



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Civil Appeal 17 of 2012

WILBERFORCE OMTUKU

OMUTSANI.....APPELLANT

VERSUS

SEITH KAKAI

AMUKANGA.....RESPONDENT

RULING

The applicant by way of Notice of Motion dated 6.2.12 seeks orders that a temporary injunction do issue restraining the Respondent, his servants, agents or assigns from in any way doing and/or interfering with the Plaintiff's property namely PARCEL No. IV/257 House No.72 and to stop any unlawful, forceful entry, collection of rent, eviction of tenants, partitioning, constructing and renovation of the said house and or to do any act that is inconsistent with the Plaintiff/Applicant's right as the proprietor of the said parcel No. IV/257 House No. 72 pending the hearing and termination of this suit.

The application is supported by the annexed affidavit of Wilberforce Omutuku Omutsani, the applicant. The applicants case is that he purchased the suit property from one ADAMS SAKALI who was the original owner allocated the property by the National Housing Corporation. The applicant exhibited a map and two letters from the Municipal Council of Kakamega to prove that he is the owner of the property.

The Applicant deponed that he never transferred the property in question to one MOSES OMUTELEMA OMUTUKU. The applicant's assertion is that the Respondent has entered the said property without any colour of right and laid a claim of ownership over it and started carrying out acts of waste, collecting rent from tenants and illegally evicting some of the tenants.

The application is opposed to as per the replying affidavit sworn by the Respondent SEITH KAKAI AMUKANGA (undated) and filed in court on 15.2.12. The Respondent avers that the applicant transferred the property to his son who was thereafter issued with an allotment letter for the property by the Commissioner of Lands. That the applicant's son later transferred the property to the respondent vide a court order. The Respondent annexed the purchase agreement and the court order (annexture SK2 & SK3)

I have considered the application, the reply to the same and the submissions of the counsels.

It is not in dispute that the Respondent is dealing with the suit property by carrying out renovations and collecting rent from the tenants.

Although the parties have given different descriptions of the suit property, they have both referred to house No. 72 National Housing Corporation Scheme. The parties are aware of the property on the ground that they are talking about.

The applicant through the documents exhibited in court has described the property as follows:-

- “Parcel No. IV/257/HOUSE NO.72.”
- “PLOT No. 72”
- “Site and Service Scheme No. 1/72”
- “S&S No.72” – (see annexures WOI – 4, 7 & 8)

The documents exhibited by the Respondent describe the property as follows:-

- “Block 1/519 – NHC.”
- “Kakamega Municipality Block 1/519 – NHC House No.72.”
- “Plot No. 72 Kakamega Site & Service”

(see annexures SKA 1, 2 & 3).

It can only be hoped that the parties will describe the property more precisely during the hearing of the main suit. Did the applicant transfer his property which he describes as No. IV/257 House No. 72 to his son (Moses Omutelema Omutuku) who in turn sold it to the Respondent? The Respondents contention is that the applicant transferred the property to the son. The Respondent has exhibited a letter of allotment (annexture SKI) which is in the name of the son (MOSES OMUTELEMA OMUTUKU) for Plot No. Kakamega Municipality Block 1/519 NHC. The Respondent has also exhibited a court order and a sale agreement (annexture SK 2 & SK3) between him and the said MOSES OMUTELEMA OMUTUKU which refer to House No. 72.

What comes out clearly is that the sale was between the Respondent and MOSES OMUTELEMA OMUTUKU. There is no document exhibited by the Respondent that reflects any dealings with the applicant. Infact the Respondent has not averred that he dealt with the applicant at any stage.

The applicant has denied having transferred the property to his son. The letter dated 19.1.12 from the Municipal Council of Kakamega (annexture No. 8) seems to suggest that the applicant’s son, MOSES OMUTELEMA OMUTUKU presented misleading documents to the Council stating that the father (Applicant) had given him the plot as a gift and found it appropriate to reinstate the earlier agreement between WILBERFORCE OMTUKU OMUTSANI and ADAMS SAKALI.

With the applicant’s contention that he never transferred his property to the said MOSES OMUTELEMA OMUTUKU, the question that arises is whether the said MOSES OMUTELEMA OMUTUKU had any good title to pass to the Respondent. The answer will probably come out during the hearing of the main suit.

In a nutshell, the scenario that emerges from the material placed before this court is *prima facie*, that the applicant holds the documents to the plot in question and the Respondent holds documents emanating from a sale transaction with MOSES OMUTELEMA OMUTUKU. There is no evidence of transfer from

the applicant to MOSES OMUTELEMA OMUTUKU.

With the foregoing, this court's conclusion is that the applicant's case meets the requirements of ***Giella vs Cassmsn Brown [1973] E.A. 358.***

The Application is therefore allowed with costs in the cause.

Dated at Kakamega this 22nd day of March, 2012

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B. THURANINA JADEN

J U D G E