



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE 46 OF 2010

JOSEPH OSUNDWA OTIPA PLAINTIFF

VERSUS

1. KUNANI WAKUNGWI alias

MWANAISHA KUNANI WAKUNGWI..... DEFENDANTS

2. ASMAN OSUNDWA AKUNGWI

R U L I N G

The application by way of Chamber Summons dated 6.4.10 seeks orders that:-

“A temporary injunction be issued restraining the respondents, their agents, servants, assigns and or allotees from trespassing, selling, utilizing or in any way interfering with land parcel No. E.WANGA/ELUCHE/808, 2296 and 2299 and any number/name subdivided from the above three numbers with nullification of new numbers (sic) pending hearing and determination of his application inter-parties and/or until further orders of this Honourable Court.”

The application is supported by the Applicant’s affidavit sworn on 6.4.10. It is the applicant’s case as set out in the said affidavit that on 28.2.1976 he purchased 3.6 Ha. of land from the 1st Respondent, KUNANI WAKUNGWI alias MWANAISHA KUNANI WAKUNGWI. That the land now belongs to the applicant by virtue of adverse possession. That the seller (1st Respondent) has continuously refused and/or ignored to transfer the said parcel of land to the applicant. That the seller (1st Respondent) secretly transferred the suit land to her son, ASMAN OSUNDWA AKUNGWI, the 2nd Respondent herein who has been trying to dispose of the same. It is the applicant’s case that he would suffer irreparable loss if the orders sought are not granted.

The application is opposed as per the replying affidavit sworn by the 2nd respondent on 4.5.10. In the said affidavit, the 2nd Respondent has deponed that the applicant is his paternal uncle, a brother to his father, SAID AKUNGWI. That the 1st Respondent who is the mother to the 2nd Respondent was inherited by the applicant following the death of the 2nd Respondent’s father. That the applicant owns land parcel No. WANGA/ELUCHE/347. That the suit land has never been sold to the applicant and that the applicant

never stayed on the same land save on the basis of his relationship with the 1st Respondent. Land parcel No. E.Wanga/Eluche/808 was closed on 25.6.09 upon being sub-divided into new Nos. 2296 – 2299 according to the certificate of official search exhibited by the applicant (annexure “JOO2”).

The applicant has stated the land parcel number in question as E./WANGA/ELUCHE/808, 2296 and 2299 and any other subdivision of the above three numbers. The parties are clearly lacking over land parcel No. E/Wanga/Eluche/808 and any subdivisions of the said land. It is therefore clear which land is the subject matter of the proceedings herein.

The affidavit evidence by the applicant talks about purchase of a portion of the suit premises. The Respondents on the other hand deny any purchase of the suit property and have brought up issues of wife inheritance whereby it is contended that the applicant’s presence on the suit premises was only on the basis of his having inherited the 1st Respondent.

It is not possible to draw a line at this stage between the intertwined issues of wife inheritance, purchase and adverse possession. These are matters that can only be resolved through a full trial. Suffice it to state at this juncture that monetary compensation would not be sufficient compensation and that the balance of convenience lies in favour of the applicant’s case.

Consequently, the application is allowed with costs.

Delivered, dated and signed at Kakamega this 15th day of March, 2012

B. THURANIRA JADEN
J U D G E