



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 88 OF 2017

JOEL MOTAROKI OMBONGI.....PLAINTIFF

VERSUS

CHAMI SIMIYU.....DEFENDANT

R U L I N G

1. This ruling relates to the plaintiff's Notice of Motion dated 6th February 2017 and filed on 7th February 2017. Through the application, the plaintiff seeks an interim order restraining the defendant against trespassing on and/or putting up permanent or other structures on Plot No. G13 (C244), Embakasi **(the suit property)**. The plaintiff also seeks an order that the Officer Commanding Ruai Police Station be directed to enforce the restraining order.

2. The plaintiff's case is that he is the beneficial owner of the suit property which is under the head ownership of Embakasi Ranching Company Ltd. The plaintiff states that he acquired the suit property through a share transfer from a Mr James Kimani Mwaura who had acquired it from a Mr Mwaura Muiguma. The plaintiff contends that he was out of the country and when he came back in November 2016, he discovered that the defendant had trespassed on the suit property and was in the process of putting up a permanent house. The plaintiff further contends that the defendant was allocated the suit property on 22nd June 2016 and was issued with a beacon certificate on 15th March 2017 in respect of the suit property yet the suit property was not available for allocation.

3. On his part, the defendant contends that he is the legal owner, through purchase, of a Plot known as V15763 & V15764 situated within Embakasi Ranching Company Ltd. That upon payment of purchase price, he was presented with a map identifying the Plot which he confirmed during a site visit. The defendant contends that he has been enjoying quiet possession of the suit property and he has developed permanent structures on the property.

4. In his supporting affidavit, the plaintiff annexed as evidence, a copy of a share certificate No 1967 issued to him by Embakasi Ranching Company Ltd, beacon certificate and receipt in respect of beacon certificate dated 1st December 2014 and 28th November 2014 respectively. The plaintiff also attached a provisional letter of allocation issued to Mwaura Muiguma on 28th January 1982, copy of share certificate issued to Mwaura Muiguma by Embakasi Ranching Company Ltd, receipt for payment of survey fees issued to Mwaura Muiguma dated 23rd March 1982 as well as an affidavit of share transfer sworn on 15th October 1992 by Mwaura Muiguma in favour of James Kimani Mwaura. The plaintiff also annexed photographs of the structures the defendant has erected on the suit property.

5. The defendant on his part exhibited a copy of a non-member certificate of plot ownership No. 028234 dated 21st June 2016 for Plot No. V15763 issued in his favour by Embakasi Ranching Company Ltd as well as a copy of a bankers cheque dated 21st June 2016 for Kshs 100,000/- drawn in favour of

Embakasi Ranching Company Ltd. The defendant also exhibited a copy of a beacon certificate issued to him by Embakasi Ranching Company Ltd.

6. The single issue for determination in this application is whether the plaintiff has satisfied the criteria for grant of a temporary injunction as laid down in **Giella v Cassman Brown & Co. Ltd (1973) EA 358**. In this regard, the plaintiff had a duty to establish a prima facie case with a probability of success and demonstrate that he stands to suffer irreparable injury which cannot be adequately compensated by award of damages if the injunctive order is not granted. Were the court to be in doubt, the application is to be determined on a balance of convenience.

7. I have carefully considered the parties' respective cases as set out in their pleadings, affidavits and submissions. The suit property in this matter is untitled and unsurveyed. Both the defendant and the plaintiff have presented rival documents of ownership, namely certificates of ownership purportedly issued by Embakasi Ranching Company Limited. The rival documents bear different plot numbers but the parties appear to be laying claim of ownership to the same physical piece of land. With those rival informal ownership documents and parallel plot identification numbers, it is not possible to be categorical as to who has better documents of ownership or who is the bonafide beneficial owner of the suit property.

8. Taking the above factors into account, the order that commends itself to the court at this point is one that preserves the suit property pending the hearing and determination of this suit. In the ultimate, focus should be placed on quick disposal of the substantive suit. Secondly, in view of the conflicting plot numbers exhibited by the parties, it is necessary that Embakasi Ranching Company Ltd is made a party to this suit to participate in the proceedings and assist in the effectual and complete adjudication of the question of ownership of the suit property. Consequently, I will make the following orders in disposing the Plaintiff's Notice of Motion dated 6th February 2017.

- a) The plaintiff shall within 15 days amend the plaint to enjoin Embakasi Ranching Company Limited as a 2nd defendant in this suit.**
- b) There shall be no further dealings by way of disposal or acquisition of interest in the suit property pending the hearing and determination of this suit.**
- c) There shall be no further developments on the suit property pending the hearing and determination of this suit.**
- d) Each party shall within 30 days file and serve a bound, paginated and indexed bundle of pleadings, witness statements and evidentiary documents.**
- e) This matter shall be mentioned on 18/4/2018 before the Deputy Registrar to confirm compliance.**
- f) Costs shall be in the cause.**

DATED SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF MARCH 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr. Amito holding brief for Mr. Nyamweya for the Plaintiff

No appearance for the Defendant

Halima - Court clerk