



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 1064 OF 2012**

**NJERI MARY KARUMBO.....PLAINTIFF**

**VERSUS**

**PHYLLIS WANGWE.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff claimed that she purchased plot No. J45 in Embakasi Ranching in 1990 from Paul Njibu and paid him the purchase price of Kshs. 1100/=. Mr. Njibu transferred the plot to the Plaintiff and she was issued share certificate number 12610 by Embakasi Ranching Company Limited in 1991. The share certificate entitled her to a bonus plot. On purchasing plot number J45, the Plaintiff left for the United States of America (USA) where she stayed for several years. She travelled to Kenya on several occasions and would go to view her plot. She came to Kenya in 2012 and discovered that a permanent house had been developed on her plot. She carried out investigations and found out that the Defendant had built a house on her plot. The Plaintiff filed suit seeking a declaration that the Defendant had trespassed on her land. She sought a declaration that the Defendant's building on her land had her anguish and damage to the land. She prayed for a permanent injunction to restrain the Defendant from dealing with the suit land, general damages for trespass and costs of the suit.

2. The Defendant filed a defence on 8/7/2013 denying the Plaintiffs claim. She denied being a trespasser on the land and averred that she was the owner of plot number 4487 in Embakasi Ranching Company Limited since 2007. She built a permanent house on her plot in 2007 and has been living in it.

3. The Plaintiff gave evidence. She stated that she purchased plot number J45 on 17/4/1990 from Paulo Njibu through a transaction witnessed by Roger Shako Advocates. She paid Kshs. 100,000/= to Paul Njibu for the share of land and a bonus share and he gave her certificate number 11713. Mr. Njibu showed her plot number J45. She went with Mr. Njibu to the Embakasi Ranching offices and got the share certificate transferred to her name. She was issued certificate number 12610 for one share and a bonus plot. Her certificate was signed by the Director of Embakasi Ranching Limited. She travelled to the USA the same year where she stayed for seven years. Upon her return, she went to the offices of the Embakasi Ranching Company to be shown her bonus plot. She was asked to pay Kshs. 6000/= for the site visit, which she paid and was shown the bonus plot identified as J45B. She left for the USA again and returned to Kenya in 2007. She went to the offices of Embakasi Ranching and paid Kshs. 2000/= for the site visit and was shown plot J45 in September 2008. There was no building on plot Number J45 at the time. She left for the USA and came back to Kenya in 2012. This time Embakasi Ranching Company Limited asked her to pay 40,000/= to be shown her plot and the bonus plot. On being shown the plot by the surveyor and a director of Embakasi Ranching Company Limited she discovered that a building had been erected on her plot. Embakasi Ranching Company Limited summoned the owner of the building to their offices but she did not go to their offices. Her lawyer sent a demand letter to the occupant of the building to which she did not respond.

4. The Plaintiff produced copies of the transfer of the share from Paulo Njibu dated 17/4/1990; share certificate number 11713 issued to Paulo Njibu in April 1988; provisional letter of allocation of plot issued to Paulo Njibu on 7/9/1989; and share certificate number 12610 issued to the Plaintiff on 5/3/1991 by Embakasi Ranching Company Limited. The reverse of the share certificate showed that Embakasi Ranching Company Limited allocated the Plaintiff plot J45 on 19/10/1991. There is an endorsement stating 'allocated on Makuano 4 by Susan Wanjiru 3/12/1998' at the back of the share certificate. The fourth endorsement is dated 3/12/1998 and reads "to show site and to pay 2,000/= for site visit". She produced a copy of the receipt issued by Embakasi Ranching for the payment of Kshs. 6,000/= that she made on 23/11/1998 for plot number J45B. The reverse is endorsed "allocated on map number 4 by Susan Wanjiru". She produced a copy of the receipt dated 13/3/1991 for payment of Kshs. 500/= for transfers fees. The reverse of the receipt is stamped "Embakasi Ranching Limited allocated plot number J45 on 19/10/1991". She also produced copies of the receipts issued by Embakasi Ranching Limited on 4/9/2008 for payment of the site visit for plot J45 and 11/10/2012 for Kshs. 40,000/= for site visit for plot number J45 and J45B.

5. While the plaintiff was testifying it was brought to the attention of the court that there was an ongoing exercise in respect of the Embakasi Ranching Company Limited land pursuant to the President's directive for the Ministry of Lands and Provincial Administration to resolve the land ownership wrangles with a view to having titles issued to the plot owners. Mr. Ochwo Advocate representing the Defendant requested to have the parties explore this avenue and come back to court if they were dissatisfied with the outcome of the process. The Plaintiff's advocate was opposed to this and preferred to have the court issue an order for Embakasi Ranching to point out to both parties where the

plots they were allocated were situated.

6. The court adjourned the matter to give parties the opportunity to explore the two avenues. Hearing of the suit resumed on 7/11/2019. The Plaintiff sought to rely on a document attached to her advocate's affidavit which she claimed emanated from Embakasi Ranching Limited. The court disallowed the presentation of that letter in evidence. On cross examination, the Plaintiff stated that Paul Njibu did not show her a map when he showed her the location of the land. She stated that the map was in the offices of Embakasi Ranching and that plot number 45 was on the company's notice board. She maintained that plot number J45 was on map number 9 while J45B the bonus plot was on map number 104.

7. She explained that she was shown the plot severally in 1990, September 2008 and in 2012 and that that was the system Embakasi Ranching Company had in place of showing someone a plot many times. She confirmed that she did not take possession of the plot in 1990. The physical location of the plot was pointed out to her by the surveyor after she made payment to Embakasi Ranching Company. She did have the maps in court, and stated that these were in the offices of Embakasi Ranching Company. She conceded that it was Embakasi Ranching Company which could determine who the suit plot belonged to.

8. The Defendant gave evidence. She stated that she had built on plot number 4487 within Embakasi Ranching Company land. She relied on her share certificate which she claimed showed that she was the owner of the plot on which she had built. She acquired the plot in 2007 and began construction and has resided on the plot since 2007. The plot was shown to her by officials of Embakasi Ranching Company. She produced a plot ownership non-member certificate number 008427 issued to her by Embakasi Ranching for plot number V0860 confirming that she had paid Kshs. 32,000/= on 10/6/2007. On cross examination she stated that she bought the plot from Embakasi Ranching with whom she signed the sale agreement but did not have a copy of the sale agreement. She claimed that she had all the documents at the time of the transaction. She was shown the plot she bought, which was plot number 4487.

9. The reverse of her share certificate shows plot number 105/4487. She explained that the other numbers were part of the filing system for Embakasi Ranching Company. She was certain that she was neither allocated plot number J45 or J45B. She paid Kshs. 300,000/= for the plot in the offices of Embakasi Ranching. She maintained that Embakasi Ranching would not have allowed a person to build on a plot if they were not sure that he was the owner. She had constructed a simple structure on the suit land which she claimed was done with the approval of the City Council approved. She stated that Embakasi Ranching had not gone to evict her from her plot. She later recollected having obtained approval to develop the plot from the City Council, but did not have the approval in court. She stated that a surveyor called Kamau showed her the plot. She maintained that nobody had shown that the plot she occupied was not plot number 4487.

10. Parties filed submissions which the court has considered. The Plaintiff submitted that the Defendant's plot number 105/4487 does not exist. Further, that the Defendant bought plot number V4860 according to the documents she produced even though she stated that she bought plot number 4487. The Plaintiff faulted the Defendant for not producing the sale agreement she entered into with Embakasi Ranching or the building approvals. The Plaintiff urged that the Defendant's documents were not genuine and that her own documents were not controverted. The Plaintiff relied on Section 38 of the Land Act which requires a contract for the disposition of an interest in land to be in writing and to be signed by the parties. The signatures should be attested by witness who was present when each party signed the contract. The Plaintiff submitted that the Defendant's claim to the suit land was void for lack of a sale agreement. The Plaintiff submitted that the Defendant had trespassed on plot number J45 and sought damages for trespass that would compensate her for the loss and damage she had suffered as a result of the trespass.

11. The Defendant submitted that the Plaintiff had failed to prove that she had built on plot J45 and added that by 2008 when the Plaintiff claims she visited the land, she was already living on the suit land. The Defendant submitted that the Plaintiff had failed to discharge the burden of proof placed on her by Section 107 of the Evidence Act.

12. The Plaintiff did not produce maps showing the physical location of plot numbers J45 and J45B which she claims were allocated to her. She did not call a surveyor or official from Embakasi Ranching Company to identify the location of her plot and only relied on the share certificate to show that she owned that plot. In addition, she did not prove that the Defendant was occupying plot number J45. The Plaintiff ought to have joined Embakasi Ranching Company Limited as a co-defendant since this is the company which sold the plots to its members and had the relevant plot records. Evidence from this company would have assisted the court resolve the dispute.

13. The Plaintiff failed to prove her case on a balance of probabilities, it is dismissed with costs to the Defendant.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of December 2019.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. James Nyakundi for the Plaintiff

Mr. John Ochwo for the Defendant

Mr. V. Owuor- Court Assistant