



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**ENVIRONMENT AND LAND CASE NO. 326 OF 2013**

**GEDION MUSAKALI MUYITU. .... PLAINTIFF/APPLICANT**

**VERSUS**

**STANLEY WEKESA**

**EVANS WAMALWA ..... DEFENDANTS/RESPONDENTS**

**RULING**

1. In an application dated 28<sup>th</sup> November 2013 and filed in court on the same date, the applicant moved the court under certificate of urgency and obtained temporary orders of injunction that restrained the respondents from ploughing, leasing, planting or entering land parcel No Bokoli/Chwele/73 pending the hearing of the application inter partes. The issue for determination now is whether the orders earlier issued can be confirmed pending the hearing of the main suit.

2. The application is supported by the grounds listed on the face of it and on the affidavit sworn by Gideon Musakali Muyitu – the applicant. The applicant avers he is the registered owner of L.R. Bokoli/Chwele/73 (herein-after referred to as the “suit land”) which he obtained after confirmation of certificate of grant. That he had given the 2<sup>nd</sup> respondent permission to take care of the suitland. Instead the 2<sup>nd</sup> respondent sold the land to 3<sup>rd</sup> parties, 1<sup>st</sup> respondent being one of them. He deposes that he will suffer irreparable loss unless the actions of the defendants are checked.

3. The respondents are contesting the motion. Both of them have sworn replying affidavits in response to the issues brought out in the application. The 1<sup>st</sup> respondent deposes that while he was working as the assistant chief, he knew the 2<sup>nd</sup> defendant and his siblings lived on this land. He is also aware the applicant and 1<sup>st</sup> defendant are cousins. In September 2009, he purchased a portion of the suitland from the 2<sup>nd</sup> respondent and he annexed copies of the sale agreement marked as **SW1** and annexed to his replying affidavit. He immediately took possession and fenced the sold portion and planted crops. On 22<sup>nd</sup> October 2013, a Mr. Wilberforce Wanjala trespassed on this land and damaged his crops. The 1<sup>st</sup> respondent denied demolishing any structures on the plot belonging to the Plaintiff.

4. The 2<sup>nd</sup> respondent said he is a cousin to the applicant. He deposes that the applicant's father got registered as owner of the suitland in trust for their family. According to him, the suitland was given to his father while the applicant's share was in L.R. Bokoli/Chwele/7. The applicant acted in bad faith in failing to disclose the interests of the 2<sup>nd</sup> respondent and his family in the suitland. He added that they have lived on this land which has been physically demarcated on the ground amongst them. He also admitted selling part of this land to the 1<sup>st</sup> respondent. He concluded by deposing that the applicant has come to court with dirty hands. The advocates thereafter filed written submissions to the application and supported the same with case law. I take note that some of the issues raised in the applicants submissions should be dealt with during the hearing of the main suit; especially items (i), (ii) & (iii) hence I will not deal with them at this interim stage. I will only consider limbs (iv), (v) and (vi) of the applicant's submissions.

5. The respondents have admitted in their pleadings and submission that currently the applicant is the registered proprietor of the suit title. The applicant avers he has a prima facie case by virtue of holding title to the suitland. The respondents contend otherwise and rely on the provisions of Sec. 28 (b)

of the Land Registration Act as regards customary trusts. This may be true but trust is a subject that can only be proved by adducing evidence. In the interim stage, the applicant enjoys the protection given by Sec. 25 of the same Act until the suit will have been heard and determined. The submission by respondent in quoting section 26 of the Land Registration Act is also premature at this stage. Allegation of fraud must be established by evidence and not merely affidavit evidence. The twin issues of trust and fraud brought forth by the respondents are issues which can only be determined if the suit is heard and not matters to be dealt with at application stage.

6. On the principle of irreparable loss, the applicant alleges the defendants demolishing or putting up any structures on the suitland will cause him irreparable loss. The respondents contend loss of maximum utilization of the land would lie if all the family in occupation members were sued. In paragraph 6 of the applicant's affidavit he deposes, ***"That in the meantime I did call my cousin Evans Wamalwa Keyari to manage for me the land by planting crops."*** In my interpretation of this statement, it means the 2<sup>nd</sup> respondent was granted "occupation rights". What the applicant was not happy with is the demolition of the structure and sale to the 1<sup>st</sup> Respondent. This is also brought out in paragraph 8 of the supplementary affidavit which states, ***"That the children of the late Patrick Keyani were occupying the said land at my pleasure hence their selling was contrary to the law since I was the title holder and the 2<sup>nd</sup> respondent had no authority to sell."***

It appears to me from the pleadings that the applicant has not been occupying the entire suitland. Since he allowed his cousins to occupy the land, the loss to be suffered would be 50:50.

7. On the last principle of balance of convenience, the applicant submits it tilts in his favour as he is in occupation. The 2<sup>nd</sup> respondent states they have been in occupation for a long time and granting the orders sought amount to eviction through the back door. On the issue of occupation as indicated in paragraph 7 above, I find both parties as being dishonest to this court. In paragraph 21 of the 2<sup>nd</sup> respondents replying affidavit he deposes, ***"That I have used the proceeds of the sale to purchase land elsewhere."*** The 1<sup>st</sup> respondent also deposed in paragraph 10 of his affidavit that, ***"Immediately upon purchase, I took possession of the land, fenced it and planted thereon various crops including coffee trees."*** It is to be inferred from this scenario that the 2<sup>nd</sup> respondent sold his share of the land to the 1<sup>st</sup> respondent then he moved out. In the respondents submitting the status quo is maintained is putting the 1<sup>st</sup> respondent into possession when the sale to him is the subject matter in this suit. Had the 2<sup>nd</sup> respondent not deposed he moved out, the balance of convenience would tilt in his favour. However this is not the case and therefore granting the orders if at all do not amount to an eviction as submitted by the applicant.

8. In conclusion, therefore I find the application meets the threshold for granting an injunction. I find the Applicant has made out a prima facie case and the balance of convenience tilts in his favour. In the result, the application is allowed but that the orders to apply strictly to the portion of the suitland initially occupied by the 2<sup>nd</sup> respondent and subsequently sold to the 1<sup>st</sup> respondent pending hearing and determination of this suit. The costs of this application to await the outcome of the main suit.

**Dated, Signed and Delivered at Bungoma this 26<sup>th</sup> of June 2014**

**A. OMOLLO**

**JUDGE.**