



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 581 OF 2013**

**HUSSEIN EBRAHIM ALI NURU.....PLAINTIFF**

**VERSUS**

**MIRIAM WAITHIRA.....DEFENDANT**

**RULING**

The Plaintiff by a plaint dated 17<sup>th</sup> May 2013 filed suit against the Defendant seeking an order of permanent injunction restraining the Defendant from interfering with his plot NO. **375 Embakasi/Njiru United Self Help Group Komarock phase 111** and for general damages for trespass. Simultaneously with the plaint the plaintiff filed a Notice of motion application seeking an interim order of injunction pending the hearing and determination of the suit. The grounds supporting the application are set out on the face of the application and on the supporting affidavit sworn by the Plaintiff in support of the application on 17<sup>th</sup> May 2013, a further affidavit sworn by the Plaintiff on 6<sup>th</sup> June 2013.

The Defendant upon being served with the Plaintiff's application filed a replying affidavit in opposition to the same dated 29<sup>th</sup> May 2013 and a further affidavit dated 2<sup>nd</sup> August 2013. Both parties filed written submissions in the matter pursuant to direction given by the court.

The plaintiff's case briefly is that in 2002 he purchased plot number **375 Embakasi/Njiru United Self Help Group** from one Joseph Mbugua for the sum of Kshs.325,000/- and that the plot was transferred to him and he was issued with a share certificate in his name as per copy annexed to the supporting affidavit and marked "**HEANI**". The plaintiff avers that during the months of June, July and August 2002 he constructed a permanent building which he was however unable to complete and that building stood thereon upto 2008 when it was vandalized leaving the foundation. The Plaintiff avers that on 14/5/2013 the Defendant with her servants and agents invaded his plot and commenced digging up the Plaintiff's foundation and carting away the materials. The Plaintiff allegedly approached the Defendant to find out why she was trespassing on his plot and reportedly the Defendant took off only to come back on 16<sup>th</sup> may 2013 when she continued excavating on the Plaintiff's land. The plaintiff made a report to the chief and the police who stopped the Defendant from carrying on with further excavation. The plaintiff avers that unless the Defendant is restrained by the court she will persist in her acts of trespass and wasting the suit property to the prejudice of the plaintiff.

The Defendant/Respondent's case is that she is the registered and lawful owner of **plot NO. 375 A Embakasi/Njiru United Self Help Group Komarock project phase 111** having acquired the same from

Hon. John Ndirangu Kariuki for Kshs.1.2 million and in respect of which she was issued with a ownership certificate NO. 737 and a beacon certificate NO. 737 both dated 24/10/2010 and which are annexed and marked “**MWK2**” in the Defendant’s replying affidavit. The Defendant avers that the City council of Nairobi duly verified her said plot and issued her with a plot formalization card and that her said plot NO. 375 A is now registered in the city council records as **Plot NO. 444E.N.U/SPINE ROAD** as per the plot normalization card annexed and marked as “**MWK-3C**” in the Defendant’s replying affidavit. The Defendant further avers that as per the register of plots of **Embakasi/Njiru United** as at 20<sup>th</sup> May 2011 the Defendant’s New plot is shown as **G444 (old no. 375 A)** and that the Plaintiff’s name does not appear in the register against plot NO. 375 which he claims.

The Defendant further claims that her **plot is NO. 375A (New Number C444) and not plot NO. 375** which the Plaintiff claims to be his. The Defendant additionally has annexed location sketch plans showing the old plots and the New Plots ‘**MWK6**’ which shows plot 375 and 375A as separate and distinct. On the new sketch plan plot 375 is represented as plot 443 while plot 375A is represented as plot 444. The Defendant contends that the allegation that there was a building constructed in the disputed plot in 2002 cannot be true since at the time the Defendant purchased the plot there was neither a building or a foundation.

The Defendant avers that on 14/5/2013 the Plaintiff in the company of police officers descended on her plot during the Defendant’s absence and arrested her workers who were carrying excavation works in her plot. The Defendant obtained the release of the arrested workers upon presentation of the ownership documents to the police. The Defendant denies that she failed to report to the police station upon being summoned and avers that it is the Plaintiff who did not avail himself at the police station despite being summoned. The Defendant denies that the plaintiff was in possession of the suit property and contends that the plaintiff is guilty of material non- disclosure as he failed to disclose that the Defendant was in possession of the suit property.

By the further affidavit sworn on 6<sup>th</sup> June 2013 the Plaintiff reiterated he was the owner of **plot No. 375 Embakasi/Njiru United Self Help Group Komarock Project Phase III** and attached beacon certificate dated 10<sup>th</sup> May 2002 for plot 375 which shows 2 plots designated as 375 and served by roads on three sides. The Plaintiff contends the documents tendered by the Defendant cannot be genuine and for instance he avers that a Mr. Kyengo who purportedly signed the Defendant’s certificate dated 24/10/2010 passed away in 2009 and could therefore not have signed the said certificate.

The Defendant in a further affidavit sworn on 2<sup>nd</sup> August 2013 in response to the Plaintiff’s further affidavit clarified that the Chairman of **Embakasi/Njiru Self Help Group** Mr. Kyengo passed away on 20/2/2011 and not in 2009 as alleged by the Plaintiff. A Daily Nation advertisement carried the Death and funeral Announcement of the said Andrew Sari Kyengo on 28/2/2011 and clearly gave the date of his death as 20/2/2011.

The parties filed written submissions in which each of them repeated the facts as outlined in their respective affidavits and the issue for determination is whether on the basis of the evidence and material placed before the court the Plaintiff has made out a case and/or demonstrated he has a prima facie case with a probability of success to entitle him to the equitable remedy of a grant of injunction that he seeks.

The plaintiff claims he is the owner of **plot NO. 375 Embakasi/Njiru United Self Help Group** having purchased the same from one Joseph Mbugua while the Defendant states she is the owner of plot NO. 375 A in the same organization having purchased the same from John Kariuki Ndirangu. Having regard to the documents tendered by the parties in this matter it does appear that there are two distinct plots described as **plot NO. 375 and Plot NO. 375A**. The Defendant has been issued with a clearance certificate confirming her ownership of **plot NO. 375A** and she has been issued with a plot formalization card for new **plot NO. 444** by the City Council of Nairobi after payment of all the necessary dues to the City council. The Defendant’s plot appears on the plot allocation list prepared by **Embakasi/Njiru United Self Help Group** as at 20<sup>th</sup> May 2011. The name of the Plaintiff is not shown against the list of plot owners and against the old plot NO. 375 the name that appears is that of John Ndirangu Kariuki. The

sketch maps produced by the Defendant clearly show the layout of the old plot NO. **375 and 375A** and the corresponding plot NOs **443 and 444** respectively being the new plot numbers. These plots are separate and distinct and there is no possibility that plot 375 claimed by the Plaintiff is one and the same as **plot NO. 375A** that the Defendant lays claim to.

Given the circumstances and facts in this case I am not satisfied that the Plaintiff has demonstrated that he has a prima facie case with any probability of success. The plaintiff has not shown that he has a right that the Defendant has infringed. It is indeed intriguing that the Plaintiff would put a substantial investment on the plot in 2002 by way of constructing a permanent building and then abandon the building until 2008 when he states it was vandalized and still do nothing until 2013 May when he says the Defendant entered the plot and started excavating. The Defendant has valid documents of ownership of **plot NO. 375 A (New number 444)** and she would be entitled to develop the same in accordance with any approved plans by the relevant authority.

As I have found and held that plot **NOs. 375 and 375A** are separate and distinct it is my view that the Plaintiff would have no reason to prevent the Defendant to work on her Plot. The Plaintiff has not shown that the plot the Defendant was excavating was not plot **NO. 375A (New NO. 444)** but plot **NO. 375** which claims to be his. In the premises I hold that the Plaintiff has not established any prima facie case with any probability of success as against the Defendant. Equally the Plaintiff has not shown he stands to suffer any damage that cannot be adequately compensated in damages should he be successful at the trial.

The upshot is that I find and hold that the plaintiff has not satisfied the conditions for grant of an interlocutory injunction as enunciated in **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** and I accordingly decline to grant an order for injunction.

The Plaintiff's notice of Motion dated 17<sup>th</sup> May 2013 is without any merit and the same is dismissed with costs to the Defendant.

Ruling dated and delivered at Nairobi this...19<sup>th</sup> .....day of...February.....2013

**J.M. MUTUNGI**

**JUDGE**

In presence of:

..... Plaintiff

..... Defendant