



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 1117 OF 2014**

**COMP WEST LIMITED..... PLAINTIFF**

**-VERSUS-**

**FRANCIS KATEI RAPAINÉ.....1<sup>ST</sup> DEFENDANT**

**BENJAMIN KUPURE RAPAINÉ.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. There is before me an application for a negative injunction to issue against the Defendants and restrain them from interfering with the Plaintiffs right of use and occupation of the Land comprised in title Nos. Kajiado/Kitengela/6971, Kajiado/Kitengela/8998 and Kajiado/Kitengela/8697. In support of the said application is an affidavit sworn by Pravin Kakad. The gist of the affidavit is that the Defendants have continued to trespass onto the Plaintiffs property detailed in the plaint. The Plaintiff has further asked the Defendants to refrain from their acts of trespass to no avail.
2. In response to the application and the suit generally the Defendants filed a joint statement of defence stating that though the suit property is owned by the Plaintiff, the titles to the suit property may have been obtained fraudulently. The replying affidavit in slightly more detail states that the Plaintiff never acquired the suit property cleanly but rather through fraud. The Defendants further state that they are in possession and ask that the status quo be maintained until the property acquisition is investigated in depth. The basis of the alleged fraud is the total acreage of the suit property.
3. The parties did file their written submissions which I have perused carefully. I have also perused the pleadings filed in the case. These include the amended statement of defence and counterclaim filed on 12<sup>th</sup> November, 2014 as well as the amended reply to defence and defence to counterclaim filed on 24<sup>th</sup> November, 2014.
4. Two simple questions need be answered at this stage. Has the plaintiff established a prima facie case with any chances of success? Secondly, in the absence of an injunction is the Plaintiff likely to suffer irreparably? If I am in doubt as to the answers to the two questions then I must balance

the inconvenience likely to be caused by the granting denying the of an injunction: see **Giella –v- Cassman Brown & Co Ltd [1973] EA 358**.

5. There is certainly no controversy that the Plaintiff is currently the registered proprietor of the suit property. The three parcels are subdivisions eked off the original parcel No. Kajiado/Kitengela/6227, which was purchased by the Plaintiff's predecessor in title Genetic Technologies Ltd in 1997 for the sum of Kshs. 7,700,000/=. Controversy emerges when the Defendants allege and contend that the resultant subdivision of title number 8697 and 8698 were fraudulently obtained. Nothing though is said by the Defendants of the third title No. Kajiado/Kitengela/6971. The fraud is inferred by the Defendants in that the paramount title measured approximately 80.93 hectares but after subdivision of the same the aggregate acreage of the sub plots is 102.84 hectares or thereabouts.
6. I have considered the rival submissions. There is no doubt that there is a genuine question raised by the Defendants on the aggregate acreage now owned by the Plaintiff. Ultimately the same may call for rectification of the title or re-parcellation of the entire area. However, the Defendants have not shown that the additional acreage, if at all, was also hived off the Defendants property. This would only have happened if the neighboring parcels of land were owned by the Defendants. That has not been shown to be so to enable an inference that in the process of subdividing title No. 6227, the Plaintiff also hived off portions from the Defendant's property. I also hasten to add that the difference in acreage is huge. By any standards a total of 21 hectares or thereabout is colossal and should not have been missed by either the Land Registrar or the Land Surveyor who handled the subdivision process.
7. The acreage discrepancy aside, I hold the view that the Plaintiff has established a prima facie case with chances of success. The Plaintiff has shown that she is the registered proprietor of the suit property. The Plaintiff claims in trespass and at this stage all the Plaintiff need establish in that the Plaintiff has constructive or actual possession of the suit property. The Plaintiff has complained that the Defendants have intermittently continued to trespass into the Plaintiff's property. This fact has not been denied by the Defendants who even asked the court to take judicial notice be taken of the fact that the Defendants are "masaais whose economic activity is actually cattle grazing" and includes movement.
8. Trespass is the unjustified intrusion by one party into another person's land. It is actionable per se once intrusion is shown: see **Ellis –v- Loftus Iron company 1874-80] All ER 232**. In the instant case the intrusion has been alleged shown and admitted. Such intrusion was not justified and neither was such intrusion authorized. At this stage of the proceedings, I require no further evidence to show that a prima facie case has been established.
9. Is the Plaintiff likely to suffer beyond compensation if the Defendants are not restrained from further trespassing into the Plaintiffs suit property? I would answer the question by first acknowledging that trespass is a tort actionable in damages. Where the trespass however is persistent then it must be stopped by way of an injunction. Besides it would certainly be wrong for a person committing a wrongful act to ask the court to sanction his doing so by purchasing his adversary's rights through assessment of damages in that behalf. Damages in my view should only be remitted where the urgency to the Plaintiff's legal rights is small and also where the case is one in which it would be oppressive to the Defendant to grant an injunction. That was my view in the recent decision in **Mahesh Shah –v- Chief Land Registrar & Another Nbi ELC 1248 of 2014**. I still hold the same view. Damages may be awarded but in my view too where a party acts in total disregard of another's rights then that cavalier like approach may only be curtailed through an injunction.
10. In the instant case the Defendants appear contented with their own act so trespass which they ask the court to condone. Trespass is an illegality and once proven or shown the court should endeavor to bring the same to an end. The Defendants admit THAT the plaintiff is the registered owner. Effectively and automatically the Plaintiff is entitled to possession. The Plaintiff has not

granted any permission to the Defendants to enter into the suit property. I would agree with the Plaintiffs that the Defendants act of trespass ought to be brought to an end. That can only be done by the court through an injunction.

11. In the result I have no doubt that the Plaintiff is deserving of the prayers sought. I allow the application dated 30<sup>th</sup> April, 2014 in terms of prayer Nos. 2 and 3 thereof. The costs of the application also awarded to the Plaintiff.

12. Orders accordingly.

**Dated, signed and delivered at Nairobi this 5<sup>th</sup> day of March, 2015.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

Mrs. Mbaabu h/b for Nyawara for the Plaintiff/Applicant

Mr. Njuguna h/b for Wambugu for the Defendants/Respondent