



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**MISC CIVIL APPLICATION NO 418 OF 2015**

**IN THE MATTER OF REGISTRATION OF TRASFER FROM GITHAIGA WAITHAKA AND  
KIBE MARIGI TO MARY WANJIRU MWANIKI**

**VERSUS**

**MARY WANJIRU MWANIKI .....APPLICANT**

**RULING**

1. What is before me is a rather interesting application which has no respondent. The applicant wants the following orders :-

*1. The court be pleased to grant an order to the applicant to advertise the loss of the Original Grant and Transfer instrument in regard to property Land Reference number 11098/112 situated in Nakuru Town, Nakuru County.*

*2.The court be pleased to grant an Order to the applicant to invite Githaiga Waithaka and Kibe Mirigi or their respective lawful representatives through advertisement in a reputable newspaper publication with national coverage to come forward to execute a fresh set of transfer instrument in favour of the applicant.*

*3. The court be pleased to grant an Order that if the transferors or their respective lawful representatives in (2) above do not respond to the advertisement, the Chief Land Registrar do effect registration of transfer of title in favour of the applicant.*

*4. Costs be in the cause.*

2. The application is founded on the following grounds :-

*(i) The applicant is the lawful owner in possession and occupation of L.R No. 11098/112 since 1990 haing purchased it from Githaiga Waithaka and Kibe Marigi except that the Grant was never transferred and registered in her name.*

*(ii) The original Grant alongside the instrument of Transfer were lost/misplaced and despite a diligent search for them, they cannot be found.*

3. The application is supported by the affidavit of Mary Wanjiru Mwaniki. She has deposed that in the year 1990, she purchased the suit property from Githaiga Waithaka and Kibe Marigi both of Nakuru. The two were the then registered proprietors. She presented the transfer instrument to the Registrar of Titles

and the same was duly received and stamped. However when she went to collect the documents, from the Lands Office Nairobi, she was informed that they had been released to her years ago. She has searched for the Original Grant and the Transfer but is unable to trace them. She reported the loss to the police station and was issued with an abstract. She has deposed that she has tried to locate Githaiga Waithaka and Kibe Marigi but she is unable to find them and she has no idea whether they are alive or dead or where their respective families could be. She has stated that the Registrar of Titles has advised her to get a court order to advertise the loss of the original grant and the transfer instrument to enable the preparation of a provisional grant. She has deposed that she also requires court orders to advertise an invitation to Githaiga Waithaka and Kibe Marigi or their respective personal representatives to come forward to execute a fresh set of transfer instruments. She has averred that if there will be no response to the advertisement, she will be entitled to an order of the court to have the Chief Land Registrar effect registration of transfer of title in her favour. According to her, she owns the land but has no title documents to it.

4. I have considered the application. In brief, the position of the applicant is that she entered into a sale transaction with the registered owners of the suit property in the year 1990; executed the necessary transfer instruments; lodged the documents in the Land Registry but the same got lost.

5. I note that the application is brought under the provisions of Sections 63(1) and (2) , 64 and 65 (1) (h) of the Registration of Titles Act, CAP 281. The said statute is however no longer in force owing to its repeal by the Land Registration Act, Act No. 3 of 2012, which came into force on 2 May 2012. On that ground alone, the application is misconceived. Be as it may, the provisions quoted above, did give court power to direct land registrars on various matters relating to the registration of instruments. They did not cover loss of a certificate of title, a matter that was covered by Section 71 of the statute which provided as follows :-

*71. In the event of a grant or certificate of title being lost or destroyed, the proprietor of the land, together with other persons, if any, having knowledge of the circumstances, may make a declaration, stating the facts of the case, the names and descriptions of the registered owners and the particulars of all changes and other matters affecting the land and the title thereto to the best of the declarant's knowledge and belief, and the registrar, if satisfied as to the truth of that declaration and the bona fides of the transactions, may issue to the proprietor of the land a provisional certificate of title which shall contain an exact copy of the original grant or certificate of title bound up in the register, and of every memorandum and endorsement thereon, and shall also contain a statement why the provisional certificate is issued; and the registrar shall, at the same time, enter in the register notice of the issuing of the provisional certificate, and the date thereof, and why it was issued, and the provisional certificate shall be available for all purposes and uses for which the grant or certificate of title so lost or destroyed would have been available and as valid to all intents as the lost grant or certificate:*

*Provided that the registrar, before issuing a provisional certificate, shall give at least ninety days' notice in the Gazette of his intention so to do.*

6. It will be noted from the above that where a certificate of title got lost, the person to make a declaration is the proprietor of the land. His declaration may be accompanied by the declaration of other persons, but his is mandatory. If satisfied, a provisional certificate of title may be issued, but this, it will be noted, is only issued to the proprietor.

7. The above provisions of the repealed statute are not far apart from the current law which is contained in Section 33 of the Land Registration Act, which provides as follows :-

*Lost or destroyed certificates and registers*

*33. (1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title*

or certificate of lease.

(2) *The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.*

(3) *If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.*

(4) *If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.*

(5) *The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.*

8. It is still the proprietor of the land who ought to apply for a lost certificate of title and who may be issued with a duplicate thereof after following the process laid out above.

9. In our case, the applicant is not the proprietor, or if she is, she has not shown me any evidence of proprietorship. In fact, I do not know for sure who the proprietor of the suit property is, since the applicant did not annex a recent copy of the search certificate of the property. She seems to have had a transfer instrument stamped but she is not very clear whether the same was registered. I am however unable to authenticate the said instrument. Neither has the applicant explained what happened since the year 1990 to date, if indeed the instruments got lost in the year 1990. It is now about 25 years later.

10. To me, the orders sought are impossible to grant and they are not supported by any law. In fact, they are dangerous orders to grant, for any person can claim to have been sold for land, allege that all the instruments are lost and the sellers cannot be traced, and ask the court to order his registration as proprietor. The effect of this will be to open the doors to fraudsters which I cannot bring myself to do.

11. I think it is upon the applicant to find the appropriate legal channels for redress but I cannot bring myself to allow this application. It is a frivolous, mischievous, and misguided application, and I do not hesitate to dismiss it. It is hereby dismissed but since it has no respondent, I make no orders as to costs.

**Dated, Signed and delivered in open Court at Nakuru this 7<sup>th</sup> day of October 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**In presence of :-**

Ms. Omwenyo for applicant

Court Assistant : Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**