



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 185 of 2012**

**PHILIP DIRO OCHIENG ..... PLAINTIFF**

**V E R S U S**

**JOSHUA AKALI MUSHIYI ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY COUNCIL OF BUTERE/MUMIA ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

In his application dated 31<sup>st</sup> July 2012, the plaintiff is seeking an order of injunction against the defendant in relation to plot number 50L situate at Khwisero market within Butere-Mumias County council. The application is supported by his affidavit sworn on the same date. The defendant filed his replying affidavit sworn on 19<sup>th</sup> October, 2012. Miss Omar, counsel for the plaintiff and Mr. Ombaye for the defendant agreed to rely on their respective documents.

According to the applicant, plot number 50(L) Khwisero market was allocated to one JAMES THOMAS ANDAFU. He started developing a structure up to the wall plate level and the plot was sold to the plaintiff. The two went to the 2<sup>nd</sup> defendant's offices and had the transfer effected. The plaintiff became the owner of the plot. He annexed a receipt for KShs.25,110/= being land rent and another one for application for change of ownership. A third receipt for KShs.5500/= dated 30.07.2010 is for an application for transfer of the plot from JAMES THOMAS ANDAFU to PHILIP DIRO OCHIENG, the plaintiff. The applicant contends that he was surprised to see that the 1<sup>st</sup> defendant assembled building materials and is developing the same plot.

The 1<sup>st</sup> defendant's position is that he applied to be allocated a plot at Khwisero market and paid for the application on 19.2.2010. On 12.7.2010 he was allocated plot number 56(C) within Khwisero market and he paid for the allotment KShs.10,500/= on 12.7.2010. The allotment had a condition that he develops the plot within 24 months. He saw the plot physically and it was empty. He presented his drawing plans and the same were approved. He paid for the approval on 21.3.2011. He was issued with a permit to occupy the plot on 12.7.2010 presumably when he paid for the allotment. He annexed copies of his building plan that bears the stamps from the Public Health officer as well as from the Butere-Mumias County Council. He also annexed copies of photographs showing the status of his building. The 1<sup>st</sup> defendant contends that he is developing on plot number 50(C) and 50 (L) which the plaintiff purports to own.

The underlying principle is whether the plaintiff has established a prima facie case with a probability of success, whether the plaintiff will suffer irreparable damage if the orders are not granted and if the court is in doubt, what is the balance of convenience?

I have read the plaintiff's application and the supporting affidavit as well as the 1<sup>st</sup> defendant's replying affidavit. The plaintiff did not annex the sale agreement between himself and one **JAMES THOMAS ANDAFU**. He is the one who filed this suit but there are no documents to support his claim. The plaintiff contends that the seller had developed plot 50 (L) up to wall plate level. Why didn't he annex photographs of that development so that the court can know whether it is the same structure being developed by the 1<sup>st</sup> defendant. Where are the building plans, allotment letters and permit to occupy the plot given to JAMES ANDAFU. The plaintiff was served with the replying affidavit and could have

countered it with more information in form of documentary evidence. The mere production of a receipt showing it was meant for transfer of a plot is not sufficient. The plaintiff ought to have asked the 2<sup>nd</sup> defendant to confirm whether plot 50 (C) is the same as 50 (L).

From the pleadings herein, I am satisfied that the plaintiff has not established a prima facie case with a probability of success against the defendants. There is no proof that he bought a plot from JAMES THOMAS ANDAFU. What stopped the plaintiff from even indicating the purchase price, what document did Andafu shown him to prove that he was the proprietor of plot number 50 (L). Is plot 50 (L) the same as plot 50 (C). I do find that lack of that information renders the plaintiff's suit too weak to qualify for granting the orders being sought.

As of now, the plaintiff has only proved that he has not spent anything. The receipts he has annexed are in the names of JAMES THOMAS ANDAFU who has not sworn any affidavit to prove that he was indeed allocated a plot. Having stated that there is no proof that the plaintiff bought a structure from the said Andafu, I do find that the plaintiff will not suffer any irreparable damage.

In the end, I do find that the application dated 31<sup>st</sup> July 2012 lacks merit and the same is hereby dismissed with costs to the 1<sup>st</sup> respondent.

***Delivered, dated and signed at Kakamega this 13<sup>th</sup> day of February, 2013***

**SAID J. CHITEMBWE  
J U D G E**