



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC NO. 1260 OF 2014**

**JANE NYAMBURA KIMANI.....PLAINTIFF**

**-VERSUS-**

**JOE MWANGI KAGAI.....1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING COMPANY LIMITED....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me for determination is an application dated 26<sup>th</sup> September, 2014. It was filed by the Plaintiff on the same day under a certificate of urgency. The application seeks an injunctive order against the 1<sup>st</sup> Defendant, her servants or agents from entering upon, re-entering , trespassing into, demarcating, building structures, interfering with and or in any other manner dealing with all that property known as plot Q242B ('the suit property') pending the hearing and determination of this suit. The Plaintiff also seeks costs of the application.

2. The application was supported by the Affidavit of the Plaintiff as well as the five grounds stated on the face of the application. Stripped to detail, the supporting affidavit is to the effect that the suit property was originally a portion of LR No. 10904/2 ("the title paramount") owned by the 2<sup>nd</sup> Defendant. The Plaintiff became a member of the 2<sup>nd</sup> Defendant and was in 1982 allocated a property known as Q242. Later on in 1995 the Plaintiff was also allocated by the 2<sup>nd</sup> Defendant the suit property as a bonus plot. The Plaintiff says she took possession of both plots and fenced the same in 1996. In August, 2014 the 1<sup>st</sup> Defendant however trespassed unto the same and not only damaged the Plaintiff's fence but also the various crops the Plaintiff had cultivated on the property. The Plaintiff maintains that she is the legal owner of the suit property and that the Defendant has no proprietary interest in the same.

3. The Application is opposed. A Replying Affidavit was filed by the 1<sup>st</sup> Defendant on 14<sup>th</sup> October, 2014. The 1<sup>st</sup> Defendant denies trespassing unto the Plaintiff's property. The 1<sup>st</sup> Defendant states that the premises he entered in August, 2014 are his premises. He allegedly bought the same from One Mwema Ndunda Mbondo now deceased and that he is lawfully in possession. He insists that the Plaintiffs bonus plot is not the same plot he is occupying. He denies there was ever a fence on or around the suit property when he took possession. He states further that at a meeting at the 2<sup>nd</sup> Defendant's office, the 1<sup>st</sup>

Defendant's position was vindicated when the 2<sup>nd</sup> Defendant confirmed who the true owner of the plot the 1<sup>st</sup> Defendant is now occupying is. He wraps up his opposition by making reference to a court decree issued by the Magistrate's court at Nairobi on 29<sup>th</sup> October, 2002 when the 2<sup>nd</sup> Defendant was directed to process the title for Plot No. 945 in favour of the deceased Mwema Ndunda who sold the plot to the 1<sup>st</sup> Defendant. That was in RMCC No. 7920 of 1998.

4. Against the back drop of the foregoing, I have now to decide whether the Plaintiff has made out a prima facie case with a probability of success: see **Giella –v- Cassman Brown & Co. Ltd [1973] EA 358**, **Steyn –v- Bonde [2013] 2 EA 8**, **Mrao –v- First American Bank Ltd & 2 others [2003] KLR 125**. I also need to determine whether in the absence of an injunction the Plaintiff will suffer irreparably, assuming the Plaintiff has established a prima facie case.

5. The Plaintiff has submitted that there is established a prima facie case in the written submissions filed on 25<sup>th</sup> November, 2014. The Defendant on the other hand filed no submissions and reliance will now be placed only on the Replying Affidavit filed on 14<sup>th</sup> October, 2014.

6. I have carefully considered the pleadings filed herein as well as the submissions. The Plaintiff filed on 26<sup>th</sup> September, 2014 identified the suit property as Plot No. Q242B. The Plaintiff further submits that she became the registered proprietor of this suit property in the year 1982. The supporting affidavit of the Plaintiff however states that the property was allocated by the 2<sup>nd</sup> Defendant in 1996 as a bonus plot. Annexed to the supporting affidavit is a copy of receipt No. 4955 for payment to the 2<sup>nd</sup> Defendant by the Plaintiff of Kshs. 6,000/= as payment for survey fees and bonus plot in August 1995. These are pretty contradictory facts. They should not be ignored for the simple reason that the court as well as the parties are dealing with an unregistered parcel of land.

7. Contrary to the Plaintiff's allegation that the Plaintiff is a registered owner there is no evidence of any registration or a register. Where a court is faced with a controversy or dispute over ownership of unregistered land the controversy or dispute is to be resolved only through the tracing of the root of title via the documentary evidence available to the root of the title paramount. The root is to be traced through an unbroken chain of trace. In the instant case I am unable to say on the face of the rather conflicting and contradictory documents and pleas that the plaintiff has established prima facie that she is the owner of the suit property.

8. I also take note of the statement by the 1<sup>st</sup> Defendant under oath that the 2<sup>nd</sup> Defendant who is the custodian of the ownership records of the unregistered plots and who is also the holder of the title paramount has, since the controversy over the suit property began, determined that the Plaintiff's plot is located elsewhere. The 1<sup>st</sup> Defendant swore at paragraph 12 of the Replying Affidavit that the 2<sup>nd</sup> Defendant determined that the plot now occupied by the 1<sup>st</sup> Defendant was owned by Mwema Ndunda, who is the one who sold the plot to the 1<sup>st</sup> Defendant. The Plaintiff despite an opportunity did not seek to controvert this statement by way of a further affidavit. In the absence of any traverse by the Plaintiff, the court must for the time being take the statement to have been admitted: see Order 2 Rule 11 of the Civil Procedure Rules. On that basis too I would hold that the Plaintiff has failed to establish a prima facie case.

9. More importantly, the 1<sup>st</sup> Defendant has also deposed that the Plaintiff's plot is different from the 1<sup>st</sup> Defendant's plot. It would have been better if the Plaintiff controverted this deposition too. She did not. As it were the 1<sup>st</sup> defendant position is that he is currently occupying Plot No. P945 on LR No. 10904/2 whilst the Plaintiff's plot is NO. Q242B. This would certainly also lead to a doubt as to the Plaintiff establishing a prima facie case.

10. I consequently answer in the negative the question as to whether the Plaintiff has established a prima facie case.

11. Ordinarily, having found that there is no prima facie case there ought to be no need to consider

whether in the absence of an injunction the Plaintiff will suffer irreparably. I would state that the circumstances of this case would dictate that an injunction is not granted either way for the basic reason that until the proper plot number being disputed is established it would not be justiciable to restrain the Defendants. I have my doubts whether an injunction if one was to be issued would be of help to the Plaintiff as the 1<sup>st</sup> Defendant lays claim to a completely different plot.

12. With the lingering doubts, the balance of convenience dictates that I do not grant the injunctive order sought. Let the status quo as it is remain. It follows therefor that the application dated 26<sup>th</sup> September, 2014 must be dismissed. It is dismissed with costs to the 1<sup>st</sup> Defendant.

13. Orders accordingly.

**Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of January, 2015.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the Plaintiff/Applicant

..... for the Defendants/Respondents