



Real Capital Limited v Githina & 4 others (Environment & Land Case E095 of 2021) [2023] KEELC 159 (KLR) (23 January 2023) (Ruling)

Neutral citation: [2023] KEELC 159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E095 OF 2021
BM EBOSO, J
JANUARY 23, 2023**

BETWEEN

REAL CAPITAL LIMITED PLAINTIFF

AND

EVALYNE WANJIRU GITHINA 1ST DEFENDANT

**SABINA N GITHINA (ADMINISTRATOR OF THE ESTATE OF CHARLES
GITHINA MWANGI) 2ND DEFENDANT**

GATHIMI PROPERTIES LIMITED 3RD DEFENDANT

LAND REGISTRAR, RUIRU LAND REGISTRY 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. Through a plaint dated 3/9/2021, the plaintiff sought the following reliefs against the defendant: (i) a declaration that the plaintiff is the legitimate proprietor of land parcel number Ruiru/Ruiru East Block 7/84 [the suit property]; (ii) an order cancelling entry numbers 7, 8, 9, 10, 11, 12, 13, 14 and 15 in the parcel register relating to the suit property; (iii) an order revoking the title issued to the 2nd defendant; (iv) a permanent injunction restraining the defendants in relation to the suit property; (v) an eviction order against the 1st defendant; (vi) general damages, among other reliefs.
2. The dispute in the suit revolves around the question of legality of the registration that changed the title to land parcel number Ruiru/Ruiru East Block 7/84 [the suit property] from the name of the plaintiff [Real Capital Limited] to the name of the late Charles Githina Mwangi [the deceased]. The plaintiff contends that the said registration and all the subsequent registrations were actions of fraud. It is the case of the plaintiff that when it learnt about the alleged fraudulent transfer, it reported the matter to the Directorate of Criminal Investigations [the DCI] and the DCI carried out investigations



which established that, indeed, the transfer was fraudulent. The plaintiff further contends that it filed ELC Case No 335 of 2008 against: (i) the deceased; (ii) the Commissioner of Lands; and (iii) the Land Registrar, but the said case was withdrawn by consent after the parcel register relating to the suit property was rectified to restore the plaintiff as the proprietor of the suit property. However, upon the death of the deceased, his estate initiated a petition in this court, challenging the process through which the parcel register was rectified. The petition culminated in the annulment of the rectification on the ground that the rectification was done unprocedurally.

3. Up to this point of the proceedings in this suit, this court has so far disposed two applications. One of the applications sought an order of temporary injunction against the defendants. The second application sought an order setting aside the *ex parte* interim order that had been granted in this suit by Cheron J. While disposing the two applications, this court directed that all parties appearing in the land register post-2001 be made defendants or interested parties to this suit.
4. Against the above background, the 1st, 2nd and 3rd defendants brought an application dated 9/9/2022, seeking leave of the court to amend their statement of defence dated 4/10/2021. The key prayer sought in the application is worded as follows:

“That this honourable court be placed to grant the 1st, 2nd and 3rd defendants/applicants leave to amend their statement of defence dated 4th October 2021.”

5. The application was opposed through grounds of opposition dated 4/10/2022, filed by the firm of Mwaniki Gachoka & Co Advocates and written submissions dated 11/11/2022.
6. I have considered the application together with the response to the application. It does emerge from a perusal of the said application together with the application, the supporting affidavit, and the annexures thereto that, whereas the applicants seek leave to amend their defence, the contemplated amendments have not been exhibited. What is exhibited is a proposed counterclaim.
7. It is clear from a perusal of the application that the application before court seeks leave to amend the applicants’ defence; it does not seek leave to plead or bring a counterclaim. In the absence of an exhibit reflecting the contemplated amendments to the defence, and in the absence of a prayer for leave (if such leave is necessary) to bring a counterclaim, the fate of the notice of motion dated 9/9/2022 is that it is fatally defective. The application cannot attract the relief canvassed in the subsequent submissions.
8. The result is that the notice of motion dated 9/9/2022 is struck out for being fatally defective. The 1st, 2nd and 3rd defendants will be at liberty to bring a competent application for leave to amend their defence and/or bring a counterclaim. The applicants shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF JANUARY 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Mbaabu for the plaintiff/respondent

Court Assistant: Osodo

