



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**ENVIRONMENT & LAND CASE NO. 142 OF 2014**

**BAKARI WANGATIA OLUOCH ..... PLAINTIFF/APPLICANT**

**VERSUS**

**1. CASSIM WANGATIS OMUSEBE**

**2. KENYA COMMERCIAL BANK LTD..... DEFENDANTS RESPONDENTS**

**R U L I N G**

1. **BAKARI WANGATIA OLUOCH** (the applicant) filed a Notice of Motion dated 8/5/2014 against **CASIM WANGATIA OMUSEBE and KENYA COMMERCIAL BANK LTD.** (the respondents) seeking the following main orders;
- b. THAT status quo be maintained in respect of the applicant's occupation of land parcel No. E/WANGA/LUBINU/785 pending the hearing and determination of this suit.
- c. THAT a temporary injunction be issued against the respondents, their agents, servants or employees restraining them jointly and severally from entering, selling, building further, charging or interfering with the applicant's peaceful occupation of parcel of land No. E/WANGA/LUBINU/785 pending the hearing and determination of this application inter-partes.
2. The applicant has also prayed for costs of the application. Prayer (c) of the application was granted at exparte stage which means the prayer for consideration now is prayer (b) of the application, that is, maintenance of status quo pending the hearing and determination of the suit.
3. The application is supported by grounds on the face of the motion and an affidavit sworn by the applicant on the same day. The applicant at the same time and or the same day filed a Plaint in which he sought some declaration that registration of the suit land in the 1<sup>st</sup> respondent's name was and is on customary trust, orders that the applicant be registered as the owner of the suit land and that the 1<sup>st</sup> respondent be ordered to transfer the suit land into the applicant's name among other reliefs.
4. In the affidavit in support of the motion, the applicant has deposed that the suit land was a traditional shrine but according to what the applicant calls clan culture, the land was to be held by the eldest son and in this case his father who was older than the 1<sup>st</sup> respondent's father.
5. The applicant further deposed that he has lived on the suit land since 1960 without any interruption until 2010 when he received a letter written on behalf of the 1<sup>st</sup> respondent asking him to vacate the land. On conducting a search, the applicant further says, he discovered that the land had been registered in the 1<sup>st</sup> respondent's father's name and thereafter into the 1<sup>st</sup> respondent's

name through transmission but who has never lived on the land.

6. The applicant also deposed that the 1<sup>st</sup> respondent's father took advantage of his father's mental illness and got himself registered as proprietor of the suit land in a fraudulent manner; and upon taking the land through transmission, he charged the land to secure a loan from the 2<sup>nd</sup> respondent. The applicant deposes that the 1<sup>st</sup> respondent has defaulted in loan repayment and the 2<sup>nd</sup> respondent has now threatened to sell the land to recover its money.

7. The applicant fears that if the intended auction is allowed to go on and the suit land sold, he will suffer irreparable loss as he will be deprived of his claim by way of adverse possession

8. The 1<sup>st</sup> respondent filed a replying affidavit to the applicant's motion and termed the application unmerited and that it was full of falsehoods and half truths. The 1<sup>st</sup> respondent deposed that the applicant was not residing on the land and that the applicant's father had his own parcel of land NO. E/WANGA/LUBINU/791 on which the applicant resides. He attached a copy of an extract of the register which showed that parcel No. E/WANGA/LUBINU/791 was indeed registered in the name of OLUOCH OMUSEBE the applicant's father on 17/5/1960.

9. The 1<sup>st</sup> respondent also denied that the suit land was ancestral land or that the applicant's father's remains were interred on the suit land. He held the view that this application and the suit are *res-judicata*, since the same issue had been raised in an application filed by the applicant in Succession Cause No. 7 of 2008 seeking similar or more or less the same orders which was however dismissed.

10. The 2<sup>nd</sup> respondent on its part filed a replying affidavit through its Credit Administration Officer, TONY MAENDE WAFULA stating that it granted the 1<sup>st</sup> respondent a financial facility of Kshs.300,000/= which the 1<sup>st</sup> respondent defaulted in repaying. According to the 2<sup>nd</sup> respondent, it issued requisite statutory notices to the 1<sup>st</sup> respondent and as the loan facility remains unpaid, the 2<sup>nd</sup> respondent was right in exercising its statutory power of sale over the security.

11. Just like the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent has also stated that the present application is *res-judicata* a similar application having been dismissed on 31/7/2012. It asked that the application be dismissed with costs.

12. The applicant filed a further affidavit stating that he was in peaceful occupation of the suit land and that as confirmation of his occupation, a notification of sale had been served on him by the agents of the 2<sup>nd</sup> respondent, Diamond Auctioneers. The applicant admitted at paragraph 4 of his further affidavit that he had sought orders restraining the 2<sup>nd</sup> respondent from auctioning the suit land through Succession Cause No. 7 of 2008 but said that he had other prayers he was now seeking in his present suit and therefore denied that the present application was *res-judicata*.

13. Parties agreed to put in written submissions which are on record. The applicant maintained his position as contained in the supporting and further affidavits that he has acquired prescriptive rights over the suit land due to what he says is prolonged and un interrupted possession over the suit land. He submitted that he has an equitable right over the property and as the first son in the household of **Oluoch Omusebe**, he is entitled to the suit land under customary law of Wanga Sub-tribe. He denied that the application was *res-judicata* and submitted that he has established a case for grant of the orders sought.

14. On behalf of the 1<sup>st</sup> respondent, it was submitted that the 1<sup>st</sup> respondent is the registered owner of the suit land and he was right in offering the land as security for the loan. It was submitted that when the 2<sup>nd</sup> respondent advertised the property for sale, the applicant filed an application in the Succession Cause which was dismissed thus rendering the present application *res-judicata*.

According to the 1<sup>st</sup> respondent, the applicant has never resided on the suit land but resides on his father's land parcel No. E/WANGA/LUBINU/791. They maintained that the applicant has not made a case for grant of the orders sought.

15. For the 2<sup>nd</sup> respondent, it has been submitted that the applicant has not shown that he has a prima facie case with a probability of success in light of the facts that emerge from the case. The applicant, according to the 2<sup>nd</sup> respondent, has not demonstrated that he is the rightful owner of the land only claiming that he has an equitable interest which was ably considered and dismissed by *Chitembwe, J.* Counsel cited various authorities to support his client's case and submitted that the applicant cannot rely on adverse possession to advance his application for injunction when there is no evidence to prove adverse possession or trust.

16. It was further submitted that the applicant has not demonstrated that he will suffer irreparable loss if the application was not granted since it had been found by *Chitembwe, J.* that the applicant's father had his own parcel of land No. E/Wanga/Lubinu/791. The balance of convenience, it has also been submitted, does not favour the applicant.

17. Finally, just like the 1<sup>st</sup> respondent, it has been submitted on behalf of the 2<sup>nd</sup> respondent that the application is *res-judicata* since a similar application was dismissed after it had been fully considered. The application therefore fell within Section 7 of the Civil Procedure Act. On this, counsel again cited several authorities to buttress his argument.

18. Mr. Mukele, counsel for the 2<sup>nd</sup> respondent, added a few oral remarks saying that the claim that the suit land was a shine if it were to succeed, would change the land laws of this county because the land was registered in the name of a proprietor and not a clan. Those sentiments were made in the previous application but rejected and the matter is therefore before this court in a disguised appeal. He prayed that the application be dismissed.

19. I have considered this application, the affidavits in support, those in opposition, submissions by counsel and authorities cited. As this is an application under Order 40 rules 1, 2 and 3 for an injunction, my duty at this stage is to decide whether or not the applicant has made a case for grant of the injunction sought.

20. It is clear and it has been appreciated by all parties, that for the applicant to succeed, he must show that he has a prima facie case with a probability of success, that he will suffer irreparable harm that cannot be compensated by an award of damages if the injunction is not granted and finally that if in doubt, the court should consider the balance of convenience and grant the injunction if the balance tilts in his favour – see *Giella –vs- Cassman Brown Ltd. [1973] EA 358.*

21. On the first principle, that of prima facie case, the applicant is not the owner of the suit land. He has brought this suit and application staking his claim as he did, on the speculative relief of adverse possession. The applicant alleges that the suit land is a clan land also called “a shrine” which he has acquired by virtue of prolonged occupation and possession. The applicant is yet to prove in any court that he indeed has acquired title by prescription and that the land the subject of this suit belongs to him. Even if he were to succeed, his claim cannot supersede the 2<sup>nd</sup> respondent's right that has crystallised through a legal charge over the property given by a registered owner to secure a financial facility.

22. The applicant has not in any way challenged the legality of the charge or the process employed by the 2<sup>nd</sup> respondent in realizing the security. At this point, it is also clear that the registered owner of the land does not oppose the intended auction. He seems to have given up and resigned into losing the land. I am unable to accept the applicant's contention that he has made out a prima facie case with a probability of success.

23. The applicant has also not shown that he will suffer loss at all or that cannot be compensated by

an award of damages. If indeed the suit land is a shrine, and there is no evidence for that at least at this stage, the so called sub-tribe has an opportunity to purchase the land (“shrine”) through a private treaty or even during the auction if that is the loss that cannot be compensated by damages. No member of the clan/sub-tribe has come out to support the applicant that this is a shrine, and whatever has been said by the applicant remains his own word.

24. But why would a shrine be registered into an individual’s name? My understanding of a shrine is that it is a place of cultural prayers or worship which should have been a communal land and not a private land. The applicant is not pursuing a communal interest but a private enterprise with a hope of benefiting personally while purporting to stand for a sub-tribe. The applicant once again has not shown that he will suffer irreparable loss that cannot be compensated by an award of damages. The value of that land can be determined and compensated if he were to succeed.

25. It is not enough for an applicant to allege that he has a prima facie case with a probability of success or that he will suffer irreparable loss. He must clearly show that that would be the case if the injunction was refused. In the case of *Nsubuga and Another –vs- Mutawe [1974] EA 487* Mustafa JA. had the following to say at page 491;

***“As regards the conditions for the grant of Interlocutory Injunction, I think they are now well settled in East Africa. I would refer to a decision of this court, *Giella –vs- Cassman Brown Ltd. [1973] EA 358....* Briefly, two of the main ones are (i) the applicant must show that he has a probability of success and (2) that unless the injunction is granted the applicant would suffer irreparable damage which would not be adequately compensated for by an award of damages. As regards the first point, that of probability of success, the plaintiff had not on the evidence adduced, shown how he could succeed let alone probably succeed...”***

26. I will be guided by the words of Mustafa, JA. and hold that the applicant before me has not adduced evidence to show how he will probably succeed given that he is basing his claim on adverse Possession, a tall order given the allegations of fraud and the fact that he is yet to show that the 1<sup>st</sup> respondent has been dispossessed or has discontinued his possession over the suit property – see *Wambungu –vs- Njuguna [1983] KLR 172*. The applicant has not shown that he will succeed let alone probably succeed to dislodge the 1<sup>st</sup> respondent’s registration as the owner of the suit land.

27. The 1<sup>st</sup> respondent is the registered owner of the suit land and by virtue of Section 28 of the Registered Land Act (Cap.300 – now repealed), he is entitled to hold that right of registration together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever. Those rights are only subject to claims recognised under the Act such as leases, charges and other encumbrances or such other claims that may appear on the register.

28. The privileges the 1<sup>st</sup> respondent is allowed to enjoy include offering the property for security as he did in this case and the applicant cannot legally argue that the 1<sup>st</sup> respondent was wrong in charging the property when he was exercising his right as the registered proprietor. This fortifies my holding that the applicant should not allege but demonstrate through evidence that he will probably succeed at the end of the day, but I am afraid, he has not succeeded in doing so.

29. Regarding the balance of convenience, the applicant says that he resides on the suit land while the 1<sup>st</sup> respondent maintains that he does not. The 1<sup>st</sup> respondent has stated that the applicant’s father had his own land on which the applicant resides being parcel No. E/Wanga/Lubinu/791 but the applicant has not denied this. The balance of convenience would appear to tilt in favour of the 2<sup>nd</sup> respondent as the lender of the money given that the owner of the land does not oppose the realization of the security. The applicant has his own land on which he either resides or can move to.

30. One other point I must mention here is that whereas the charge over the suit property was

created during the retired Registered Land Act (Cap 300), the process for realization of that security is being undertaken during the current Land Law regime and the applicant seems to concede that Notification of sale was served on him by the Auctioneers in compliance with Section 96 (3) (i) of the Land Act (No. 6) of 2012 which provides as follows;

**96 (3) (i) “A copy of the Notice to sell served in accordance with sub-section (2) shall be served on –**

- a. ....
- b. ....
- c. ....
- d. ....
- e. ....
- f. ....
- g. ....
- h. ....
- i. **Any other person known to have a right to enter on and use the land or the natural resources in, on or under the charged land by affixing the notice on the property...”**

31. This may also appear to be an answer to the applicant’s claim that he occupies the land and has acquired a right through possession. Such a claim cannot stop a chargee from exercising its statutory power of sale. The 2<sup>nd</sup> respondent having observed the law regarding those who may be on the land or use natural resources on the land, cannot be faulted and for that reason too, the applicant’s application is not merited.

32. Finally, the respondents have submitted that the application is **res-judicata** as a similar one had been heard and determined by this court, (Chitembwe, J.) in succession Cause No. 7 of 2008. Ironically, the applicant has admitted this fact stating that indeed he had filed an application for injunction only saying that the current application and suit has more prayers. I have also seen the ruling by Chitembwe, J. and clearly, the parties in that application are the same parties before me and the prayers sought in that application were among others, an order restraining the 2<sup>nd</sup> respondent herein from auctioning parcel No. E/Wanga/Lubinu/785 the subject matter in this suit and application. The prayer for injunction in that application was dismissed on 31/7/2012.

33. That being the case, however much the applicant may try to remodel his current application, it is clearly within the scope of **Section 7** of the Civil Procedure Act and therefore **re-judicata**. I agree with the holding by Majanja, J. in ***ET –vs- AG & Another [2012] KLR*** when he says;

**“Courts must always be vigilant to guard litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction.”**

34. The words of Justice Majanja aptly apply to this case and I can only add that the applicant before me wants the same relief he lost before **Chitembwe, J.** but now clothed as a land matter before a different court, but of concurrent jurisdiction.

35. Even if the applicant had succeeded in establishing that he had a prima facie case with a probability of success and that he would suffer irreparable loss that could not be compensated by an award of damages and was therefore entitled to an order of injunction, he would still have lost on the ground of **res-judicata**.

36. For the above reasons, the application dated 8/5/2014 is declined and is dismissed with costs. If any orders of injunction are in force, they stand discharged.

*Dated and delivered at Kakamega this 25<sup>th</sup> day of March, 2015*

**E. C. MWITA**

**JUDGE**