



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI MILIMANI LAW COURTS**  
**ELC CASE NO. 552 OF 2012**

**SELINA WANJIKI MAINA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOHN NDUU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**EMBAKASI RANCHING CO.LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter coming up for determination is the Notice of Motion Application dated **28<sup>th</sup> August 2012**, brought by the Plaintiff/Applicant herein **Selina Wanjiki Maina**, against the Defendants seeking for these Orders.

*i. That the Court be pleased to grant the Plaintiff an Order of injunction against the 1<sup>st</sup> Defendant restraining him, his agents, employees, Servants and/or whoever against trespassing, encroaching and constructing on Plaintiff's plot and or in any other way interfering with the quiet enjoyment and/or use of the Plaintiff's property known as **Plot No. 5006 Embakasi Ranching**, serialized as Certificate No. **1290**, Nairobi until the hearing and determination of this suit or further Orders of the Court.*

*ii. That the Court be pleased to issue an Order against the 2<sup>nd</sup> Defendant to the effect that the 2<sup>nd</sup> Defendant shall write an official letter addressed to the 1<sup>st</sup> Defendant to the effect that the said plot belongs to the Plaintiff and that the 1<sup>st</sup> Defendant should refrain from trespassing, encroachment and illegal construction going thereon.*

The application is premised on the grounds set on the face of the application and also on the affidavit of **Selina Wanjiki Maina**. These grounds are;

*a. That the Plaintiff is the owner of Plot No. P 5006, Embakasi serialized as Certificate No. 12900.*

*b. That the conduct of the Defendant is most greivous, illegal and uncalled for, particularly noting that the Plaintiff has proof of legal ownership of the plot.*

*c. That the Plaintiff has tried all her best even through the Head offices of Embakasi Ranching Company and the police to reign upon the Defendant but the Defendant has remained defiant.*

***d. That the Court has jurisdiction to grant the Orders sought for the rules of law to prevail and for justice to be seen to be done.***

***e. That the Plaintiff has constitutional right to own property and to have same safeguarded against encroachers like the Defendant, who has no respect even to her right to own and enjoy private property.***

In her supporting Affidavit, the applicant ***Selina Wanjuki Maina***, reiterated that she is the owner of the parcel of land known as Plot No. P 5006 within ***Embakasi Ranching Company*** serialized as ***Certificate No.12900*** as evidence by ***SWM1***. She averred that she paid all the charges and was issued with a beacon certificate as evidenced by ***SWM2, SWM3, and SWM4***. It was her contention that on or about 20<sup>th</sup> July 2012, and without any justifiable cause, the 1<sup>st</sup> Defendant, his agent's employees, and or servants began construction on the said plot causing the erection of an illegal and unwanted structure on her above mentioned plot. She stated that she reported the matter to ***Embakasi Police Station*** who took no action and further reported to ***Embakasi Ranching Company*** about the illegal structure and they also took no action. She urged the Court to allow her application.

The application is opposed by the 1<sup>st</sup> Defendant herein. The 2<sup>nd</sup> Defendant though appointed the firm of M/s ***Ngatia Kamau*** Advocates to appear for them, did not file Replying Affidavit.

The 1<sup>st</sup> Defendant, ***John Ndua***, swore his Replying Affidavit and opposed the Notice of Motion. He averred that his late father, ***Ndua Thuo***, was the legal owner of all that parcel of Land known as plot ***No. P71***, that is within ***Embakasi Ranching Company*** and was the holder of Certificate of ownership ***No. 8207*** as evidenced by ***JN1***. He further averred that his father purchased the suit plot from the 2<sup>nd</sup> Defendant Company and was issued with a provisional letter of allocation dated 28<sup>th</sup> November, 1982 as per ***annexture JN2*** . Further, that his father paid all the charges stipulated in the provisional letter of allocation as per ***JN3*** . It was his contention that his father was shown the plot physically on 2<sup>nd</sup> December, 1983 by the 2<sup>nd</sup> Defendant's surveyors after paying the requisite fees of ***Kshs.500/=*** as per ***annexture JN4***. He further stated that his father passed on in the year 1990, having bequeathed him the suit property. He deposed that he paid ***Kshs.5,000/=*** on ***30<sup>th</sup> July, 2009*** wherein he was issued with beacon certificates as per ***annexture JN6*** .

It was his further contention that he has always been in possession of the suit premises despite the assertions by the Plaintiff. Further, that the documents on records clearly shows that the deponent's father acquired the property long before the Plaintiff/Applicant and there has been no sale effected in her favour. The deponent therefore urged the Court to disallow the applicant's application.

The parties herein chose to canvass the application by way of written submissions. The counsel for the applicant. ***Mr. Kimani Watenga Advocates*** filed his written submissions on 28<sup>th</sup> March 2013. However, despite several adjournments, the Defendants never filed their written submissions.

I have now carefully considered the written submissions by the Plaintiff herein and the relevant laws and I make these findings:-

The applicant herein has sought for injunctive Order. These are discretionary Orders which are granted at the discretion of the Court. However, the said discretion must be exercised judicially. See the case of **Hasmukh Khetsi Shah Vs Tinga Tranders Ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628 where the court held that;**

***“It must be stated at the outset that the granting of the interim Injunction is an exercise of judicial discretion”***

Since the applicant has sought for injunctive relief, she needed to satisfy the Court that she deserves the Orders sought. The principles for grant of injunctive Orders are well settled. See **Giella Vs Casman**

**Brown & Co.Ltd 1973 EA 358.**

The Courts in Kenya have severally restated the set principles. In the case of **The Delphis Bank Ltd Vs Recco Builders & Another, Civil Appeal No 291 of 2005** , the Court held that:-

*“The conditions to be considered in an application for injunction are first, an applicant must show a prima facie case, with a probability of success; secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and thirdly, if the court is in doubt, it will decide the application on a balance of convenience”.*

The applicant herein must satisfy the above conditions. Has she done so?. Firstly, applicant needed to establish that she has a prima facie case with probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125.** The Court of Appeal described prima-facie case as:-

*“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.*

In the instant application, the applicant has alleged that she was allocated **Plot No. 5006** by the 2<sup>nd</sup> Defendant on 15<sup>th</sup> March, 1991 as per her annexures SWM 1. This Plot was serialized as Share Certificate **No. 12900**. There is no doubt that the applicant paid several charges as evidenced by annexure **SWM2, SWM3, and SWM 5**. It was her allegations that the plot **P5 006B** belongs to her. It is evident that the Plaintiff paid for the Beacon Certificate on 25<sup>th</sup> June, 2003. It is her contention that the 1<sup>st</sup> Defendant has encroached on her plot and has put up a structure as evidence by SWM6, thus trespassing on her said plot.

On his part, the 1<sup>st</sup> defendant alleged that the Plot in question was issued by 2<sup>nd</sup> Defendant to his late father **Ndua Thuo**, on 28<sup>th</sup>, November, 1982 as per the provisional letter of allocation JN2 and certificate of allocation **JN1**. The plot that the 1<sup>st</sup> Defendant referred to was **Plot No. P 71, Share Certificate No. 8207**. He attached several documents to show that other charges were paid for.

He alleged that he acquired this plot after his father's death and has always been in possession of the same. There is no doubt therefore that both the plaintiff and 1<sup>st</sup> Defendant have documents to show ownership of a plot in Embakasi . Each one of them has documents showing a different number of plots. The Plaintiff plot **No. P5006** and 1<sup>st</sup> Defendant is plot No. P 71. However, both of them claim that plot in question is one and the same as their plot. It is therefore not clear who owns the suit plot. That doubt could have been cleared by the 2<sup>nd</sup> Defendant who allegedly allocated the plots to the applicant and one **Ndua Thuo**, the father to the 1<sup>st</sup> Defendant. However, 2<sup>nd</sup> Defendant did not file its Replying Affidavit. The parties had sought for time so that a surveyor could visit the site and try to solve the problem. However, such report was never produced in Court. At this juncture, the court cannot hold and finds with certainty that this suit plot belongs to the Plaintiff herein.

The Court therefore finds that the Plaintiff has not established that she has a prima facie case with probability of success. On the second issue, the applicant alleges that the 1<sup>st</sup> Defendant has encroached on her plot and has put up a structure. The 1<sup>st</sup> Defendant on his part alleges he has been in possession of this suit plot since 1990 when his father passed on. There is no evidence by the Plaintiff herein that she has ever lived on the suit plot. There is evidence that she was allocated the plot by the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant has documents to show that his father was also allocated the suit plot. The issue herein is for the 2<sup>nd</sup> Defendant to point the physical plot of each of the party herein. There plot in question can be valued and it is probable if 2<sup>nd</sup> Defendant was the one in the wrong, then it can be ordered to compensate the Plaintiff with another plot or in damages. The documents by 1<sup>st</sup> Defendant shows **Ndua Thuo**, was

first to be allocated his plot. Plaintiff was later allocated her plot in 1991. The plaintiff has not shown that she will suffer irreparable damages which cannot be compensated by an award of damages. See the case of ;Wairimu Mureithi Vs City Council of Nairobi , Civil Appeal No. 5 of 1979 KLR 332 396 where the Court held that:-

***“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.***

There is no evidence herein that the damages would not be adequate remedy for the applicant.

The Court is not in doubt herein as both the Plaintiff and 1<sup>st</sup> Defendant have documents to show that indeed 2<sup>nd</sup> Defendant allocated separate plots to each one of them. The question that ought to have been answered by the 2<sup>nd</sup> Defendant and which it did not answer as to who owns between the Plaintiff and 1<sup>st</sup> Defendants the plot in question. However, that is a question that would adequately be answered during the full trial of this matter by calling evidence and production of documents and even site visit.

Since both the Plaintiff and 1<sup>st</sup> Defendant claims ownership of this Plot and the 2<sup>nd</sup> Defendant is yet to shade light as to who owns the Plot, it is best to preserve the **Status Quo** herein to the effect that no party herein, neither the Plaintiff nor the 1<sup>st</sup> Defendant should have any dealings or carries any further developments, dispose of, alienate and/or charge the suit plot until the matter is heard and determined. The issue of **Status Quo** was adequately addressed by the Court in the case of Ougo & Another vs Otieno (1987) KLR 1 where they held that:

***“...the general principal is that where there is serious conflict of facts, the trial court should maintain the status quo until the dispute has been decided in a trial.”***

Having now found that the Plaintiff and 1<sup>st</sup> Defendant herein both claims ownership of the suit plot, the Court Orders that **Status Quo** be maintained as above stated. The Plaintiff to ensure that the matter herein is set down for hearing within the next 12 days from the date of this Ruling months so that the issue of ownership can be resolved. Failure to do so, the **Status Quo** Order issued will automatically lapse unless otherwise extended by the Order of this Court.

Further, the Court Orders costs shall be in the cause.

It is so ordered.

Dated and Delivered and Signed this **3<sup>rd</sup> October, 2014.**

**L GACHERU**

**JUDGE**

3/10/2014

Before Gacheru J

Kamau : Court Clerk

In the presence of M/s Mudae holding brief for Mr Kamau Watenga for the Plaintiff/Applicant

None attendance for 1<sup>st</sup> Defendant /Respondent

None attendance for 2<sup>nd</sup> Defendant/Respondent

**L GACHERU**

**JUDGE**

**3/10/2014**

**Court:**

Ruling read in open Court in the presence of the above advocate and absence of Defendants' Advocates.

**L GACHERU**

**JUDGE**

**3/10/2014**