



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 607 OF 2008**

**CHARLES NJENGA KINUTHIA..... PLAINTIFF**

**VERSUS**

**MBURU IKIGU KAMAU..... DEFENDANT**

**JUDGMENT**

The Plaintiff filed the present suit on 13<sup>th</sup> October 2008 but following a long period of inaction on the part of the plaintiff in prosecuting the suit the Defendant who had also filed a defence and counter claim dated 28<sup>th</sup> November 2008 which was and subsequently amended on 30<sup>th</sup> November 2010 applied for the plaintiff's suit to be dismissed for want of prosecution vide a Notice of Motion application dated 2<sup>nd</sup> September 2013 and filed on the same date.

The application for the dismissal of the plaintiff's suit for want of prosecution was fixed for hearing on 5<sup>th</sup> November 2013 and the same was served on the plaintiff's Advocates **M/S Nganga Munene & Associates** on 9<sup>th</sup> September 2013 as per the affidavit of service filed on 11<sup>th</sup> September 2013. On 5<sup>th</sup> November 2013 the application was listed before me for hearing. The plaintiff and/or his Advocates did not attend court on the said date and the Defendant who appeared in person proceed with the prosecution of the application exparte. As the plaintiff had not filed any response to the application, the same was unopposed and the court granted the application as prayed and ordered the plaintiff's suit dismissed with costs and further directed that the Defendant's counter claim be fixed for hearing.

The Defendant's counter claim was fixed for hearing before me on 15<sup>th</sup> January 2014 but owing to heavy workload of the court on the material date the hearing could not proceed and the court adjourned and refixed the hearing on 3<sup>rd</sup> March 2014. On the 3<sup>rd</sup> March 2014 only the Defendant appeared and there was no attendance by the plaintiff and/or his Advocate. The court allowed the Defendant to prosecute his counterclaim exparte.

The Defendant by his defence and counterclaim had averred that he is the rightful owner of the property known as **Thika Municipality Block 9/390** and by the Counterclaim sought a declaration that the property known as Thika Municipality Block 9/390 belonged to the Defendant and the costs of the suit and the counter claim.

The Defendant testified before me on 3<sup>rd</sup> March 2014 and in his evidence adopted and relied on his witness statement dated 4<sup>th</sup> December 2013 and the list of documents set out and contained in the bundle of documents dated 4<sup>th</sup> December 2013 and filed in court on the same date. The Defendant testified that

he was allocated the suit property by the Commissioner of Lands vide a letter of allotment **Ref NO. 128690/78** dated 23<sup>rd</sup> April 1991. The Defendant testified that he paid to the Commissioner of Lands and the Thika Municipal Council all the necessary dues and payments and was eventually issued the lease of Title NO. **Thika Municipality Block 9/390** on 21<sup>st</sup> December 2009 as per the copies of the documents included in the Defendants bundle of documents. The Defendant has availed a certificate of official search dated 21<sup>st</sup> May 2013 which confirms that the Defendant is the registered owner of the suit property. The Defendant holds and has custody of the original title documents and has never sold and/or transferred the property to any other person. The Defendant testified that the documents that the plaintiff held were forgeries and the same are not genuine.

The Defendant has tendered evidence by way of documents to demonstrate that he applied for approval of the building plans for the suit property to the Council that were consequently approved. The Defendant testified that the suit property is in vacant possession since the High Court in Nyeri **HCCC NO. 135 of 2008** before the case was transferred to Nairobi High Court issued an order for maintenance of status quo pending the hearing and determination of the case and this the Defendant stated has prevented him from undertaking the development that he wanted to do. The Defendant stated that he was the true owner of the suit property and urged the court to grant him the declaration as sought.

I have considered and evaluated the evidence tendered by the plaintiff in support of the counter claim and I am satisfied on the basis of the documentary evidence adduced that the Defendant is the registered owner of the suit property he having been allocated the property and having paid all necessary dues to facilitate his registration. A copy of the letter of allotment, payment receipts, copy of lease and certificate of lease have all been tendered in evidence. The certificate of official search issued by the Registrar on 21<sup>st</sup> may 2013 confirms the Defendant to be the registered owner of the suit property. Under section 26(2) of the Land Registration Act NO.3 of 2012 this constitutes conclusive evidence that the Defendant is the registered proprietor of the suit land and prima facie the title cannot be challenged save on grounds of fraud or misrepresentation to which the Defendant has to be shown to be a party. There is no evidence of any fraud or misrepresentation in the present suit and I therefore hold and find that as the registered owner the Defendant's title is absolute and indefeasible and is thus entitled to enjoy all the proprietorship rights as provided under section 25 (1) of the Land Registration Act.

The evidence of the Defendant has not been contraverted by any evidence and I therefore accept the same and make the finding that the Defendant has proved his counterclaim as against the plaintiff on a balance of probabilities and I accordingly enter judgment in favour of the Defendant on the counterclaim in the following terms:-

- a. **That the Defendant be and is hereby declared as the rightful owner of Title NO. Thika Municipality Block 3/390.**
- b. **That the costs of the counterclaim are awarded to the Defendant.**

Orders accordingly.

Judgment dated, signed and delivered at Nairobi this 16<sup>th</sup> day of May 2014.

**J.M MUTUNGI**

**JUDGE**

**In the Presence of:**

..... For the Plaintiff

..... For the Defendant