



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Environmental & Land Case 20 of 2012**

**CALEB TERAH OMURANDA ..... PLALINTIFF**

**VERSUS**

**SAMWEL WANYONYI KUSIMBA ..... 1<sup>ST</sup> DEFENDANT**

**ANDREW WASUTA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The matter coming up for ruling is the application dated 31.10.12. The application brought by way of notice of motion seeks the following orders;

1. That pending the hearing and determination of this application interpartes the defendants herein whether by himself, his servants, agents, nominees or appointees or anybody acting through him be temporarily restrained by way of a temporary injunction from continuing with leasing, ploughing, planting or entering or attempting to access or interfering with the plaintiffs proprietary rights over land parcel **No. NDIVISI.NDIVISI/638** measuring 5.6 acres situated within Bungoma East District.
2. That a temporary injunction in terms of prayer 2 above be issued against the defendants pending hearing and determination of the main suit.
3. That cost of this application be provided for.

The issue for determination is prayer No. 3 on injunction pending hearing and determination of suit. The application is opposed and the respondent has filed a replying affidavit.

The applicant through his counsel Mr. Situma has submitted that his client brought the suit land **NO. NDIVISI.NDIVISI/638** at a consideration and holds a valid title to the land.

The applicant annexed a sale agreement, search and copy of title to his affidavit to verify these facts. He further submitted that being a title holder, he has rights under Sec. 24 of the Land Act to exercise his rights. In response to the respondent's claim of an order issued in O.S. No. 72 of 2009, Mr. Situma submitted that the applicant put up his house after the order was granted and therefore the respondent could have cited him for contempt. Neither was the applicant a party to the Bungoma CMCC No. 166 of 2005 and 658 of 2009, the subject matter was a burial dispute.

The applicants reason for seeking the injunction is that the responded chased away his workman, has leased out part of the land and that balance of convenience tilts in the applicants favour.

Mr. Athunga for the respondent opposed the application because it lacks merit, and frivolous.

He submitted that since the applicant seeks equitable remedy, he does not qualify because he has gone to court with unclean hands.

According to Mr. Athunga, the cause of action in CMCC 166 of 2005 and 638 of 2009 is similar to the present suit. That the sale between the applicant and former registered owner was entered into after the civil suit NO. 166/05 was already filed. Athunga then informed this court of the several criminal proceedings instigated by the applicant against the respondent and they have amended their proceedings. The upshot of Mr. Athunga's argument is that the applicant obtained a title when he knew of a dispute existing as regards the suit land.

The question this court seeks to answer is whether the application has merit to warrant the granting of an injunction and if this order will conflict with the previous orders issued in O.S NO. 72 of 2009. I have looked at the documents annexed to the respective parties' affidavits. It is not disputed that several suits (both civil and criminal) have arisen out of land parcel NO. Ndivisi/Ndivisi/638.

It is also not disputed that current registered holder of title is the applicant and from what is available on record, the respondent has not had himself registered as the owner.

The search dated 13.4.12 annexed to the applicant's affidavit shows the applicant was issued with a title on 20.8.2009 (annexed CTOII).

The respondent in his annexure SWK 1 (6) which is an order issued on 9<sup>th</sup> June 2010. This was subsequently after the applicant obtained title. One of the orders he got was an order restricting the suit title. He has not explained to this court why he never had the title restricted using this order. The search clearly shows that the title is free from all encumbrances. Further applicants annex CTO-IV shows the respondent has leased out the suit land to a third party named Mrs. Beatrice Kikeyo and refers to himself as the proprietor. He has not denied this fact in his replying affidavit not during the oral submissions. He has only denied chasing away the applicant's servants.

It is thus clear that the respondent is interfering with the applicant's title and or user of the suit land. In all the existing cases cited above save for O.S No. 72 of 2009 which was after issuance of title to the applicant, there was no restriction on this title that would have stopped/made illegal the applicant purchasing the suit land. The respondent has not demonstrated what effort he made to stop his brother from selling the land. He is a defendant in both Bungoma CMCC NO. 166 of 2005 and 638 of 2008.

The applicant has thus satisfied this court that his applicant is merited and is entitled to an injunction.

The 2<sup>nd</sup> question, would the orders in O.S. 72/09 conflict if this court grants the injunction?

First the order was issued on 9<sup>th</sup> June 2010. It seems no steps have been taken to have that suit determined. Secondly the orders were injunctioning the present applicant from "selling, disposing, wasting, cultivating and or interfering with the respondent (read applicant) quite occupation, possession and use of the suit land pending hearing and determination of O.S. NO. 72 of 2009 and the status quo be maintained".

To my mind this order does not allow the respondent to waste the land either by leasing it out to third parties. It also mentioned the maintenance of a status quo. Therefore the respondent cannot misuse the order to enter into lease agreement with other parties before that suit or this present suit is determined. He must be stopped in his tracks.

By this court issuing an injunction against him will be towards preserving the suit land until both cases are heard. It is not disputed that both the applicant and respondent have structures on this land and that would be the status quo this court shall order to be maintained pending the determination of this suit.

In a nutshell, I hold that the applicant's notice of motion has merit and the prayer (3) in the notice of motion is granted. The costs shall abide the outcome of the suit.

RULING read and delivered this 16th day of January, 2013.

**A. OMOLLO**

**JUDGE**