



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 379 of 2012

TERESIA WAITHIRA K. NJUGUNA Suing as the ADMINISTRATRIX OF THE ESTATE OF GIDEON NJUGUNA

**RICHU.....PLAINTIFF/
APPLICANT**

VERSUS

**HOMEWAY POULTRY FARM LTD.....1ST
DEFENDANT**

**MILKA WANJIRU MBUTHIA..... 2ND
DEFENDANT**

**PAUL MBURU MBUTHIA.....
.....3RD DEFENDANT**

**JEMIMA MUKAMI KABOGO..... 4TH
DEFENDANT**

RULING.

The Plaintiff/Applicant has filed a Notice of Motion dated 28th June, 2012 and brought under **Order 40 Rules 1, 2 and 3** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law essentially seeks orders :-

- a) That a temporary injunction be issued restraining the Defendants/ Respondents and/ or their servants, or agents from entering, trespassing, sub-dividing or erecting fake beacons, structures or demolishing structures or interfering with all that parcel of land known as plot No. 23 within L.R. No. 106531 Homeway Poultry/Farm Ltd (herein after referred to as “the suit property”) pending hearing and determination of this suit.
- b) That the O.C.S Njiru Police Station be ordered to ensure compliance of this order.
- c) That cost of the application herein be provided for.

The application is supported by the grounds on the face of the application and the affidavit of **Teresia Waithira K. Njuguna** sworn on 28th June, 2012. She has legal capacity as the administratrix of the estate of her deceased husband **Gideon Njuguna Richu** in this suit by virtue of Letters of Administration and certificate of confirmation of grant dated 13th September, 2010 and 12th July, 2011. That vide a sale

agreement executed on 24th November, 2003 the deceased purchased from one, Mary Wambui Wambugu parcel of land known as Plot No. 23 within L.R No. 105531 Homeway Poultry Farm Ltd. That since 24th November, 2003 she and the deceased had been in possession, occupation use and quiet enjoyment of the suit property until 22nd, 23rd, 8th June, 2012 and 11th April, 2012 when the Defendants/Respondents jointly with their servants and a gang of hired men illegally and unlawfully descended on the suit property which she and her family has been in possession of for over nine (9) years now and tried to destroy the structure erected thereon. That the Defendants/ Respondents intend to resell to 3rd parties the suit property despite the fact that all final survey was completed long ago.

That she served the 2nd and the 3rd Defendants/ Respondents notices to stop illegal sub-divisions and erection of fake beacons on the suit property on 12th April, 2012 which notice was in vain. The 3rd Defendant / Respondent has not responded to the application herein.

The 1st and 2nd Defendants /Applicants through in replying affidavit dated 4th October, 2012 contend that the Plaintiff/ Applicant and her deceased husband are not owners of the suit property. That the alleged confirmation of grant does not have the suit property as one of the properties owned by the deceased therefore the Plaintiff/ Applicant has no capacity and lacks locus standi to claim it without proper authority. That there is no evidence of sale or transfer to the deceased nor was the company made aware of the sale and that there are no such records. That the same is confirmed by the original title to the said plot being claimed and issued to Mary Wambui Wambugu who denounced the sale and will be seeking eviction orders based on an incomplete and withdrawn sale transaction, they have annexed the affidavit of Mary Wambui Wambugu to support this argument. It is contended that the semi-permanent structures on the suit property built by the registered owner Mary Wambui Wambugu encroached on the adjacent plots thus plot No. 21 and 22. That that is why she may have sold it to the deceased but that does not change the fact that the structures encroach on the 2nd Defendants plot. That the 1st Defendant was informed of the encroachment by the owners of plot No. 21 and 22 who called a surveyor and a discrepancy in the land boundaries was discovered. That at the time of the said discovery the Plaintiff was at the time a would be purchaser and efforts to make the Plaintiff understand were not successful. That despite the Plaintiff being aware of the discrepancy he through his advocates went ahead to enforce an irregularity through the institution of this suit. The said title was handed over to its rightful owner as per their records and thus any intended suit should be directed to the registered owner.

Mary Wambui Wambugu in her affidavit avers that she entered into a sale agreement with the deceased wherein she sold him the said plots plus the structures therein but that the deceased never completed payment the completion date being 18th February, 2004 thus the agreement became null and void. That on or about April, 2012 she was informed that the structures she had built on plot No. 23 encroached on plot Nos. 21 and 22 but the Plaintiff was adamant on leaving the plot and resisted all attempts to amend the situation on the ground. That the said semi-permanent structures were built before the survey was done on the whole land and once the survey was complete, then each shareholder of the company was to build permanent structures within the defined boundaries.

The 4th Respondent vide his replying affidavit sworn on 8th October, 2012 avers that he is the beneficial owner and holder of a certificate of title on L.R. No. 10389/3 thus plot No. 21 and has in support of the said averment annexed a copy of Certificate of Title to that effect. He too states that the structures encroaching on his plot were built by Mary Wambui Wambugu which encroachment was confirmed by a survey done on the 1st Defendant. He contends that the Plaintiff is not known to him since the plaintiff does not reside in the suit property and it is by virtue of that fact and the Plaintiff's lack of cooperation that there was a forced demolition.

In response to the 1st 2nd and 3rd Defendants/ Respondents contention the Plaintiff through her supplementary affidavit dated 15th October, 2012 states that the issue before court is not a dispute of ownership, rather it is that of trespass, mis-use wastage and a scheme to disposes her and her family of her possession of the suit property thereby requiring an injunction pending hearing and determination of the suit. The Plaintiff/ Applicant states that Mary Wambui Wambugu's claim of ownership of the suit

property in the affidavit marked “**MWM1**” is not satisfactory as the alleged certificate of title is not annexed thereto and that the on 17th April,2012 Mary Wambui Wambugu’s advocates wrote to her advocate indicating that they hold her certificate of title, letter is annexed as “**TWK 3B**”.

In the submissions made, counsels for the Plaintiff/ Applicant and the Defendants/ Respondents reiterated the averments in the affidavits. I have considered these rival submissions and read the pleadings in this case. The plaintiff seeks an injunctive order and as per the principles held in the case of **Geilla Vs. Cassman Brown Limited Company E. A 1973** the applicant has to establish that she has a prima facie case with a probability of success, that if the orders are not granted she will suffer irreparable loss and damage and if the Court is in doubt it will decide the case on a balance of probabilities. The plaintiff claims that she is the owner of the suit plot and that the issue in dispute is not of ownership but the use of thuggery to destroy her income generating structures and intend dispossession from her plot No. 23 and unilateral sub division by the defendant. The Defendants’ content that they were justified to demolish the structures on the suit property because the said structures encroach into their plots No. 21 and 22. This is an issue that ought to be addressed in full trial and if it is an issue of boundaries parties should comply with the provision of section 18 of the Land Registration Act 2012 . I say so because despite merely alleging in their affidavits, none of the Defendants have furnished this Court with documentary evidence to prove encroachment. A survey report to that effect would have sufficed. Secondly, the 2nd Respondent is not clear on when exactly the discovery of discrepancy was made so as to establish whether or not at the time of such discovery the Plaintiff was really a would be purchaser of the suit property.

Since there is no evidence of encroachment to justify the demolition nor prove of ownership by Mary Wambui Wambugu yet she admits that she sold the plot to the plaintiff’s deceased husband, it is only fair that the order sought by the plaintiff/applicant in prayer (c) be granted. Prayer (c) and (d) of the application dated 28/6/2012 are therefore granted. The plaintiff however shall give an undertaking as damages within 30 days from the date of this ruling. Parties to comply with the provisions of Order 11 within 45days and take a pre-trial conference date. Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 12th day of April 2013

R. OUGO

JUDGE

In the presence of:

.....Plaintiff/Applicant

.....1st, 2nd 3rd and 4th Defendants/Respondents

.....Court Clerk