



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**

**CIVIL SUIT NO. 370 OF 2010**

**JOHN WANDURI NJOROGE.....PLAINTIFF/  
APPLICANT**

**VERSUS**

**ESTHER WANGUI NGUGI.....1<sup>ST</sup>  
DEFENDANT/RESPONDENT**

**CYRUS NJOROGE MWANGI.....2<sup>ND</sup> DEFENDANT/  
RESPONDENT**

**RULING**

The Applicant avers that he entered into an agreement with the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> August 2009, to purchase the suit property identified as Plot B 94, Umoja Innercore Sector for an agreed purchase price of Kshs 1,200,000/=. The copy of the sale agreement between the Applicant and 2<sup>nd</sup> Respondent on record is however dated 3<sup>rd</sup> August 2008. There is evidence of payment of kshs 1,080,000/= being made by the Applicant to the 2<sup>nd</sup> Respondent on 6th August 2009.

The 1<sup>st</sup> Respondent also avers that she entered into a sale agreement with the 2<sup>nd</sup> Respondent to buy the suit property for Kshs 1,200,000/= on 2<sup>nd</sup> July 2009. There is a copy of a sale agreement of that date between the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent on record. There is no evidence of the purchase price payment having been paid by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent.

Both the Applicant and 1<sup>st</sup> Respondent claim to have met their obligations with respect to the allotment of the suit property by way of payments of outstanding charges to the Nairobi City Council, and have annexed copies of various receipts. They both also claim that the 2<sup>nd</sup> Respondent executed a special power of attorney in their favour, with the Plaintiff's copy on record having been registered on 17<sup>th</sup>

February 2010, and the 1<sup>st</sup> Respondent copy on record having been registered on 19<sup>th</sup> August 2009.

The Applicant further avers that having purchased the property he proceeded to fence it and commenced with the transfer process. He was then informed on 25<sup>th</sup> July 2010 that the fence had been removed by the 1<sup>st</sup> Respondent who proceeded to construct houses on the said property, and still continues to do so.

The Applicant then filed a Notice of Motion on 30<sup>th</sup> July 2010 seeking orders on the following prayers:

1. That an injunction issue restraining the Respondents by themselves, their servants and or agents or through any other person or authority from wasting or dealing in any manner with the suit property pending the hearing and determination of this suit
2. That the 1<sup>st</sup> Respondent be evicted forthwith from the suit property
3. That the OCS Buruburu Police Station ensures compliance of the court order
4. Costs of this application be borne by the Respondents

The 1<sup>st</sup> Respondent in reply states that she has enjoyed possession of the suit since July 2009 and it is the Plaintiff who is trespassing on her property. The hearing of the application and highlighting of written submissions was held on 10<sup>th</sup> October 2011. The Applicant's counsel was Mr. Ongwae, and the 1<sup>st</sup> Respondent was represented by Mr. Kamwendwa. There was no appearance by the 2<sup>nd</sup> Respondent despite a hearing notice having been served on his advocate on 7<sup>th</sup> October 2011.

I have read and carefully considered the pleadings, evidence, written submissions and oral submissions by the respective parties to this application, as well as the authorities cited. The Applicant and 1<sup>st</sup> Respondent have both submitted that the issue of who has ownership of the suit property is crucial to determining the existence of an arguable case, with each party claiming to be the legal and beneficial owner. I wish however to point out the Court of Appeal's decision in **Wreck Motor enterprises Vs. Commissioner of Lands and 3 others**, Civil Appeal No.71 of 1997 where it was stated as follows:

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter of allotment and actual issuance thereafter of title document pursuant to provisions held.”

Neither the Applicant nor the 1<sup>st</sup> Respondent have produced any evidence of title to the said property and cannot therefore claim any ownership. For the same reason the Affidavit sworn by the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> August 2010 and annexed to the Further Affidavit sworn by the Applicant on 27<sup>th</sup> September 2010 cannot be taken to provide evidence of ownership in the absence of evidence of a title in the 2<sup>nd</sup> Respondent's name.

What all the parties to this suit have is an interest in land that is capable of registration. Who has a better interest would normally be determined on the basis of which interest was acquired first. It is however difficult to make this determination as between the Applicant and 1<sup>st</sup> Respondent, in the light of the gaps and doubts presented by the facts provided by the two parties. On the part of the Applicant there is doubt created as to whether the sale agreement was entered into on 3<sup>rd</sup> August 2008 or 3<sup>rd</sup> August 2009. On the part of the 1<sup>st</sup> Respondent there is doubt as to the completion of the sale agreement in terms of payment of the purchase price.

I therefore cannot make a finding of a *prima facie* case for the Applicant which is one of the requirements stated in Giella vs Cassman Brown & Co Ltd (1973) EA 358 in order for interlocutory orders to issue. The only recourse left to me is to decide the application on a balance of convenience, which I hereby do by making the following orders:

1. That the *status quo* be maintained as follows:
  - a) The Applicant and Respondents be restrained from selling any interests in, or transferring title of the suit property pending the hearing and determination of this suit.
  - b) No construction to be commenced or continued in the suit property pending the hearing and determination of this suit or further orders.
2. That the costs of this application be in the cause.

Prayer 3 of in the Notice of Motion dated 30<sup>th</sup> July 2010 is therefore allowed only to the extent provided for in the above orders. Prayers 4 and 5 of the said application are denied.

All the parties will also take the necessary steps to comply with Order 3 rule 2 and Order 7 rule 5 of the Civil Procedure rules within 30 days, and the suit will be mentioned on 5<sup>th</sup> December 2011 for further directions.

Dated, signed and delivered in open court at Nairobi this 24<sup>th</sup> day of October, 2011.

**P. NYAMWEYA**

**JUDGE**