



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 789 OF 2014**

JACINTA NDUKU MUNYAMBU ..... 1<sup>ST</sup> PLAINTIFF

VERSUS

SILVESTER MACHARIA KAMERE ..... DEFENDANT

**RULING**

The plaintiff by a Notice of Motion dated 6<sup>th</sup> June 2014 and filed in court on 18<sup>th</sup> June 2014 seeks an injunction to restrain the Defendant from trespassing, encroaching, constructing on or in any manner interfering with the plaintiff's quiet possession of **plot NO. 171** within **Omega Extension project** in Nairobi pending the hearing and determination of this suit.

The application is supported on the grounds set out on the body of the application and on the annexed affidavit of the plaintiff, **Jacinta Nduku Munyambu** sworn on 16<sup>th</sup> June 2014. The plaintiff states that she is the registered owner of **plot NO. 171** in **Omega Extension Scheme** having been allocated the same in the **Omega Extension project** in the **Saika area** of Nairobi. The plaintiff avers that the Defendant was allocated plot number 167 and annexes the members list showing the allocated plots against their names marked "**JM2**". The plaintiff further avers that she has been in her plot since 2001 and that the City Council of Nairobi formalized the ownership of the plots by membership certificate cards and in her case she was issued with membership card serial **NO. 7545** in respect of **plot NO. 171** annexed and marked **JM4**.

The plaintiff alleges that in May 2014 the Defendant whose **plot NO. 167** is far removed from hers deposited building materials in her **plot NO. 171** and started constructing on the plot and even after demands that he ceases construction, the Defendant failed to oblige and there now stands a semi permanent structure on **plot No. 171** built by the Defendant as per the copy of photograph annexed and marked "**JM5**". The plaintiff states efforts to get the Defendant to stop construction on the plot through the area chief failed to yield results.

The Defendant filed a replying affidavit sworn on 29<sup>th</sup> September 2014 in opposition to the plaintiff's application. The Defendant admits he is a member **NO. 167 Omega Extension project**. The Defendant states that **plot NO. 167 Omega Extension project** was allocated to him while **plot NO. 171 Omega Extension project** was allocated to one **Betty Nyaguthi**. The Defendant however states that during the process of plot formalization the officials who came on the ground showed him **plot NO. 171** as his plot and gave him authority to go ahead and develop. The Defendant states that after two years after he had

been shown the plot, **Betty Nyaguthi** came back staking claim to plot No. 171 after the Defendant had constructed a permanent building on it. The Defendant states that when the matter respecting **plot NOs. 167 and 171** was reported to the officials of the project, the officials acknowledged the error and requested that we agree so that **Betty Nyaguthi** takes **plot NO. 167** and I (the defendant keep **plot 171** which I had already developed. The Defendant avers that the dispute relating to the two plots was referred to the **Chief Njiru location** and the parties were summoned to attend before the chief on 30<sup>th</sup> May 2014 but **Betty Nyaguthi** did not attend but the plaintiff and the officials of **Omega Extension project** attended. The Defendant states that at the meeting the resolution was that the two plots be swapped so that **Betty Nyaguthi** takes over ownership of **plot 167** and the Defendant continues with the development of **plot NO. 171**. A report made by the chief on the resolution of the dispute is annexed and marked "SMKII". The officials of **Omega Extension project** on 1<sup>st</sup> July 2014 wrote to the City County Housing Department confirming both **Betty Nyaguthi** and the Defendant were their members and recommending a swap of the plots allocated to them as the Defendant was in advertently shown the plot that was initially allocated to **Betty Nyaguthi** and he had developed the same.

The plaintiff swore a supplementary affidavit in response to the Defendant replying affidavit stating that he is the one who had a dispute with the Defendant since he had purchased the plot from the said **Betty Nyaguthi**. The Defendant was shown the wrong plot and avers the Defendant only entered **plot NO. 171** in May/June 2014 when he started the construction of the structure thereon and denies that the Defendant has been in the plot for the last 2 years as alleged.

The parties filed written submissions where they reiterated the facts as set out in their respective affidavits. The facts that are not in dispute are that the **Betty Nyaguthi** who sold her plot to the plaintiff and the Defendant were members of Omega Extension project which had acquired property within the **Saika** area of Nairobi and had allocated its members plots. The said **Betty Nyaguthi** as per the members register was allocated plot **NO. 171** while the Defendant was allocated **plot NO. 167**. That is the point where the agreement ends. The plaintiff purchased the plot from **Betty Nyaguthi** but she apparently did not take occupation and/or possession. For his part the Defendant states that when he wanted to take possession and occupation of his **plot NO. 167** for purposes of development he was shown what turned out to be **plot NO. 171** by the officials of **Omega Extension Project** and that he commenced and has constructed a permanent house on the plot. The plaintiff admits the Defendant has constructed a semi permanent structure on **plot NO. 171** but states that it is incomplete and that the construction was rushed during May/June 2014 precipitating the instant suit.

From the facts and material presented by the parties it is not in dispute that both plots **NOS. 171 and 167** do exist and the issue is whether the plaintiff and the Defendant should swap the plots as recommended by the Chief and the officials of the Omega Extension project which the plaintiff objects to. The Defendant alleges he was given the go ahead by the officials to continue with the development in **plot NO. 171** since it was an error on their part to point out to him the wrong plot and at any rate were of the view that the plaintiff could take the other **plot NO. 167** which was available.

Without hearing and interrogating the parties during the hearing of the case it is difficult to determine whether the Defendant's act of entering into **plot NO. 171** and constructing a house thereon was deliberate or as a result of a genuine error/mistake. If it was a genuine error/mistake on the part of the officials who were in charge of the allocations, it would be unfair and/or unjust to penalize the Defendant yet he was not the person who was responsible for the inadvertent error or mistake.

The Defendant has confirmed his willingness to yield **plot NO. 167** to be taken up by the plaintiff. There is no suggestion and/or evidence that **plot NO. 167** differs materially and/or substantially from **plot no. 171**. Looking at the membership list there is no indication that any plot was different from the other. Infact the plots are numbered sequentially from 1-223 alongside the names of the members.

In the circumstances of this case I am unable to hold that the plaintiff has demonstrated she has a prima facie case to entitle her to an order of temporary injunction. The plaintiff in my view has not satisfied the conditions upon which an injunction may be granted as established in the case of **Giella –vs- Cassman Brown & co. Ltd (1973) EA 358**. The Notice of Motion application dated 16<sup>th</sup> June 2014 is devoid of

merit and I order the same dismissed. However considering the attendant circumstances whereby it is the Omega Extension Project officials who may have been the cause of the confusion that may have led to the entry by the Defendant in the wrong plot I direct that each party meets their own costs for the application.

Orders accordingly.

Ruling dated, signed and delivered this.....**15<sup>th</sup>**.....day of.....**May**.....2015.

**J. M. MUTUNGI**

**JUDGE**

**In the Presence of:**

..... For the Plaintiff

..... For the Defendant