

REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 116 of 2012

BELISI K. ASENA..... PLAINTIFF

VERSUS

JAPHET ISINGA DEFENDANT

RULING

The Notice of Motion application dated 11.5.12 applies that an order of temporary injunction be issued restraining the defendant/respondent, his agents, servants or assigns from evicting or threatening to evict the plaintiff/applicant from the portion of land she occupies and uses on land parcel Kakamega/Mbale/545 pending the hearing and determination of the main suit.

Secondly, that a Prohibitory Order be issued to preserve the suit property (Kakamega/Mbale/545).

The application is supported by the affidavit of the applicant, **BELISI KAGONYA ASENA** sworn on 11.5.12. The main ground of the application as set out in the said affidavit is that L.P. NO. KAKAMEGA/MBALE/545 (hereinafter suit land) was inherited by her late husband NATHAN ASENA NDUGU from his late father BARNABA NDUGU. That the respondent, JAPHETH ISINGA purchased a portion measuring 47ft by 78ft out of the suit land while the applicant's family continued occupying the rest of their land. The applicant further averred that the respondent did not pay Kshs.10,000/= balance of purchase price for the plot that he occupies.

The applicant accuses the respondent of having taken advantage of her illiterate late husband and fraudulently transferring the entire parcel of land to himself (respondent) while purporting to assist the applicant's late husband to have the parcel of land transferred to him through transmission than sub-divide the same for each party to get their portion of the land.

The applicant further added that the respondent had issued her with a Notice to vacate the Suitland hence the instant application.

In opposition to the application, the respondent swore an affidavit in reply on 25.5.12. According to the said affidavit, the respondents stand is that he bought the whole of the suit land from the late NATHAN ASENA NDUGU and fully paid for it. That on 15.10.88, he bought the portion measuring 47ft x 78ft and paid a total of Kshs.70,000/=. On 30.9.91, he bought the remaining portion of the suit land at a total of Kshs.120,000/= which he fully paid for.

The respondent contended that he obtained the Consent of the Land Control Board to have the land transferred and the late NATHAN ASENA NDUGU voluntarily executed the transfer and thereafter the whole parcel of land was registered in the respondent's name.

Mr. Getanda advocate appeared for the applicant while Mr. Chitwa advocate appeared for the respondent. I have considered the application, the reply to the same and the submissions by the counsels.

It is not in dispute that the respondent purchased the first portion of land measuring 47ft x 78ft. What is in dispute is whether there was a sale of the rest of the land or whether the respondent fraudulently registered the entire parcel of the Suitland in his name. The applicant has exhibited a letter dated 13.7.2001 (annexture "BKA 4") from the Advocates of the late NATHAN ASENA NDUGU to the

respondent accusing the respondent of breach of contract for non payment of Kshs.10,000/= balance of purchase price for the 47ft by 78ft portion and for fraudulently registering the whole parcel of land in the respondent's name. There is no comment concerning the said demand letter. On the other hand, the applicant also had no reply to the agreement (annexture "JI1") for the sale of an addition parcel of land measuring 45 x 130ft. It is not possible to tell at this stage of the case which party is entitled to which portion of the land. The balance of convenience therefore falls in favour of maintaining the status quo pending the hearing of the main suit.

Consequently, I allow the application. Costs in the cause.

Delivered, dated ant signed at Kakamega this 11th day of October, 2012

B. THURANIRA JADEN
J U D G E