



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL SUIT NO. 382 OF 2015**

**JAMES KAMAU MWAURA.....PLAINTIFF**

**= VERSUS =**

**1. MARY NJERI**

**2. EMBAKASI RANCHING COMPANY LIMITED.....DEFENDANTS**

**R U L I N G**

1. The Plaintiff brought this suit through a Complaint dated 12/5/2015 seeking the following prayers:-

- 1. Injunction to restrain the Defendants, by themselves, their servants, employees and/or agents from trespassing, disposing, transferring, charging or in any manner whatsoever interfering with the Plaintiff's rights of use and occupation of all that property known as Plot No. P2172B and P387B pending the full hearing and determination of this matter or the further orders of this court.**
- 2. An order directing the cancellation of any other title the defendants may have and a declaration that the property belongs to the plaintiff.**
- 3. Costs of the suit.**
- 4. Interest at court rates.**
- 5. Any other relief this Honourable court may deem fit and expedient to order**

2. Alongside the Complaint, the Plaintiff lodged a Notice of Motion dated 12/5/2015 seeking an order of temporary injunction restraining the Defendants against dealing with the suit properties or undertaking construction works thereon. This Ruling relates to that Notice of Motion by the Plaintiff dated 12/5/2015.

3. The Notice of Motion is supported by an affidavit sworn by the Plaintiff on 12/5/2015 in which he contends that he bought the suit properties from one Rahab Mumbi Kimani in 2008. He further contends that he has been in quiet possession of the suit properties since 2008. He says that in December 2014, the 1st Defendant in the company of one other person went to the suit properties claiming to have internal ownership documents of the properties from the 2nd Defendant. This is what prompted the Plaintiff to file this suit and the present Application dated 12/5/2015.

4. In a Replying Affidavit sworn by the 1st Defendant on 5/6/2015 she contends that she owns Plot

Numbers P 1719 and P1720 being subdivisions of Land Reference Number 10904/2. She further contends that she was allotted “bonus plots” designated as P1719B and P1720B. She further depones that in 2014, the Plaintiff trespassed onto Plot Nos P1719B and P1720B and started constructing on them. She contends that “the site upon which the Plaintiff is trying to construct is on Plot Number P1719B and P1720B and not on the plot numbers he alleges to own”. Lastly, at paragraph 21 of the Replying Affidavit, she contends:

**“21 that the confusion or problem the plaintiff finds himself in is self created as he could have confirmed with the officials of the 2nd Defendant where his plots are located as the same is a common problem within the massive Embakasi Ranching Area and the 2nd Defendant has been putting up adverts in local newspapers asking people like the Plaintiff to report to them for clean-up of records (Annexed hereto and marked “MN 4”) is one such advert carried in the Daily Nation).”**

5. The 2nd Defendant in an affidavit sworn by Walter Kigera Waireri on 3/6/2016 contends that “the true identity of the disputed plots is allocation No. P1719 and P1720 arising out of subdivision of LR 10904/2”. He further contends that in an internal transfer sanctioned by the 2nd Defendant, the Plaintiff’s beneficial predecessor in title, Reuben Kioi, sold and transferred to the Plaintiff Plot No. P2172B and P387B. He asserts that the identity of the contested plots on the ground is P1719B and P1720B respectively and not P2172B and P387B respectively. Lastly, he urges that the Plaintiff should get in touch with the 2nd Defendant to be shown the location of his plots instead of interfering with the 1st Defendant’s lawful plots”.

6. The issue for determination in this Application is whether the Applicant has satisfied the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella vs. Cassman Brown & Co. Ltd (1973) E. A 358**. In summary, the Plaintiff must establish that he has a prima facie case with a probability of success; that he will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted; and if the court is in doubt, the application is to be determined on a balance of convenience.

7. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** as:

**“ a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”**

8. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court outlined the key ingredients of a prima facie case as follows:

**“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”**

9. None of the parties presented to the court a certified copy of Title or official search in respect of Land Reference Number 10904/2. Secondly, it is apparent that the plots in dispute are unsurveyed and form part of a larger parcel of land. Thirdly the 1st Defendant has unequivocally asserted on oath that mix up of plot numbers is a common problem within the 2nd defendant's scheme.

10. From the material presented to this court, it is not in dispute that the Plaintiff is a beneficial owner of some two plots within a larger piece of land held by the 2nd Defendant. What is in dispute is the true identity of the two plots. What is also in dispute is the true identity of some other two plots allegedly owned by the 1st Defendant in the same scheme. The Plaintiff is in occupation and has developed some two plots he contends to be what he purchased. He acquired those plots with the consent of the 2nd Defendant. He contends that they are designated as Plot Nos. P2172B and P387B respectively. On his part, the 1st Defendant contends that the Plots occupied by the Plaintiff belong to the 1st Defendant and are designated as Plot Numbers P1719B and P1720B (in paragraph 17 of her Replying Affidavit). The dispute in this matter is therefore about the identity of the Plaintiff's two Plots and the identity of the 1st Defendant's two other plots, if indeed the first defendant's contention of beneficial ownership of two plots is bona fide.

11. The 2nd Defendant would ordinarily have been the right party to objectively resolve the dispute about the identity of the four plots. At Paragraph 4 of Walter Kigera Waireria's Replying Affidavit, the 2nd Defendant contends that "the true identity of the disputed plots is allocation No.P1719 and P1720 arising out of subdivision of LR No.10904/2". This contradicts Paragraph 17 of the Replying Affidavit of the 1st Defendant where she contends that the site upon which the Plaintiff is trying to construct (suit properties) is on Plot Numbers P1719B and P1720B. It similarly contradicts the Plaintiff's contention that the suit properties are Plot Numbers P2172B and P387B. The 2nd Defendant confirms that the Plaintiff has developed and occupies some two plots but disputes the internal identification numbers alluded to by the Plaintiff.

12. Taking into account the unique circumstances of the dispute before the court, I am of the view that limiting of the court's focus to the narrow principles of **Giella Vs Cassman Brown** would not be a judicious and efficacious way of disposing the Plaintiff's Application dated 12/5/2015. The unique nature of this dispute dictates that at this stage we focus on preserving the suit properties and proceed to hear and determine the key issues in the substantive suit. Consequently, the Plaintiff's Notice of Motion dated 12/5/2015 is disposed in the following terms:-

- a. **The Plaintiff will continue to occupy the plots he occupies pending hearing and final determination of this suit.**
- b. **The disputed plots which are currently occupied by the Plaintiff shall not be developed further nor disposed by any of the parties herein or their agents pending hearing and final determination of this suit.**
- c. **Similarly, the plots designated as P2172B, P387B, P1719B and P1720B shall not be disposed or developed pending hearing and final determination of this suit.**
- d. **Each party shall bear own costs of the Application.**
- e. **The Court shall give compliance timelines in this matter with a view to fast track its disposal.**

**Dated, signed and delivered at Nairobi on this 17th day of May 2017.**

**B M EBOSO**

**J U D G E**

**In the presence of:-**

No appearance for the Plaintiff

Ms Kiongi Advocate for the 1<sup>st</sup> Defendant

Kelvin - Court clerk