



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 93 OF 2017**

**JANE WANJA NJIRU .....**  
**.....PLAINTIFF**

**VERSUS**

**JURIA IROBO NTHIGA (*Suing as the Legal Representative of the Estate of NTHIGA ELIJA NYAGA Alias NTHIGA ELIJAH NYAGA (DECEASED)*).....**  
**.....1<sup>st</sup> DEFENDANT**

**ANTHONY NDII.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

1. By a notice of motion dated 15<sup>th</sup> May 2017, the Plaintiff sought two orders of interlocutory injunction and an order for survey of Title No. Mbeere/Kirima/4477 to ascertain its acreage on the ground. The material order of injunction for purposes of this ruling is an order to restrain the Defendants from transferring, alienating, cultivating, disposing of or interfering with the said property pending the hearing and determination of the suit.
2. The said application was supported by the supporting affidavit of the Plaintiff sworn on 15<sup>th</sup> May 2017 and the supplementary affidavit sworn on 22<sup>nd</sup> June 2017.
3. The said application was opposed by the Defendants on the basis of the replying affidavit of the 1<sup>st</sup> Defendant sworn on 12<sup>th</sup> June 2017 and the replying affidavit of the 2<sup>nd</sup> Defendant sworn on the same date. The 2<sup>nd</sup> Defendant stated that he had been wrongly sued since he was merely a witness to the sale agreement in dispute and not an agent of the 1<sup>st</sup> Defendant.
4. It is common ground that there was a sale agreement between the Plaintiff and the 1<sup>st</sup> Defendant for the disposition of Title No. Mbeere/Kirima/4477 (hereinafter known as the ‘suit property’) dated 10<sup>th</sup> August 2016. The only dispute between the parties is the acreage of the suit property. Whereas the copies of the land register and the certificate of search indicate that its size is 13.52 ha, the Plaintiff claims that its actual acreage on the ground is 9.71 ha.
5. The Plaintiff contends that she was fraudulently induced into entering into the contract. She therefore sought a temporary injunction for presentation of the suit property and an order for a survey thereof to ascertain its true acreage. It would appear from the prayers sought in the plaint that the Plaintiff is really interested in rescission of the contract and reimbursement of the purchase price already paid.

6. The 1<sup>st</sup> Defendant admitted the existence of the sale agreement but denied that the acreage of the suit property is less than 13.52 ha. He further denied misleading the Plaintiff on the correct acreage and stated that if there was any mismatch between the ground acreage and the one shown in official documents, then it is the Lands Registry to be faulted. The 1<sup>st</sup> Defendant further stated that the Plaintiff had visited the suit property prior to the sale and was satisfied with the property. He considered the complaint on the acreage as an attempt by the Plaintiff to evade her contractual obligations. He therefore urged the court to dismiss the said application.

7. I have considered the Plaintiff's application, the replying affidavits and the oral submissions of the parties. The main point of controversy between the parties is the size of the suit property. The mere fact that official documents from the Land Registry have declared the suit property to be 13.52 ha is not conclusive on the acreage thereof. It is a matter of common knowledge that in practice, there do exist discrepancies between the ground acreage and paper acreage. There would be no harm for the parties to ascertain the true ground acreage. In the circumstances, this court is inclined to grant, and hereby grants, order No. 4 for a survey of the suit property. The Plaintiff shall meet the costs of the survey.

8. The next issue relates to the prayer for interlocutory injunction. The court is empowered under **Order 40 Civil Procedure Rules** to preserve any property in dispute which may be in danger of being wasted, damaged, or alienated during the pendency of a suit. This court is satisfied that in the circumstances of this case and the material on record, it is necessary to preserve the suit property and to prevent its alienation until the issue of acreage is resolved in line with the authority of **Shivabhai Patel v. Manibhai Patel [1957] EA 907** where it was held that:

**"It is not only right that the court should attempt to preserve property which may be in issue but it is the clear duty of the court to do so."**

9. The court is of the view that the order for preservation in this suit should last for a limited period of time to enable the Plaintiff make an election on whether to proceed with the transaction or to seek rescission upon ascertainment of the acreage of the suit property. The court is therefore inclined to issue an interim order in terms of prayer No. 3 of the notice of motion dated 15<sup>th</sup> May 2017 for a period of 6 months only. For the avoidance of doubt, such order shall only restrain the 1<sup>st</sup> Defendant from alienating or disposing of the suit property.

10. The upshot of the foregoing is that the Plaintiff's notice of motion dated 15<sup>th</sup> May 2017 is allowed in the following terms:

- a) An interim injunction is hereby issued restraining the 1<sup>st</sup> Defendant from alienating or disposing of Title No. Mbeere/Kirima/4477 for a period of 6 months from the date hereof.
- b) An order for the survey of the said property to ascertain its ground acreage.
- c) The Plaintiff shall bear the costs of the survey.
- d) Costs of the application shall be in the cause.

11. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **26<sup>th</sup>** day of **SEPTEMBER, 2017**

In the presence of Mr Mutuma for the Plaintiff and Mr Omakalwala holding brief for Mr Andande for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Court clerk Njue/Leadys

**Y.M. ANGIMA**

**JUDGE**

**26.09.17**