

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 44 OF 2013

TIMON ISAAC ODOYO PLAINTIFF

V E R S U S

LUMONA ONDERE 1ST DEFENDANT

PR/EMUSANGA CHURCH 2ND DEFENDANT

R U L I N G

In the application dated 5.2.2013 the plaintiff is seeking an order of injunction restraining the defendant from dealing with plot number **BUTSOTSO/SHIKOTI/4210** pending the hearing and determination of this suit. The application is supported by the plaintiff's affidavit sworn on the same date. The applicant also filed a supplementary affidavit sworn on the 27.2.2013. The defendant filed a replying affidavit sworn on the 20.2.2013 as well as a preliminary objection dated 12.2.2013.

Mr. Odero, counsel for the applicant submitted that the applicant is the registered owner of the suit land. In December 2012 the applicant visited his land and saw a mud structure erected thereon which was alleged to be a church. The acts of the defendant to build the structure on the applicant's land amounts to interfering with the sanctity of the plaintiff's title. Counsel further submitted that the plaintiff's land was derived from a sub-division of the original plot and the suit land is distinct from the land the defendant claims to own. The defendant alleges that there is a primary school on the land but the school is built on plot number 3304 and not on the suit land. The original plot was number 250 and it was divided into two. The suit land was created in January 1990. The school and the church were not located on the plaintiff's land and the original plot does not exist.

Mrs. Asunah, counsel for the respondent submitted that the defendant is merely a pastor of the church who was posted to the church in July 2012 and installed in August 2012. The Emusanga Church of God is a registered society which can sue and be sued in its own capacity. The suit is therefore wrongly instituted and should be struck out against the defendant. Counsel further submitted that the suit land was initially plot number **BUTSOTSO/SHIKOTI/250**. The plot was subdivided and created plot numbers 3304 and 3305. The suit land was created from plot number 3305. The church was built in 1969 and a school was built in 1973. The school has been existing on the original plot number 250 which was registered under the names of the County Council of Kakamega and reserved for the church. The Council is not aware of the subdivision. The church and the school have been on the suit land for over 40 years and an order of injunction will lead to condemnation of the church and its congregation. The respondent will suffer damage and the balance of convenience is in favour of the respondent.

The pleadings show that the suit land was created from the original plot number **BUTSOTSO/SHIKOTI/250**. A search dated 14.7.2009 shows that the original title deed for plot 250 was opened on the 22.1.1969 and registered in the names of **EMUSONGA CHURCH OF GOD**. The plot was approximately 2.8 acres. On the 8.8.1988 the title deed was closed on subdivision and two titles were created namely **BUTSOTSO/SHIKOTI/3304** and **3305**. Plot number 3304 was approximately 0.17 Hectares while plot number 3305 was 0.91 Hectares. On 12.8.1988 plot number 3305 was transferred to **JONATHAN OMBAYO MUTSEMBI** presumably by the Kakamega County Council. The transfer is registered to have been a gift and a title deed was issued to him. On the 19.1.1990 the title to plot number 3305 was closed upon subdivision and two titles were created namely **BUTSOTSO/SHIKOTI/4209** and **4210**. Plot number **4210** measuring 0.09 Hectares was transferred to the plaintiff on the 29.1.1990 at a

consideration of Kshs.5,000/=.

The evidence provided by the respondent in form of correspondence with the Kakamega County Council indicates that the original plot number **250** was owned by the County Council but reserved for Emusonga Church of God. A letter dated 30.10.2003 signed by one Ernest S. Ikoha indicates that the property was registered in the names of Kakamega County Council in 1969 during adjudication but the letter gives the acreage as 0.4 acres only. It is clear that the plaintiff got his title from Jonathan Ombayo Mutsembi. The land was owned by the Kakamega County Council and it is not clear how the said Jonathan Ombayo Mutsembi got the property in form of a gift. Further the initial registration done in 1969 indicates that the plot number 250 was reserved for Emusonga Church of God. Although the plaintiff cannot be held to have participated in the subdivision and transfer of part of the plot to Jonathan Ombayo Omutsembi, I do find that there is need for that subdivision to be examined with a view to finding out whether the Kakamega County Council sanctioned the subdivision and whether the Emusanga Church of God was notified of the fact that its original 2.8 acres was going to be reduced and a bigger chunk measuring 0.91 Hectares was going to be taken away from the church.

The plaintiff's main contention is that he is a registered owner of the suit land and his title should not be disturbed. That might be so but the court is empowered to examine the process through which the plaintiff obtained his title deed. I am satisfied that the property was initially reserved for the church and the circumstances under which it was subdivided and reduced in size before it was transferred to a third party in the name of **JONATHAN OMBAYO MUTSEMBI** has to be examined. Granting the order of injunction would be tantamount to sanctioning the subdivision and transfer of the initial plot number 250 at the interlocutory stage. I do find that the balance of convenience tilts in favour of the respondent and the church which has been in occupation of the suit land. It will not be prudent at this stage to differentiate between the original plot number 250 and the resultant subdivisions leading to the creation of plot number 4210. It appears that the applicant has not made any developments on the land and a church and a school does exist on the suit land. Although according to the plaintiff the school does not exist on plot number 4210 I do find that plot number 4210 was part and parcel of the original plot number 250 which belonged to the Emusanga Church of God.

In the end I do find that the plaintiff has not established a prima facie case with a probability of success against the defendant. No irreparable damage shall be suffered by the plaintiff. The cost of the property is indicated as KShs.5,000/=. I do not wish to dwell on the preliminary objection as the same is based on technicalities which can be cured by way of amendment of the plaint to include the name of the church as one of the defendants. The application dated 5.2.2013 is hereby dismissed. The preliminary objection dated 12.2.2013 is also dismissed. Each party shall bear his own costs.

Delivered, dated and signed at Kakamega this 25th day of July 2013

SAID J. CHITEMBWE

J U D G E