



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

JUDICIAL REVIEW NO.8 OF 2017

(FORMERLY PETITION NO.153 OF 2017-NAIROBI)

IN THE MATTER OF ARTICLE 2 & 3 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR CONTRAVENTION OF THE RIGHT TO OWNERSHIP AND PROTECTION OF PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF APPLICATION FOR THE CONTRAVENTION OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA

AND IN THE MATTER OF THE LAND REGISTRATION ACT NO.3 OF 2012

AND

IN THE MATTER OF CRIMINAL CASE NUMBER 1674 OF 2015 REPUBLIC VS EVALYN WANJIRU GITHINA

BETWEEN

SABINA NYAMBURA GITHINA.....1ST PETITIONER/APPLICANT

EVALYN WANJIRU GITHINA.....2ND PETITIONER/APPLICANT

-VERSUS-

THE LAND REGISTRAR,

THIKA LAND REGISTRY1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

RULING

The matter for determination is the Petitioners'/Applicants' **Notice of Motion** application brought under various Articles of the Constitution of

Kenya 2010, who have sought for the following orders:-

- 1) ***That this Honourable Court be pleased to issue conservatory order by way of an order of temporary injunction restraining the 1st Respondent either by themselves, employees, servants and or agents from registering any further entries on the register in respect of the property known and registered as LR.Ruiru/Ruiru East Block 7/84, pending the hearing and determination of the Petition.***
- 2) ***That this Honourable court be pleased to stay the Criminal Proceedings Cr.Case No.1674 of 2015, Republic..vs...Evalyn Wanjiru Githina – Chief Magistrate's Court at Thika pending the hearing and determination of this Petition.***
- 3) ***That this Honourable court be pleased to issue conservatory orders by way of an order of temporary injunction restraining the Respondents either by themselves, employee's, servants and or agents from entering onto, taking possession of or otherwise interfering with the Applicants' possession of the subject property LR.Ruiru/Ruiru East Block 7/84, pending the hearing and determination of the Petition.***
- 4) ***That costs of this application be provided for.***

This application is premised on various grounds stated on the face of the application and among these grounds are:-

- a) ***The 1st Respondent has unilaterally and without a colour of right cancelled the Title No.Ruiru/Ruiru East Block 7/84 of Charles Githina Mwangi (Deceased), which title forms part of the Estate in which the 1st Petitioner administrates.***
- b) ***The 1st Respondent has further purported to issue a title deed for the said property to the Interested Party herein.***
- c) ***Arising from the said cancellation, the Interested Party lodged a complaint at Ruiru Police Station, whereby the 2nd Petitioner was arrested by the 2nd Respondent's Officers, arraigned in court and charged by the 3rd Respondent with the offence of forcible detainer.***
- d) ***In view of the cancellation, issuance of a new title deed to the Interested Party and the subsequent arrest and arraignment in court of the 2nd Petitioner, it is clear that the acts of the Respondents in collusion with the Interested Party, are intended to fraudulently dispose the estate of the deceased the ownership of the said property contrary to Article 40 of the Constitution of Kenya on the right to property.***
- e) ***The above turn of events have taken place after the Interested Party had initially filed a suit ELC 355 of 2008, Real Capital Ltd..vs..Charles Githina Mwangi, Registrar of Lands, Thika, Commissioner of Lands and the Attorney General, claiming ownership of the land, which suit was withdrawn by consent of all the parties.***

Further, the application is also supported by the affidavit of **Sabina N. Githina**, the 1st Petitioner who averred that she is the legal administrator of the estate of **Charles Githina Mwangi** and also a beneficiary of the said estate. She also averred that the deceased **Charles Githina Mwangi** purchased the suit property **Ruiru/Ruiru Block 7/84**, from **James Kinyua Theuri** on **8th August 2005**, after carrying due diligence, and ascertaining that the title was in order. She further averred that the said **Charles Githina Mwangi** paid the full purchase price and all other outgoings being the stamp duty and transfer charges. Thereafter the suit property was registered in the name of the deceased and he took possession of the property in **August 2005**.

She further averred that the deceased remained in possession until his demise on **25th August 2015**. It was her further averments that in

2008, the Interested Party herein filed **ELC No.355 of 2008 – Real Capital Ltd...Vs...Charles Githina Mwangi & Others**, intimating that the late **Charles Githina Mwangi**, was a ghost owner of the suit property. However on **5th November 2014**, the said **Real Capital Ltd**, withdrew the claim against the Defendants. She also stated that her husband passed on in **February 2015**, and the Petitioners took control of the suit property. However on **5th May 2015**, the 2nd Petitioner was arrested by the 2nd Respondent and charged at **Thika Law Courts**, with the offence of **Forcible Detainer**.

She also contended that she has now learnt that the suit property is registered in the name of the Interested Party herein after cancellation of several entries on the Green Card without the knowledge or involvement of the Petitioners herein. Therefore the effect of the cancellation is that the estate of the deceased shall be deprived of the suit property and there is a great possibility of adverse action against the title including transfer to third parties and disposal of the same. It was her contention that it is in the interest of justice that this court do grant the orders sought.

The application is vehemently opposed by the 2nd and 3rd Respondents who filed a Replying Affidavit sworn by **PC Paul Njoroge (No.86275)**, who averred that he is the Investigating Officer herein. He confirmed having charged the 2nd Petitioner in **Thika Criminal Case**

No.1674 of 2015, and that that decision arose from the office of the

Director of Public Prosecutions (DPP), after careful review of evidence presented to him. He further averred that the current registered owner of the suit property is **Real Capital Ltd** and that the 2nd Petitioner did encroach on the suit property.

It was his further contention that there are fraudulent entries in the Land Register showing that the land had been transferred to **James Kinyua Theuri** on 19th November 1996 and later to **Charles Githina Mwangi** on 21st March 2006, who was the father to the 2nd Petitioner. That the matter was investigated by **DCIO Thika**, and later the Land Registrar issued a new Register showing the current owner of the suit land as the Interested Party herein. It was his contention that 2nd Petitioner was charged after investigations and it is not true that the Petitioner have been deprived of their right to property. Therefore the Petitioners apprehension that the Respondents and Interested Party are in cahoots to frustrate and arbitrary arrest them is unfounded. He urged the Court to dismiss the instant application.

The Interested Party on its part filed a **Notice of Preliminary Objection** dated 8th November 2017 and urged the Court to strike out the Petition with costs on the following grounds:-

- 1) **That there is absolutely nothing constitutional about the present Petition.**
- 2) **That this Honourable Court has improperly been moved.**
- 3) **That this Honourable court lacks jurisdiction to issue the prayers being sought.**
- 4) **That there is no 5th Respondent in the matter whereas the Petitioner has time and again referred to the said Respondent.**
- 5) **That the deponent of the supporting Affidavit has no authority from the Co-petitioner to depose to the affidavit in her stead.**

The 1st Petitioner/Applicant **Sabina N. Githina** filed a **Supplementary Affidavit** and averred that the allegations of fraud made against **Charles Githina** have not been proved and there is no evidence that the said **Charles Githina** was a party to the said fraud. Further that the said Charles Githina had purchased the said property for value and was accordingly registered as a proprietor of the suit property. She further contended that she was not aware of the Gazette Notice issued by the 1st Respondent as by the time the Gazette Notice was issued, the suit property was registered in the name of her deceased husband and there was a suit pending between the Interested Party and the said **Charles Githina Mwangi**. It was her further contention that the investigations carried by 2nd and 3rd Respondents were cosmetics aimed at frustrating the Petitioners ownership of the property for reasons only known to them.

The Court directed that both the **Preliminary Objection** and the **Notice of Motion** be canvassed together by way of written submissions. The parties herein complied through their respective advocates and filed their rival written submissions.

This Court has not carefully read and considered the said rival written submissions and the cited authorities thereon. The Court has also considered the pleadings in general and the annexures thereto. Further the Court has considered the relevant Articles of the Constitution 2010 cited and the other relevant provisions of law and the Court renders itself as follows;

At the centre of contention herein is the suit property **Ruiru/Ruiru East Block 7/84**, which is currently registered in the name of **Real Capital Ltd**. There is also no doubt that in the year 2005, the suit property was transferred from one **James Kinyua Theuri** to **Charles Githina Mwangi (now Deceased)**, the husband to the 1st Petitioner herein and father to the 2nd Petitioner. It is evident that the said **Charles Githina Mwangi** had been issued with a title deed for this suit property in the year 2006. It is also evident that the Interested Party had filed **ELC No.355 of 2008** against the said **Charles Githina Mwangi, Registrar of Lands Thika** and **Commissioner of Lands** claiming ownership of the same and seeking for orders of nullification of the entries in the Register in respect of the suit property **Ruiru/Ruiru East Block 7/84** and reverting of the said title to its name (**Real Capital Ltd**). There is also no doubt that the said Real Capital Ltd did withdraw the said **ELC No.355 of 2008** in the year 2014. It is also evident that the **Land Registrar, Thika** cancelled the entries on the Green Card which entries were alleged to have been entered fraudulently. Further it is evident that after the said cancellations, a new title deed was issued to **Real Capital Ltd** on 21st January 2013. Further, it is not in doubt that the 2nd Petitioner was charged at **Thika Law Court** with an offence of **Forcible Detainer contrary to Section 91 as read with Section 36 of the Penal Code**. The Land in contention in the said Charge Sheet is the suit property **LR.No.Ruiru/Ruiru East Block 7/84**, which was alleged to belong to **Real Capital Ltd**. This is the same suit property that had allegedly been purchased by **Charles Githina Mwangi**, from **James Kinyua Theuri**, as is evident from a copy of the **Sale Agreement** dated 8th August 2005. The Petitioners have alleged that after the purchase of the said suit property from **James Kinyua Theuri**, the said **Charles Githina Mwangi** took possession of the suit property and he was in such possession until his demise on 25th February 2015.

The Court has seen the letter dated 29th October 2010 from **DCIO Thika** and in the said letter, it has been acknowledged that investigations did show that one **James Kinyua Theuri** admitted to have sold the parcel of land to one **Charles Githina Mwangi**. In the Plaint filed in court by **Real Capital Ltd**, the Interested Party herein, it is clear that the **Interested Party** herein had purchased the suit property in the year 2007. However, from the Petitioners annexures, one **Charles Githina Mwangi** purchased the suit property in the year 2005, and title deed was

issued in the name of the said **Charles Githina Mwangi** on 21st March 2006 before **Real Capital Ltd** purchased the suit property. Further it is evident that **Real Capital Ltd** withdrew **ELC 355 of 2008** in the year 2014, before the issues in dispute had been resolved. It is also evident that by them, the entries that gave rise to the title deed held by **Charles Githina Mwangi** had been cancelled.

The Petitioners alleged the said entries were cancelled without the knowledge of **Charles Githina Mwangi** and indeed **ELC 355 of 2008**, was still on-going. Further the title deed that is held by **Real Capital Ltd** was issued in the year 2013 while **ELC 355 of 2008** was pending and the Petitioners have alleged that the holder of title deed for the suit property, **Charles Githina Mwangi** was not aware by then that his **title deed** had been cancelled and a new title deed issued in favour of **Real Capital Ltd**. These are the issues in dispute in the Petition herein but which issues can only be resolved after calling of evidence in the main Petition.

However, it is evident that the 2nd Petitioner has been charged with a **Criminal Offence** in **Thika Chief Magistrates Court** being **Criminal Case No.1674 of 2015**. The Petitioner has alleged that she was in possession of the suit property by virtue of being the daughter of **Charles Githina Mwangi (now deceased)**, who had taken possession of the suit property after purchase of the same from **James Kinyua Theuri** in the year 2005. The issue of whether the said **Charles Githina Mwangi** obtained a good title from **James Kinyua Theuri** has never been resolved by any court of law. Further no court of law or lawful tribunal has pronounced **Real Capital Ltd** as the genuine and rightful proprietor of the suit property. The dispute of ownership of **Ruiru/Ruiru East Block 7/84** is purely a civil dispute which ought to have been resolved in a court of law that handles land disputes as provided by Environment and Land Court Act 2011. Therefore by charging the 2nd Petitioner herein, then one of the disputant herein (**Real Capital Ltd**) has an upper hand in the civil dispute involving the suit property herein.

The Petitioners have sought for conservatory orders by way of temporary injunction. Before grant of such orders, the Petitioner/Applicant needed to demonstrate that they have a prima-facie with likelihood of success. This was the findings in the case of **Centre for Rights Education and Awareness & 7 Others... Vs...The Attorney General (HCCP No.16 of 2011)**, where the court held that:-

“[Arguments] in this Ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only required to demonstrate that he has a prima-facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”.

The Applicants have alleged that the 1st Respondent arbitrarily cancelled the title deed which was held by **Charles Githina Mwangi** and issued a new one in the name of the Intended Party. The 1st Respondent has not denied those averments. The issue of whether the said cancellation was arbitrary or not is one of the issues to be determined in the Petition. The Applicants have thus established that they have a *prima-facie* case with likelihood of success at the trial.

In the Petition, the Applicants have sought for cancellation of the title deed and re-instatement of the same in the name of **Charles Githina Mwangi**. However, the title deed is in the name of **Real Capital Ltd** and as the proprietor, **Real Capital Ltd** have their rights as provided by Section 24 of the Land Registration Act. The proprietor of a parcel of land such as **Real Capital Ltd** herein, has a right of dealing with the said land as it wishes. Selling, subdividing and transferring of the same is one of such right. If conservatory orders are not issued, then **Real Capital Ltd** can dispose off the suit property to third parties which action will prejudice the Petitioners herein. Therefore the Court finds that the Applicants have demonstrated a case for grant of conservatory orders as sought in the **Notice of Motion** herein.

On whether the Criminal Proceedings should be stayed pending the hearing and determination of the Petition, it is indeed not in doubt that 2nd Petitioner was in possession of the suit property by virtue of being the daughter of **Charles Githina Mwangi**, who had allegedly purchased the same. The cancellation of the title deed held by **Charles Githina Mwangi** is the crux of this Petition. Certainly, it would be unfair to allow the criminal case to proceed before determination of whether issuance of title deed in the name of **Real Capital Ltd** was proper or not. See the case of **Republic...Vs...Chief Magistrate’s Court at Mombasa Ex-parte Ganijee & Another [2002]2 KLR 703**, where it was held that:-

“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their cases. That is an abuse of the process of the court.... When a remedy is elsewhere provided and available to a person to enforce an order of a civil court in favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the Appellant is to over-awe the Respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot

be countenanced by the court...in this matter the Interested Party is more actuated by a desire to punish the Applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that it is when the High Court steps in...”

Having carefully considered the instant ***Notice of Motion*** dated ***5th April 2017***, the Court finds it merited and it is allowed entirely in terms of ***prayers No.5, 6 and 7*** with costs being in cause.

On the ***Notice of Preliminary Objection***, the Court finds that it does not meet the criteria of what constitutes a ***Preliminary Objection*** as described in the case of ***Mukisa Biscuits & Co. Ltd....Vs...West End Distributors Ltd (1969) EA 696***, where it was held:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.

The objections raised by the Interested Party herein are issues that can only be determined in the main Petition. Therefore this Court finds that the ***Preliminary Objection*** as raised by the ***5th Interested Party*** is ***not merited and consequently, the same is dismissed entirely with costs being in the cause.***

It is so ordered.

Dated, Signed and Delivered at Thika this 22nd day of June 2018.

L. GACHERU

JUDGE

In the presence of

M/s Ndolo holding brief for Mr. Wilson for Petitioners/Applicants

Mr. Mboha for Interested Party

No appearance for 1st Respondent

No appearance for 2nd Respondent

No appearance for 3rd Respondent

No appearance for 4th Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

22/6/2018