



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE 167 OF 2011

ENOCK MUSHISA MAKALE.....PLAINTIFF/APPLICANT

VERSUS

JARED MAKALE.....1ST DEFENDANT/RESPONDENT

PAUL SAIDI.....2ND DEFENDANT/RESPONDENT

RULING

The Notice of Motion dated 23.1.12 seeks orders that the Honourable court be pleased to issue an order restraining the 2nd defendant/respondent from entering and or cultivating land parcel number SOUTH KABRAS/CHEMUCHE/1739 pending the hearing and determination of this suit.

Secondly, that the Honourable court be pleased to order the Kakamega District Land Registrar to put a prohibition order in respect of land parcel number SOUTH KABRAS/CHEMUCHE/1739 pending the hearing and determination of this suit.

The application is supported by the affidavit sworn by the Applicant **ENOCK MUCHISA MAKALE** on 23.1.12.

According to the said affidavit, the Applicant is the son to the 1st Respondent **JAFRED MAKALE**. The Applicant has deponed that the 2nd Respondent sold and transferred their family land parcel No. **SOUTH KABRAS/CHEMUCHE/1739** (hereinafter suit land) to the 2nd Respondent, **PAUL SAIDI**. According to the Applicant, his family was not aware of the sale until the 2nd Respondent started fencing and cultivating the suit land. The Applicant has further deponed that the 2nd Respondent obtained title to the suit land but has not taken possession of the land. The Applicant has averred that if the 2nd Respondent takes possession of the suit land, the family of the 1st Respondent would be left landless and destitute.

In his response to the application, the 1st Respondent in his affidavit in reply sworn on 20.2.12 stated that he sold the suit land without the knowledge of his family. That his family became aware of the transaction when the 2nd respondent started taking possession of the suit land.

The 2nd Respondent swore a replying affidavit on 1.2.12 in opposition to the application. According to the 2nd Respondent, the 1st Respondent's wife, **SOFIA MAKALE** was aware of the land sale

transaction. The 2nd Respondent exhibited a copy of the application for the consent of Land Control Board (annexture PS-1) duly signed by the 1st Respondent and endorsed by the wife, **SOFIA MAKALE** that she had no objection. The 2nd Respondent added that the Plaintiff and his other brothers were minors at the time of the transaction. The 2nd Respondent exhibited a title Deed in his name for the suit land (annexture PS -2) and stated that he has fenced and cultivated the suit land for the last 13 years. It is not in dispute that the suit land was sold by the 1st Respondent to the 2nd Respondent. It is not in dispute that the title to the land is in the name of the 2nd Respondent.

The 2nd Respondent has exhibited an application for the Consent of the Land Control Board showing that the wife to the 1st Respondent had no objection to the transfer. This has not been challenged by the Applicant. The 2nd Respondent's averment that the Applicant and his brothers were minors at the time of the transaction has also not been rebutted.

According to the affidavit evidence of both the Applicant and his father, the 1st Respondent, it comes out clearly that the 2nd Respondent entered the land and started cultivating. The Applicant cannot therefore argue in the same breath that the 2nd Respondent has not taken possession of the land.

The application has not met the requirements set out in the case of ***Giella vs Cassmsn Brown [1973] E.A. 358*** to warrant for the issuance of the restraining orders sought.

One of the grounds of the application is that the land in question is ancestral land. I will therefore not dwell at this stage on the issue of whether the applicant has any ***Locus Standi*** to file this suit.

I will however allow the preservatory prayer for issuance of a Prohibitory order in terms of prayer No. (iii) pending the hearing and determination of the suit.

Costs in the cause.

Delivered, dated and signed in open court at Kakamega this 21st day of June, 2012

B. THURANIRA JADEN
J U D G E