



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CIVIL SUIT NO: 56 OF 2013**

**STELLA NAMAKHULI KOMBO.....PLAINTIFF**

**AND**

**JACKSON MAMBO .....DEFENDANT**

**RULING**

The plaintiff filed this suit and contemporaneously filed her application dated 19/2/2013 seeking an order of injunction restraining the defendant from occupying, entering or dealing with Plot Number **ISUKHA/LUBAO/2725** pending the determination of this suit. The application is supported by her affidavit sworn on 19/2/2013 when the application was filed the court granted interim orders on 13/3/2013.

The defendant filed his notice of motion dated 17/4/2013 seeking an order of injunction to restrain the plaintiff from dealing with plot number **ISUKHA/LUBAO/2725** pending the hearing and determination of this suit. The application is supported by the defendant's affidavit sworn on 17/4/2013. The court also granted interim orders on 17/4/2013.

The court visited the suit land on 9/12/2013 at the instance of the parties. On 20/3/2014 the court gave direction and allowed the defendant to utilize 0.5 acre portion of the suit land. The court noted that the plaintiff's business premises namely a school is a bit far from the portion that was to be utilized by the defendant. This action prompted the plaintiff to file the application dated 27/3/2014 seeking to have that direction reviewed. The application is supported by her affidavit sworn on 27/3/2014 and a supplementary affidavit sworn on 2/4/2014. The defendant filed a replying affidavit sworn on 3/4/2014. All the three applications were argued together.

The plaintiff's case is that she is the registered proprietor of the suit land having bought it for Ksh six million. It is her case that the land belonged to the same family and the family members sold the entire land and moved out. The land had undergone a succession process whereby the grant was confirmed, vide succession cause number 207 of 1989 before the Kakamega High court. The plaintiff contends that the defendant's father, the late **STEPHEN SHANYISA** was a beneficiary of 0.35 Hectares out of the original plot number **ISUKHA/LUBAO/476** that was the subject of the succession cause.

It is the plaintiff's case that when she was buying the land, the defendant's mother **BETSY MBONE JUMBA**, represented the interest of **STEPHEN SHANYISA** and she duly signed the Sale Agreement. After completing the sale transaction she sellers including the defendant and his mother demolished their houses and moved out to Moi's Bridge where they bought bigger parcels of land. The plaintiff contends that the defendant had land at Moi's bridge and is therefore not landless. Although the sale Agreement was for 2.5 Hectares, the land on the ground was found to be 2.37 Hectares. The order allowing the defendant to utilize 0.5 acres of the suit land is inconveniencing her as she is running a school and there is

only one gate leading to the suit land.

On his part the defendant maintains that the sale of the suit land to the plaintiff was done secretly, illegally and fraudulently it is his position that his late father, STEPHEN SHANYISA, was entitled to 0.35 Hectares of the suit land. His grandfather, JACKSON MAMBO, his namesake was the registered owner of the original plot number **ISUKHA/LUBAO/476**. The land was subject to succession. It is his position that it is the other beneficiaries who sold their respective portions and migrated elsewhere. The land was sold by his uncle **MOSES MMBWANGA MAMBO** who had no proper title to transfer to the plaintiff. The defendant avers that his mother did not sign the sale agreement and was only informed that she was signing a document to facilitate the processing of her title. Mr. Osango, Counsel for the defendant maintains that the original title deed was 3.2 Hectares while the plaintiff's title is only 2.37 Hectares. This shows that the portions claimed by the defendant was not sold to the plaintiff. The defendant is landless and has no where to go.

The main issue for determination is who among the two parties should be restrained from utilizing the suit property pending the determination of the suit. The plaintiff's claim is based on a sale transaction that was duly executed before an advocate. I have noted that the original plot number 476 was to be inherited by several beneficiaries plot 476 was 3.2 Hectares. The title was closed on 29/10/2009 upon sub-division into plot number 2694 and 2695. The suit land emanated from plot number 2694. Since the original land was sub-divided and two titles created, it cannot be established with certainty at this stage that there is excess land that is not contained in the plaintiff's title. There is no document that has been annexed to show the original acreage of plot number 2694 and 2695. It is also clear that the plaintiff's title is a sub-division of plot number 2694. Thus the contention that the plaintiff's title may not include the portion meant for the defendant's family is not proved at this interlocutory stage.

According to the plaintiff, the defendant's mother signed the sale agreement. She was paid and used the money to buy land at Moi's bridge. The plaintiff has annexed photographs showing the new residence of the defendant's family. The area chief one **ISAIAH SHIKUNZA** wrote a letter indicating that the defendant, his mother and two brothers sold their land to the plaintiff and bought land at Moi's bridge. He has cited the new land at Moi's bridge as **Ex Callen Farm LR No. 6199/2**. The defendant's family according to the chief moved out and stayed away for over 22 months only to return to reclaim the land.

The court visited the suit premises. There is a fully developed Primary school that is operating. The land is fenced and there is a gate. Although the defendant stated in his pleadings that the plaintiff was not utilizing the suit land, It is clear that the plaintiff is the one using the land. The defendant has no house on the land as the family's original houses were demolished.

The orders allowing the defendant to utilize 0.5 acres of the suit land were made on the belief that the defendant is landless. From the pleadings herein and especially from the letter dated 25/3/2014 by the area chief, I do find that the defendant is not landless. There is land at Moi's bridge which he can utilize.

At this stage, the court cannot hold that the plaintiff's title was obtained fraudulently. The defendant's mother wrote a statement indicating that she signed some documents in the presence of an advocate whom I presume is the plaintiff's advocate. The defendant can only prove fraud if the case is fully heard and the evidence comes out. The defendant's mother will have to explain how she bought land at Moi's bridge and who paid for it, whether she received any money after thumb printing the document that would have facilitated the processing of her title or not and several other issues.

I do find that the plaintiff has established a prima facie case with a probability of success. She is the one in occupation. The defendant does not reside on the land. The balance of convenience tilts in favour of the plaintiff. The defendant is not claiming the entire land owned by the plaintiff. His claim is for only 0.35 Hectares which is contained in the plaintiff's land. If the defendant proves his case, all that he will get is 0.35 Hectares for his family. The portion can easily be carved out from the suit land. There is no irreparable damage that would befall the defendant.

In the end, I do find that the plaintiff being the current registered owner has a prima facie case with a

probability of success against the defendant. The plaintiff's application for injunction dated 19/2/2013 is granted in terms of prayer three (3). The plaintiff's application dated 27/3/2014 for the review of the orders made on 25/3/2014 is equally granted as prayed. The defendant's application dated 17/4/2013 is hereby dismissed. Costs shall follow the outcome of the main suit. The dispute involves land is hereby transferred to the Land and Environment court.

Dated, delivered and signed at Kakamega this 17<sup>th</sup> day of September, 2014

**SAID J. CHITEMBWE**

**JUDGE**