



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Suit 137 of 2009**

**JUSTINA MURINGA KANYIRI.....PLAINTIFF**

**(SUING ON BEHALF OF THE HE ESTATE OF**

**FRANCIS KANYERI WAMAI ALIAS**

**FRANCIS KANYIRI WAMAI ALIAS**

**FRANCIS KANYEKI WAMAI)**

**VERSUS**

**JOHN NJARIA MUTUNGA...DEFENDANT/RESPONDENT**

**RULING**

The Applicant/Plaintiff has moved to this court, vide a plaint dated 27<sup>th</sup> day of March 2009 and filed on the 30<sup>th</sup> day of March 2009.

The salient features of the same are that:-

- The action is brought on behalf of the estate of one Francis Wamai Kanyeri Alias, Francis Wamae Kanyiri alias, Francis Kanyeki Wamai.
- That the deceased was allocated plot No. P1340 and P1340B.

- That it has come to the notice of the plaintiff that the defendant has encroached on the said plot and has started construction on the same, where upon the plaintiff complained to Embakasi Ranching company officials who demolished the structures.
- The above notwithstanding, the plaintiffs efforts to stop the defendant from trespassing on the said premises have been fruitless because of his influence with the local administration hence the move to seek the courts', intervention.
- Maintain the plaintiff has no legal rights to put up structures on the suit land.

The suit is simultaneously filed with an interim application by way of chamber summons brought under order XXXIX Rule 1, 2 and 3 of the CPR order C rule 1, 2 and 12 of the CPR and section 3A of the CPA. 3 prayers are sought namely:-

1. *Spent*
2. *That the Honourable court be pleased to grant an injunction restraining the respondent by himself or agents from trespassing, interfering, occupying, constructing, alienating or in any way, interfering with plot No. P.1340 and P.1340B pending the hearing and final determination of this suit.*
3. *That cost of the application be provided for.*

The application is supported by the grounds in the body of the application and supporting affidavit. The sum total of the same is that the subject property truly belongs to the estate of the named deceased as per the documentation exhibited namely;-

- Share certificate number 10851
- Letter of allocation of plot No. P.1340 and P1340B

- Receipts issued by Embakasi Ranching Company.
- Letter dated 23<sup>rd</sup> December 2008 confirming ownership of the property as belonging to the deceased.

The Defendant/Respondent at first moved to oppose the application on the basis of grounds of opposition dated 8<sup>th</sup> day of June 2009 which were withdrawn and a replying affidavit deponed by one John Njaria Mutunga on the 19<sup>th</sup> day of June 2009 and filed on the same date.

The salient features of the same are that.

- The defendant does not own the plot in question and has never built on them
- That the plots in question were public utilities plots allocated to the Methodist Church in Kenya as per their application.
- That the deponent is a former Director of Embakasi Ranching Company and is familiar with the subject plots.
- Maintains that the subject plots were public utility plots and are bigger in size than the going residential plots.
- That the letter of confirmation talks of one plot and not two plots.
- That they have already constructed a permanent sanctuary, permanent washrooms and a nursery school serving several people and thus qualifying as a public utility plot.
- That the suit was filed solely to water down a criminal activity committed by the applicant and her children against the deponent and for purposes of obtaining orders to demolish the church structures.

In response to the replying affidavit the applicant put in a further affidavit whose

salient features are that:-

- They maintain the defendant has encroached on their plot.
- There is nothing to show that the church whose photograph is exhibited is on the said plot.
- Indeed there is a letter applying for a church plot but there is nothing to show that the said church was allocated any plot.
- The court, is invited to go by the documents exhibited by them to confirm the allocation of the plots to the deceased.
- That the map exhibited is a forgery.
- That the criminal proceedings have nothing to do with these proceedings.
- That if indeed the defendant was assaulted then he was assaulted in the course of the trespass to the suit plot.

In their written skeleton arguments, counsel for the applicant simply reproduced the grounds in the body of the application, supporting affidavit, and further supporting affidavit, and then referred the court to case law. The skeleton arguments are dated 6<sup>th</sup> day of July 2009 and filed on the 8<sup>th</sup> July 2009.

Those of the Respondent are dated 10<sup>th</sup> day of July 2009 and filed the same date and the following are stressed:-

- That the plaintiff filed documents claiming ownership of the said plots. The defendant also filed similar documents, but the Embakasi Ranching Company which allegedly allocated the plots in question has not been made a party to these proceedings.
- That it is Embakasi Ranching Company which has the title to the

suit plots to which the current disputants are mere allotees.

- That they rely on the content of the replying affidavit to demonstrate that the plaintiff has sued a wrong party.
- They contend the relief being sought by the applicant is not available to her because:-
  - (i) There is a church on the ground.
  - (ii) The dispute is between the plaintiff and the church
  - (iii) The allocation of the plots was done by Embakasi Ranching Company not party to these proceedings.
  - (iv) Nether party has a title to the suit premises and also in constructive possession.
  - (v) The defendant sued is not in occupation.
  - (vi) There is uncertainty as to the plots allocated and shown to the plaintiff and those that are occupied and used by the church.
  - (vii) The court is invited to take note of the fact that the obtaining of the grant ad litem, and filing of the proceedings was after the plaintiffs' children were charged in Makadara court in connection with a criminal case against the defendant.
- It is their stand that by reason of what has been stated above, the applicant has not demonstrated a clear case satisfying the ingredients for the granting of an injunctive relief.

On case law the court, was referred to the case of **MBOTHU AND 8 OTHERS VERSUS WAITUNU AND 11 OTHERS (1980) KLR 171** a court of appeal decision dealing with ownership of land in common.

The case of **OSO TRA CO LIMITED VERSUS ATTORNEY GENERAL (2003)**

**2EA 654** decided by the high court of Uganda. On a claim for eviction, permanent injunction and damages, the court, held inter alia that *“the plaintiffs were the registered owners of the suit (property and were entitled to possession. The defendant was in wrongful possession of the suit property and had wrongfully denied the plaintiff use and occupation of the same.*

**NAIROBI PERMANENT MARKETS SOCIETY AND OTHERS VERSUS**

**SALIMA ENTERPRISES AND OTHERS (1995-1998) IEA 232** court of appeal decision, where it was held inter alia that *“under section 23 of the Registration of titles Act, a certificate of title issued by the Registrar to any purchaser of land was to be taken by the courts, as conclusive evidence that the person named therein was the absolute and indefeasible owner thereof. That title was not subject to challenge except on the ground of fraud or misrepresentation to which the purchaser was a party. In this instance, it was not disputed that the first respondent had purchased the land for valuable consideration and that the land had been duly registered in its favour. There was no allegation that the company was party to any fraud or misrepresentation perpetrated on the applicant. The order of 20<sup>th</sup> December 1995 was thus an interference in the first respondents rights and the judge was justified in vacating it.”*

*The applicants had not disclosed or established any right or interests that they might have in the suit land and in the absence of that they could not expect a court, to interfere with the first respondents rights of ownership. They therefore had no right to be heard and had no locus standi, prima facie to bring an action against the respondent.*

The case of **GIELLA VERSUS CASSMAN BROWN AND COMPANY**

**LIMITED (1973) EA 358** in which it was held inter alia that in order for one to earn an

injunctive relief:-

(iv) *An applicant must show a prima facie case with a probability of success.*

(v) *An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.*

(vi) *When the court, is in doubt, it will decide the application on the balance of convenience.*

On the courts', assessment of the rival arguments herein, it is clear that what is in issue is the granting or not granting of the interim application, in this interim application which the applicant is seeking an interim injunctive relief. A perusal of the documentation exhibited by them reveals that it is alleged that the benefit of the litigation will go to the estate of the named deceased. Being an estate property, the plaintiff needed to clothe herself with locus standi which she did by obtaining the grant of letters of administration ad litem annexure JMK1 issued on the 24<sup>th</sup> day of March 2009. The suit was filed on 30<sup>th</sup> day of March 2009. It is therefore the finding of this court that the proceedings are competent and can be ruled upon on their merits.

The strength of the applicants interim application is cemented on the alleged documents of ownership also exhibited namely JMK3 being a share certificate NO. 10851 being for one ordinary share of one thousand and one hundred shillings each fully paid up to the above named company subject to the memorandum and Articles of Association thereof. The above named company is Embakasi Ranching Company limited. It is dated 2/1/88. This is followed by a provisional letter of allotment annexure JMK4 dated 26/4/88 allocating one share JMK5 are 2 copies of receipts numbers 1392 and 9910 to the tune of Kshs. 3,500/= (three thousand five hundred shillings) both payments being in respect of share certificate number 10857. In the same bundle there are additional receipts numbers

1714 of 31/5/1983 for Kshs. 2,500. There is also a document marked JMKS which is receipt No. 610 to the tune of Kshs. 6,000/= dated 23/6/93 being payment for the original allotted plot number P1340 and bonus plot allocation number P1340-B. There is in place also JMK6 dated 23<sup>rd</sup> December 2008 confirming allocating of plot NO. P 1340 as per the share certificate No. 1085.

It is the stand of the applicant that the defendant had put up a structure on the said plots which was demolished by the Embakasi Ranching Company. The nature of the structure, where allocated and on which day the structure was demolished are not disclosed in paragraph 5 of the plaint or the deponements in the supporting affidavit.

By reason of what has been stated above, the applicant contends that she is within the ambit of the ingredients for granting of such relief and she should be accorded the same.

The defendant has resisted the interim application on the basis of the grounds already set out herein in a summary form these are:-

- The plaintiff has no title deed.
- The title holder Embakasi Ranching Company should have been made a party to the proceedings.
- The party allocated the plot is the church which is the proper party to those proceedings.
- The structures are already in place and in a permanent form.
- That the plots on which the church stands is a public utility plot.
- That there is uncertainty to the location of the plot.

In response to those allegations the plaintiff claimed that the photographs exhibited were of a strange church, that there is nothing to show that the church was allocated with any plot, and that the plot they are feuding over is the plot which was allocated to them.

Due consideration has been made by this court of the Rival arguments and the question that the court, has to ask itself is whether on the facts as presented the plaintiff/applicant has brought herself within the ambit of the ingredients required to be established before one can earn an interlocutory injunctive relief. In this courts', opinion, the facts demonstrated by both sides have left gaps in the plaintiff's application which needs to be filled in before the plaintiff/applicant can earn an injunctive relief. The gaps noted by this court, are enumerated as hereunder:-

1. The Plaintiff/Applicant has not exhibited an area survey plan or map showing existence of the plots on the ground and where located. Indeed the defendant displayed a map which though not certified, has been termed by the Plaintiff/Applicant to be fake. This being the position, it will not be imprudent on the part of the court to issue a protective order for a plot or plots which have not been demonstrated to exist on any survey map displayed before it.
2. The defendant has alleged not to be the allottee of the suit plot but the Methodist church. The plaintiff has not described clearly in her plaint the capacity in which the defendant is being sued, though it is alleged that he was a stranger. It was therefore necessary to source information from the Embakasi Ranching Company records to confirm whether it is the defendant who was allocated the said plots or the Methodist church.
3. It has also transpired that the plaintiff/applicant is a beneficial owner of the suit plots. The title holder is asserted by the Defendant/Respondent to be still the Embakasi Ranching company limited. This being the case it means that the titleholder should have been brought on board. Because if the

defendant does not have the title, he will not be in a position to guarantee the safety and protection of the Plaintiffs/Applicant beneficial interest.

4. The Plaintiff/Applicant alleged that the defendant had put up structures on the suit plots which were demolished and then went a head to refute the photographs displayed by the defendant to be for the suit plot and said they were of another plot, it was necessary for the applicant to display the photographs of the current position of the plot to confirm that indeed it is still vacant.
5. There were also allegations that the plot in connection with which the defendant has been sued is a public utility plot set aside by the Embakasi Ranching Company and therefore the Methodist church as a public utility is rightfully allocated the same. It was necessary for the Embakasi Ranching Company to be brought on board to shed light on to the issue for it will be an exercise in futility if this court, were to issue an injunctive relief only the plot to turn out to be a public utility plot.

For the reasons given in number 1-5 above, the court, declines to grant prayer 2 of the applicants application dated 27<sup>th</sup> day of March 2009 and filed on 30<sup>th</sup> March 2009.

The plaintiff is at liberty to address the gaps pointed out above and then seek appropriate interim relief if she still so desires.

(2) The defendant will have costs of the application.

**DATED, READ AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF FEBRUARY 2009.**

**R.N. NAMBUYE**

**JUDGE**