



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Elc. Case No. 22 Of 2012

**STEPHEN KARIUKI MACHIBI ..... 1<sup>ST</sup> PLAINTIFF**

**FRANCIS GITHIRI WAIHAKA.....2<sup>ND</sup> PLAINTIFF**

*(Suing on their own behalf and on behalf of the Members  
of the Nyumba ya Mbari ya Waithaka Welfare Association)*

**VERSUS**

**KARU WANJOHI .....1<sup>ST</sup> DEFENDANT**

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

**JUDGMENT**

The Plaintiffs filed suit by their Complaint dated 18/1/12 and filed on the same date. They sought the following:-

- a. A permanent injunction to restrain the Defendants either by themselves, their agents, servants, employees and/or otherwise from taking possession, constructing or in any other way interfering with the Plaintiff proprietary rights over plot No.1220 comprising plot numbers 105/5224 and 105/5225 (hereinafter referred to as the "Suit Property").
- b. A mandatory injunction to forestall any development and to remove any structures by the Defendants on the Suit Property.
- c. General damages for trespass and loss of user.
- d. Costs of this suit with interest thereon.
- e. Any other relief that this Honourable Court may deem just to grant.

Briefly, the facts of this case are that the Plaintiffs who are the Chairman and Secretary of the Association known as Nyumba ya Mbari ya Waithaka Welfare Association (hereinafter referred to as the "Association") brought this suit against the Defendants on behalf of the Association which was formed in the mid 1980's to cater for the Welfare of members of the Waithaka clan presently comprising 20 active members. One Isabella Karegi Kiara was the original allottee of the Suit

Property measuring ½ acre by the 2<sup>nd</sup> Defendant. A copy of her share Certificate No. 10865 attesting to this fact was produced in evidence.

On 16<sup>th</sup> August 1995, the Association bought her share and thereby acquired ownership of the Suit Property. Produced in evidence to attest to this transaction was the Sale Agreement between the said Isabella Karegi Kiara and the Association dated 16/8/95, the transfer of shares form dated 17/8/95 and the new share certificate No. 901 in respect of the Suit Property issued by the 2<sup>nd</sup> Defendant to the Association. Pursuant to the said purchase, the Association took possession of the Suit Property. In 2006, the Association decided to construct two units of 1 bedroom each on the boundary of the Suit Property which structure was almost complete. However, in December 2011, the 1<sup>st</sup> Defendant encroached on the Suit Property by depositing building materials on the site thereby interfering with the Association's ownership, possession and enjoyment of the Suit Property. Further, in January 2012, the 2<sup>nd</sup> Defendant began building a perimeter wall on a portion of the Suit Property with the effect of blocking members of the Association and would be tenants from accessing the Suit Property. The Association averred that it has never disposed, alienated and/or transferred the Suit Property to anybody at all. The 2<sup>nd</sup> Defendant had in the past confirmed the location of the Suit Property through a site visit and placement of beacons which the Association paid for.

Despite service of the summons upon them, only the 1<sup>st</sup> Defendant entered appearance. Neither of the two defendants filed a defence or attended court for the hearing of this Suit. The suit therefore proceeded to formal proof.

The evidence adduced in this case points to the fact that what is really in dispute is the right to access to Suit Property, particularly the two units which have been constructed on the very boundary of the Suit Property. Other than this, no evidence has been presented to this court to show that the Defendants have encroached into the Suit Property as marked out by beacons established by the 2<sup>nd</sup> Defendant upon sale of the Suit Property to the Association. Hence, the issue for determination is whether the 1<sup>st</sup> Defendant has denied the Association access to the Suit Property as alleged and if so what is the best remedy that can be given to resolve this issue. Looking at the evidence of this case, there is no dispute on the ownership of the Suit Property by the Association. It emerges quite clearly that the current recognized owner of the Suit Property is the Association.

Evidence adduced in this case shows that indeed, the Association built two one bedroomed units on the Suit Property. However, the 1<sup>st</sup> Defendant built a perimeter wall which effectively denies the Association access to the two units it has built on the Suit Property. Clearly, this is a contravention of the Association's ownership rights over the Suit Property.

Having established that the Association has ownership rights over the Suit Property, this court is duty bound to ensure the Association is able to exercise its full ownership rights over the Suit Property as it wishes. Exercise of access rights are a very important component of its ownership rights and this too must be protected. Accordingly, this court finds that the 1<sup>st</sup> Defendant's action of blocking access to the Suit Property amounts to a gross violation of the Association's ownership rights over the Suit Property.

In light of the foregoing, this court enters judgment in favour of the Plaintiffs as prayed in their plaint with the exception of the prayer for general damages.

It is so ordered.

**SIGNED AND DELIVERED AT NAIROBI ON THE 21<sup>ST</sup> DAY OF JUNE 2013.**

**MARY M. GITUMBI**

**JUDGE**