



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC.481 OF 2017
(FORMERLY MILIMANI ELC.1068 OF 2013)

KABOGO THARAU..... PLAINTIFF

-VERSUS-

JOASH OMWENGA..... 1ST DEFENDANT

EMBAKASI RANCHING CO. LIMITED.....2ND DEFENDANT

JUDGEMENT

By a *Plaint* dated **6th September 2013**, the Plaintiff herein *Kabogo Tharau* sought for various orders against the Defendants. The orders sought are:-

- a) *An injunction restraining the 1st Defendant and his agents or employees from trespassing to or in any other manner interfering with the suit properties being Plots Nos.E.249 B and E.250 B.*
- b) *An injunction restraining the 2nd Defendant or its agents or employees from transferring or interfering with the shareholding of the Plaintiff in the 2nd Defendant and/or the suit properties.*
- c) *Costs of the suit.*
- d) *Interest on the costs at court rates.*
- e) *Such other or further relief as this Honourable court may deem fit to grant*

In his *Plaint*, he alleged that he is a *shareholder* of *Embakasi Ranching Co. Ltd*, holding two shares under share *certificate no.4606*. He also

alleged that the 2nd Defendant allocated to him two plots by virtue of his shareholding and he is therefore the legal owner of two plots namely *plot No.E.249B and E.250B in Embakasi*. He further alleged that in *July/August 2013*, the 1st Defendant encroached on the above stated plots without his authority and started to develop thereon by constructing on the two plots. He contended that despite complaints to the 2nd Defendant, it has not taken any action to stop the illegal activities of the 1st Defendant and the Plaintiff is apprehensive that the 2nd Defendant may be acting in cahoots with the 1st Defendant and may

with time, illegally transfer the property from the Plaintiff to the 1st Defendant. That despite demand and Notice of Intention to Sue, the Defendants have failed to stop the illegal construction and trespass.

Though the 1st Defendant herein **Joash Omwenga** entered appearance through the **Law Firm of C. M. Ongoto & Co. Advocates**, he did not file his Defence. However, the 2nd Defendant did not enter any Appearance nor file Defence. Judgement in default and/or interlocutory Judgment was entered against them on **21st November 2013**. Matter was therefore directed to proceed for formal proof.

However, **Kabogo Tharau** died on **30th January 2014**, before the matter could proceed for formal proof. **Letters of Administration** were issued to **George Ngure Kabogo** and **3 others** as is evident from the **Grant** issued on **20th April 2015**. Further through a **Notice of Motion** application dated **1st September 2015**, **George Ngure Kabogo** applied to be substituted as the Plaintiff herein being one of the legal representative of **Kabogo Tharau**. The said application was allowed entirely by the court. Therefore in this matter now, the Plaintiff **George Ngure Kabogo**, is the **legal representative** of the **Estate of Kabogo Tharau**. He gave his evidence on **12th October 2016**, and relied entirely on the witness statement of **Kabogo Tharau**, filed in court on **6th September 2013**. He also produced all the exhibits that were listed in the Plaintiff's bundle of documents. These exhibits were share certificates exhibit no.1, Letter of Allocation exhibit no.2, Bundle of receipts exhibit 3. He urged the Court to allow his claim.

The Plaintiff further filed his **written submissions** on **12th April 2017**, which this Court has carefully read and considered. The Court has also considered the available evidence and the annexures thereto: - There is no doubt that **Kabogo Tharau** herein acquired shareholding in **Embakasi Ranching Co.Ltd** in **1978**, and he purchased two shares vide **Certificate no.4606**. It is also evident that the Plaintiff thereafter was allocated plots **no.E249B** and **E280B**. Further, it is evident that the Plaintiff paid all the requisite fees as was required by the 2nd Defendant. The Plaintiff has now alleged that the 1st Defendant has encroached on his parcels of land and has started to develop and construct on the two plots.

The Plaintiffs at the formal proof produced the original documents to

support his claim. The Defendants did not file their Defence and so the Plaintiff's claim remain unchallenged or uncontroverted. The Plaintiff having produced share certificates that were not challenged nor controverted, then this Court will have no reason not to hold and find that indeed these two plots were allocated to the Plaintiff and he is therefore the rightful proprietor of these two parcels of land.

The Defendants did not call any evidence and the Court holds that the **Plaintiff is the proprietor** of the two parcels of land **E.249B** and **E.250B** being subdivisions from **Embakasi Ranching Co.Ltd**. Since there was no evidence availed to the effect that the allocation of these plots to the Plaintiff had been revoked, then the action of the 1st Defendant of developing and construction thereon amounts to trespass or illegal encroachment. The Plaintiff is therefore entitled to protection of this court as his right to property as provided by Article 40 of the Constitution has been breached by the Defendants herein. The Defendant herein chose not to file their Defence and the inferences herein is that they had no answer to the claim lodged by the plaintiff. See the case of **Esther Ndegi Njiru & Another...Vs...Leonard Gatei (2014) eKLR**, where the Court held that:-

“The failure of the 2nd Defendant to file a Defence after appointing advocates to represent him can only lead to the inferences that he had no answer to the Counter-claim”.

Having now carefully considered the available evidence, the Court finds that the Plaintiff herein, **George Ngure Kabogo** has proved his case on a balance of probabilities. Consequently, the **Court enters Judgement for the Plaintiff against the Defendants in terms of prayers no.(a), (b) and (c).**

On prayer no.(e) the 1st Defendant is directed to move out of the Plaintiff's suit property within a period of 90 days from the date of this Judgement. The Plaintiff to issue the relevant Notice to the 1st

Defendant. **Failure** to move out voluntarily, **the Plaintiff is at liberty to evict the 1st Defendant.**

It is so ordered.

Dated, Signed and Delivered at Thika this **17th day of November 2017.**

L. GACHERU

JUDGE

In the presence of

Mr. Mugisha H/B for Mr. Maoka for Plaintiff

No appearance for Defendant

Lucy - Court clerk.

Court – Judgement read in open court in the presence of the above stated advocate and absence of the Defendant.

L. GACHERU

JUDGE

17/11/2017