandatory injunction restraining either, or both, of the Respondents from further amendments of survey map for Thika Municipality Block 7 pending the hearing and determination of this Petition.

3) That the Honourable Court be persuaded and pleased to issue a conservatory order against either of, or both, the Respondents requiring them not to proceed to cancel the Petitioner's title to land parcel Nos.Thika Municipality Block 7/186 and Thika Municipality Block 8/187 pending the hearing and determination of this Petition.

4) That the Honourable Court be persuaded and pleased to declare that the Respondent's amendment of survey map for Thika Municipality Block 7 and the subsequent deletion of the Petitioner's title to land parcel Nos.Thika Municipality Block 7/186 and Thika Municipality Block 8/187 is unlawful, null and void.

5) That the Honourable Court be persuaded and pleased to order the Respondents to amend the current survey map for Thika Municipality Block 7 and restore back to the map the Petitioner's title for parcel Nos.Thika Municipality Block 7/186 and Thika Municipality Block 8/187.

6) That costs of this application be provided for.

The application is premised on the following grounds:-

- a) *That the Petitioner is the registered proprietor of land parcel Nos.Thika Municipality Block 7/186 and Thika Municipality Block 8/187.*
- b) *That the Petitioner innocently bought the said parcels of land from Joseph Mwangi Mwai, the initial allottee from the Government, a transaction the Respondents sanctioned through documents the Respondents duly authenticated.*
- c) *That the Petitioner is in possession of the said parcels of land which he has extensively developed.*
- d) *That the 1st Respondent has secretly, in collusion with the 2nd Respondent, amended the survey map and deleted the Petitioner's title numbers for his parcels of land from the survey map of Thika Municipality Block 7. The said deletion is a prelude to the 2nd Respondent's intended cancellation of the Petitioner's title to the said parcels of land.*
- e) *That the said deletion of the Petitioner's land references from the survey map and the intended cancellation of his title to land parcel Nos.Thika Municipality Block 7/186 and Thika Municipality Block 8/187 has been done in total disregard to and breach of various provisions of the Land Registration Act, 2012 and the same is unlawful and unconstitutional.*
- f) *That in the event the Honourable Court does not step in and issue such orders as are sought here, the Petitioner is likely to suffer grave prejudice and irreparable loss.*

It is also supported by the *Affidavit* of **Charles Kimani Kuria**, the Applicant herein. He averred that he is the registered owner of the land parcels **No.LR.No.Thika Municipality Block 7/186 and Block 7/187**, which he purchased from **Joseph Mwangi Mwai** in the year 2014 and was duly issued with title deeds. That before he purchased the said parcels of land, his advocate authenticated that the documents presented to him by the Vendor were genuine and the said **authentication** was done by the Respondents herein as is evident from **annexture CCK-5**. He further averred that upon payment of consideration, and after the titles were issued to him, he took possession of the said parcels of land and started construction of a residential house.

However in **March 2016**, one **Patrick Karangi Ngugi** illegally and maliciously trespassed onto the premises and pulled down the Applicant's perimeter wall as shown by **annexture CCK-6**. The said destruction was reported to the police and the said **Patrick Karangi Ngugi** was arrested and charged with criminal offence at **Kandara Law Courts**. It was his contention that thereafter, he procured from the 1st Respondent's **Survey Maps** for the area marked **CCK-7**. However, when he went for a subsequent search for an **updated version** of the Survey map, he was shocked to find that the 1st Respondent had **amended** the said map and **deleted** the two parcels of land, **Thika Municipality Block 7/186 and Block 7/187**. He was therefore apprehensive that the Respondents were in the process of unlawfully cancelling titles to his parcels of land as shown by the latest version of the map. He also contended that he was never heard by either or both Respondents before deleting of the land references from the survey map. He further averred that his advocate has advised him that the Respondents' action is **unconstitutional, unlawful and illegal**. He urged the Court to allow his application.

The Respondents were served with the instant application and **Hearing Notice** on **24th November 2017**, as per the **affidavit of Service of Phyllis Kanini Moki**, a **Court Process Server**, sworn on **1st December 2017**, but they failed to file their responses to the said application. The application is therefore unopposed.

The Applicant filed **written submissions** which this Court has carefully read and considered. The Court has also considered the relevant provisions of law and the cited authorities and it renders itself as follows:-

There is no doubt that the Applicant herein **Charles Kimani Kuria**, is the registered owner of the two parcels of land, **Thika Municipality Block 7/186 & 187** as per the **Certificate of Lease** issued to him on **31st December 2015**. There is also no doubt that the Applicant had purchased these two properties from one **Joseph Mwangi Mwai**, who was in possession of **Letter of Allotment** for the **Unsurveyed Residential Plot No.B – Thika Municipality** issued to him on **9th November 2007**. The Applicant purchased the said parcels of land on **14th March 2014**, vide the **Sale Agreement** even dated **marked CCK-2**.

It is also evident that before the issuance of the title deeds to the Applicant, there were various correspondences between the personnel working towards survey of the said plots and the Respondents herein. The Respondents approved survey of the said plots and later transfer of the lease from **Joseph Mwangi Mwai**, the original allottee to the Applicant herein. The Court has not seen any objection raised by either of the Respondents in regard to the said transfer between the Applicant and the said **Joseph Mwangi Mwai**.

The Applicant has further alleged that before he purchased the two parcels of land, he carried out due diligence and confirmed that the said **Joseph Mwangi Mwai**, was the genuine allottee of the two properties. Having carried due diligence and having confirmed that the said Vendor, **Joseph Mwangi Mwai** was the proprietor of the suit property, then the Applicant herein was an innocent purchaser for value without Notice.

Subsequently, after the transfer, the Applicant acquired titles to the suit property on **31st December 2015**. As a registered proprietor of the suit property, then the Applicant is deemed to be the **absolute and indefeasible** owner of the said property as provided by **Section 26(1)** of the **Land Registration Act** which Provides:-

“The certificate of title issued by the Registrar upon registration, or to a purchase of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate,

and the title of that proprietor shall not be subject to challenge except:-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

From the above provision of law, the Applicant's proprietorship can only be challenged if the said Certificates of titles were acquired through **fraud, misrepresentation, unprocedurally** or through **corrupt scheme**. The allegations of fraud or acquisition of titles through other irregular means can be ascertained through the legal forums such as a court of law, wherein evidence would be adduced and tested in the usual legal manner. See the case of **R.G Patel..Vs..Laiji Makanji(1957)EA 314**, where the court held that:-

“Allegation of fraud must be strictly proved. It was incumbent upon the Plaintiff therefore to demonstrate to this court that the transfer of the titles to the Defendants names was fraudulent and specifically explain the actions which constituted the fraud”.

However, the Applicant has alleged that the Respondents have cancelled the area map which is a precursor to cancellation of the Certificate of titles held by him over the two parcels of land. Further the Applicant alleged that he was not given an opportunity to be heard or informed before the said cancellation. He contended that he was condemned unheard which action goes against the rule of natural justice which states that; **‘No man should be condemned unheard’**. The Respondent did not file any response to the Applicant's allegations.

Section 19 of the Land Registration Act provides as follows:-

(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

Therefore, if the Respondents did cancel the existing area map, they had a duty to notify the Applicant of the said intentions and grant him an opportunity to be heard. The Applicant alleged that he was not given such a **Notice** or an opportunity to be heard. Therefore the Respondents' actions goes against the rule of natural justice. The above allegations have not been controverted by the Respondents.

The Applicant has sought for mandatory interlocutory injunction which are final orders which are granted in very special or exceptional circumstances. The principles to be considered herein are the ones stated in the case of **Kenya Breweries Ltd & Ano....Vs...Washington O. Ikeyo, Civil Appeal No.332 of 2000 1EA 109** where the Court held that:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See Volume 24 Halsbury Laws of England 4th Edition Paragraph 948.

The Applicant has alleged that the area map was cancelled by the Respondents. It is not clear to this court at this juncture why the said area map was deleted. To ascertain that, evidence must be called and indeed confirmed that the area map was deleted and the two land references were removed from the area map. Therefore the Court finds that this is not a very clear case which the Court thinks that it ought to be decided at once. The Court cannot ascertain at this stage that the act done by the Respondents is a simple one which can easily be remedied as more evidence needs to be availed and tested through the usual manner of cross-examination. The Court therefore finds that mandatory injunction cannot be issued at this juncture.

However, if the Respondents have cancelled the area map, it is evident that the next move would be cancellation of the Applicant's title deed. That would be done without having given the Applicant's an opportunity to be heard. See the case of **Kuria Greens Ltd...Vs...Registrar of Titles & Another, Nairobi Petition No.107 of 2010**, where the Court held that:-

“It was only the court that has authority to cancel a title which has been obtained through fraud or mistake and only where it is not a first registration.”

For the above reasons, the Court finds that the Applicant is deserving of the conservatory orders which have been sought herein. However, at this stage, the Court cannot declare the deletion of the said parcel numbers from the area maps null and void. The Court would need to hear evidence and the reasons for the said deletion.

Therefore from the available evidence, the Court finds that the Applicant is deserving of **prayers No.2 and 3** of the instant **Notice of Motion**.

However *prayers No.4* and *5* will await the calling of evidence at the main trial.

Having now carefully considered the instant *Notice of Motion* dated *9th October 2017*, the *Court finds it merited in terms of prayers No.2* and *3* only. Consequently, the Court allows the two *prayers No.2* and *3* *but declines to allow prayers No.4* and *5* at this juncture. ***The Applicant is also entitled to costs of the application.***

It is so ordered.

Dated, Signed and Delivered at Thika this 24th day of May 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Petitioner/Applicant

No appearance for 1st Respondent

No appearance for 2nd Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the absence of the parties though they had been served with Ruling Notices.

L. GACHERU

JUDGE

24/5/2018