



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ENVIRONMENT AND LAND COURT**  
**CIVIL CASE NO. 772 OF 2014**

**TERESIA NJERI MWANGI (SUING AS LEGAL REPRESENTATIVE  
OF THE ESTATE OF STEPHEN MWANGI MAINA ... PLAINTIFF**

**VERSUS**

**NANCY LYDIA NYAMBURA ..... DEFENDANT**

**R U L I N G**

The matter coming up for determination is the Notice of Motion application dated **16<sup>th</sup> June 2014**, brought under **Order 40 Rules 1 and 2** of the *Civil Procedure Rules (2010)*, **Sections 1A, 1B and 3A and B** of the *Civil Procedure Act Cap 21 Laws of Kenya* and any other enabling provisions of the law.

This application is brought by **Teresiah Njeri Mwangi** (suing as the legal representative of the Estate of **Stephen Mwangi Maina** (Deceased) against the Defendant, **Nancy Lydia Nyambura**, seeking for these orders:-

- i. ***That the Defendant/Respondent whether by herself, agent or servant be restrained by way of temporary injunction from fencing off, constructing, farming, threatening or using force against the Plaintiff's servants and/or agents, entering or in any manner dealing with Ruiru West Block 1/789, pending the hearing and determination of this suit.***
- ii. ***That the Defendant be ordered to open up access to Ruiru West Block 1/789, immediately as the Plaintiff is on site to commence development.***
- iii. ***Costs of this application be provided for.***

The application is supported by the grounds set on the face of the application and the supporting Affidavit of **Teresia Njeri Mwangi**. Among the grounds in support of the application are: That the suit plot was owned by one **Stephen Mwangi Maina** (now deceased) and the Plaintiff herein is the administrator of his estate. However, the Defendant has invaded this suit plot No. **Ruiru West Block 1/789**, and has constructed an iron sheet fence at the access point of the property.

Further, the Defendant has used force to paralyse any development on the property by the Plaintiff and/or her agent one Samuel. Therefore that unless the Defendant is restrained from further interference and/or otherwise dealing with the suit plot, the Plaintiff will suffer irreparable damages. Therefore, it is for the

interest of justice that the Defendant be restrained from further dealing.

The application is contested. The Defendant/Respondent **Nancy Lydia Nyambura**, swore a replying affidavit and averred that she is the proprietor of the suit plot and present in occupation which plot initially belonged to **Gichuru Gathu** who has since transferred the same to her. She further averred that the plot initially belonged to **Githunguri Constituency Ranching Company Ltd.** and which has since allotted the said plots to individual allottees through a ballot system and the allottees are issued with share certificates and later titles are processed. Therefore the said company is the custodian of the original records of the allotments that shows the rightful allottee of the suit property as evidenced by annexure NL1.

The Respondent contended that the Plaintiff's husband **Stephen Mwangi Maina** (deceased) was a Director of **Githunguri Constituency Ranching Company**, and he used his position to perpetrate fraud and thereby illegally acquire the title to the suit premises. She therefore contended that an illegally acquired property cannot find basis for the grant of injunction as sought. The Respondent opposed the application and urged the court to dismiss it with costs.

The parties herein consented to canvass this application by way of written submissions. I have now carefully considered the pleadings, the annexures thereto and the written submissions and I make the following findings.

From the available documents, the suit plot herein **Ruiru West Block 1/789**, is registered in the names of **Stephen Mwangi Maina**, now deceased. The Plaintiff/Applicant herein **Teresia Njeri Mwangi** is legal representative of the Estate of the said **Stephen Mwangi Maina**, as per annexure TM1. The title deed herein in favour of **Stephen Mwangi Maina** was issued on 1<sup>st</sup> November 2003.

On her part, the Defendant herein, **Nancy Lydia Nyambura** had attached a share certificate from **Githunguri Constituency Ranching Company Ltd**, dated 25<sup>th</sup> July 2014, a Police Abstract for loss of Title Deed for Plot No. 789 allegedly reported on 10<sup>th</sup> March 2014, and various receipts in the name of **Gichuru Gathu** from Githunguri Constituency Ranching Company Ltd – some indicating **Plot No. 789** while others did not indicate they were in reference to which Plot. There is no doubt that both the Plaintiff and the Defendant are seeking ownership of the suit plot.

The applicant has alleged that the Defendant has interfered with the suit plot by forcefully ejecting her agent and also blocking the access route to the suit plot. She has thus approached the court for injunctive orders.

The court bears in mind that injunctive orders are equitable remedies which are granted at the discretion of the court. However, such discretion must be exercised judiciously. See the case of **Hasmukh Khetschi Shah vs. Tinga Tranders Ltd., Civil Appeal No. 326 of 2002 KLR 4 628** where the court held that:

**“It must be stated at the outset that the granting of the interim injunction is an exercise of judicial discretion”.**

Since the applicant has sought for injunctive relief, she must satisfy the well laid down principles for grant of such orders. These principles were set out in the case of **Giella vs Cassman Brown Co. Ltd. 1973 EA 358** and which have later been repeated in various judicial pronouncements. In the case of **Kibutiri vs. Kenya Shell, Nairobi High Court, Civil Case No. 3398 of 1980 (1981) LR 390**, the court held that:

***“The conditions for granting of a temporary injunction in East Africa are well known and these are; first an applicant must show prima facie case with probability of success; secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages; thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.***

The applicant therefore needs to establish that she has a prima facie case with probability of success. In **Mrao Ltd. vs. First American Bank of Kenya and 2 Others (2003) KLR 125**, the court described prima facie case as:

***“A prima facie case in civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the apposite party as to call for an explanation on rebuttal from the later”.***

The applicant herein has alleged that her husband was the registered owner of the suit land. She has attached Title Deed, **TM2** to her Affidavit in support. She is also the administrator of the Estate of her deceased husband as per annexure **TM1**. It was alleged that the Defendant has entered into the suit plot and even block access to it. The Defendant has on her part alleged that she owns the suit plot. She has attached a share certificate dated 25<sup>th</sup> July 2014.

The certificate of Title of **Stephen Mwangi Maina** was issued on 19<sup>th</sup> November 2003. No evidence that anyone has challenged the same. Though the Defendant attached a copy of police abstract to show that she reported loss of Title Deed **for Plot No. 789**, she did not attach a search certificate from the Ministry of Lands to confirm that there indeed exist a certificate of title in the name of the Defendant herein. The Plaintiff has attached a certificate of official search dated 5<sup>th</sup> November 2009 confirming that Plot No. **Ruiru West Block 1/789** is in the name of **Stephen Mwangi Maina** as the proprietor.

The certificate of title is a prima – facie evidence that the person named therein is the proprietor. The above position is supported by **Section 26 (1)** of the *Land registration Act* which reads as follows:

***“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima – facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except ....”.***

The Defendant has alleged that the Title Deed herein was obtained by the husband of the Plaintiff who was a Director of Githunguri Ranching Company Ltd through fraud. However, no evidence of fraud was tendered and the issue of fraud can only be determined after calling evidence and interrogating the said evidence through cross-examination in a full trial.

Again, the Defendant alleged that she bought the suit plot from **Gichuru Gathu**. However, the said **Gichuru Gathu** has not sworn an affidavit to support the Defendant’s allegations. The said issue of whether the suit plot was sold to Defendant by **Gichuru Gathu** can only be determined on a full trial where the Defendant will need to call the said **Gichuru Gathu** and officers from **Githunguri Ranching Constituency Company Ltd** to support her allegations.

For now, the court holds and finds that the suit plot is in the names of **Stephen Mwangi Maina** and the Plaintiff herein is the administratrix of the said Estate. The Defendant has entered into the said plot and thus interfered with the Plaintiff’s occupation and/or use of the said. The Plaintiff has established that she has a prima – facie with probability of success.

The applicant also needed to establish that she will suffer irreparable loss which cannot be compensated by on a ward of damages. It is evident that the Defendant has occupied the suit land and is building a perimeter wall using iron sheets. The Plaintiff cannot access her suit plot. If Defendant is allowed to continue occupying the suit land, she might put up a permanent structure and thus change the substratum of the suit land. The Plaintiff would therefore suffer loss which she many not be able to recover by way of damages.

On the balance of convenience, the Plaintiff herein is the one who has certificate of title for the suit plot. The Defendant only attached a share certificate which was issued in the year 2014. The balance of

convenience tilts in favour of the applicant herein.

The court having now considered the pleadings and the written submissions finds that the applicant's Notice of Motion dated **16<sup>th</sup> June 2014**, is merited and the same is allowed in terms of prayers No. 2 and 3 of the said Notice of Motion.

However, the applicant is directed to set down the main suit for hearing within a period of 12 months from date hereof. Failure of which the orders issued herein will automatically lapse unless specifically extended by the Court.

It is so ordered.

**Dated, Signed and delivered this 27<sup>th</sup> day of February 2015.**

**L. GACHERU**

**JUDGE**

In the presence of Mr Kibet holding brief for Njega for Defendant/Respondent

Mr Kundere holding brief for Njonjo for Plaintiff/Applicant

Court Clerk: Lerionka

Court:

Ruling Read in open Court in the presence of the above Counsels.

**L. GACHERU**

**JUDGE**