

REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL SUIT NO.66 OF 2010 (O.S)

RAYLEIGH WANYAMA.....APPLICANT

VS

KHISA MYUNDO alias ZABLON KASISI MUYUNDO.....RESPONDENT

RULING

There is a notice of motion dated 27/7/2011 by the Plaintiff seeking that a restriction be placed on land parcel nos. Ndivisi/Muchi/7285 and 7286 and to any other resultant numbers to restrict any dealing with the parcels until the suit is heard and determined. It was further sought that the Defendant, and all those acting under him, be restrained by order of injunction from sub-dividing, alienating, disposing or in any other way interfering with the Plaintiff's use and occupation of the parcels until the suit is heard and determined. The application was made under sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and Order 40 rule 10 (1) (a) of the Civil Procedure Rules and section 128 of the Registered Land Act (Cap.300). The Defendant opposed the application. I received oral submissions from Mr. Murunga for the Plaintiff and M/s Mbaka for the Defendant which I have considered.

The application is within a suit by way of originating summons under sections 7, 37 and 38 of the Limitation of Actions Act (Cap.27) and Order 36 rules 3D and 7 of the Civil Procedure Rules that the Plaintiff filed on 8/7/2010 seeking to be declared to have become entitled to land parcel no.Ndivisi/Muchi/636 registered in the name of the Defendant by way of adverse possession. The Plaintiff pleaded that his late father Ezekiel Wanyama Kayile bought the parcel in 1968 and that since 1969 the deceased and his family had occupied and developed the same continuously without interruption. The deceased died on 29/8/2003 leaving the Plaintiff and the rest of the family on the land. He claimed that the Defendant's title to the land has been extinguished and sought the rectification of the register by removing the name of the Defendant and substituting it with his name.

What has subsequently happened is that the Defendant has subdivided the parcel into 7285 and 7286. It is the further dealing with the suit land that this application seeks to prevent.

The Defendant admits to have sold 7 acres of the suit land (Ndivisi/Muchi/636) to the deceased subsequent to which the deceased and his family settled on the land and have lived thereon since. He states that he has no problem surrendering the 7 acres to the family of the deceased. He stated that the suit land is in total 7.6 hectares. After he has surrendered the 7 acres, he stated, the balance is his exclusively. Lornah Mukhwana is the deceased's wife and mother of the Plaintiff. She supported the Defendant that what the deceased bought was 7 acres and not the whole parcel. Indeed, in Bungoma CM CC no.460 of 2009, **she** successfully sued the Defendant for the 7 acres and there is a decree the execution of which led to the subdivision of the suit land. The result of that is that she is the registered proprietor of 7 acres comprised in 7286 and the Defendant is the registered proprietor of the balance, 7285. It should be pointed out that an order of restriction or order of injunction cannot issue in respect of 7286 whose owner (Lornah Mukhwana) is not a party to the suit or application.

The Plaintiff was aware of the suit in Bungoma CM CC No.460 of 2009. He unsuccessfully applied to be joined in the proceedings. There was no appeal filed against the judgment or decree in the suit. The suit, in my view, finally brought to a close any claim that the family of the deceased had against the Defendant in regard to parcel 636. Under section 7 of the Civil Procedure Act, it would appear, the present suit and

application are *res judicata*. (**Gichuki v. Gichuki [1982] KLR 285**). The Plaintiff claims that his mother secretly and without the knowledge of the family filed the case in the subordinate court against the Defendant and obtained judgment to their detriment. Such a claim can only be ventilated in a suit on application for review.

It was in the affidavit of Lornah Mukhwana that since the death of the deceased no succession proceedings have been filed in respect of his estate. If that is true, the capacity of the Plaintiff to bring this suit and application has been questioned.

In the final analysis, the Plaintiff does not appear to me to have a suit that will probably succeed. (**Giella v. Cassman Brown & Co. Ltd [1973] EA 358**). The Defendant has already surrendered 7 acres to the family of the Plaintiff and therefore the issue of irreparable loss or damage may not arise. The Plaintiff has somewhere to stay until the suit is heard and determined. It should be pointed out that the Defendant is a registered proprietor whose claim under sections 27 and 28 of the Registered Land Act is *prima facie* absolute and indefeasible. It would not be easy to injunct such a claimant. I dismiss the application with costs.

Dated and delivered at Bungoma this 14th day of March, 2012.

A. O. MUCHELULE

JUDGE