



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Suit 64 of 2010**

**late WEKULO**

**EUNICE AKETCH OKUMU** (*suing on behalf of the estate of the*

**SAISI..... PLAINTIFF**

**VERSUS**

**.... DEFENDANT**

**EVANS WANYAMA JUMA.....**

**RULING**

The defendant/applicant filed the motion one dated 30th October 2012 and supported by affidavit of the applicant Mr. Evans Wanyama Juma. The motion sought for orders by:

b). temporary injunction restraining the plaintiff whether by themselves, servants, agents and or any other person acting on their behalf or under their instructions

from interfering and in whatsoever manner and/or stopping the cane cutters from Nzoia from harvesting sugarcane in the land parcel NO. E. Bukusu/E. Sangalo/2943 pending hearing and determination of application and in prayer (C) same orders as above pending hearing of suit. Since the application was argued and opposed, the substantive prayer for me to deal with is (c) of the motion.

The respondent on his part filed a replying affidavit opposing the defendant/applicant getting the orders sought. The affidavit is dated 21.11.12.

Mr. Watanga made oral submissions before me on 22.11.12 that the applicant is the registered owner of the suit land and has annexed a copy of title to his applicant's affidavit. That the defendant planted cane on it which cane is mature and ready for harvesting.

The plaintiff has restrained the harvesters and therefore defendant need security to be able to harvest his cane. He annexed letter from Nzoia sugar Co. Ltd. Showing cane is ready for harvest.

Ms. Wakoli on her part opposed the submissions by Mr. Watanga. Her contention is the application is bad in law as it was filed by Mr. Makokha, Watanga & Luyali associates yet the firm on record for the defendant/applicant is Wetangula, Adan & Makokha advocates. The present application is filed by a stranger.

Secondly, she submitted that the documents filed by the applicant are forged since the title deed was obtained after the death of the original owner.

The contract from Nzoia is also materially altered therefore casting doubt on its authenticity.

Finally the respondent submitted the sugar cane belongs to brother Bernard Simiyu and a contract to that effect is annexed to the replying affidavit.

I have analysed the submission by both counsels and also perused the pleadings filed.

There are two issues for determination by this court;

- (a) Whether the defendant established a prima facie case as to entitle this court to grant him the injunction sought.
- (b). The objection raised by Ms. Wakoli as to whether this motion is bad in law having been filed by a law firm different from the one previously on record for the applicant.

The first issue deals with merit of the motion while 2<sup>nd</sup> issue is its legibility

to stand. I therefore deal with the 2<sup>nd</sup> issue first under O. 9 rule 5 of the

Civil Procedure Rules provides;

***“a party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter without an order for that purpose but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall subject to rules 12 & 13 be considered as advocate for the party until final conclusion of the cause or matter including any review or appeal.”***

The instance case, no notice of change of advocate was filed by the firm of Makokha Watanga & co. advocates neither was an explanation offered to counter the objection by the respondent. I do therefore find that the firm of Wetangula Adan & Makokha advocates are the ones representing the defendant as per the provisions of O. 9 rule 5 of the Civil Procedure Rules. The application before court is filed by a stranger to the pleadings and therefore I proceed to strike out from the record until proper procedures are complied with.

I am alive to the fact that matters should be dealt with substantially and not on technically as provided for under Sec. 1A & 1B of the Civil Procedure Act and article 159 (d) of The Constitution. The issue of representation to me is a substantiative issue.

On the issue of merit of application, I shall not touch on it as from the above finding there is now no application before this court to adjudicate upon.

Costs of the motion shall be in the cause.

**JUDGMENT DATED, SIGNED, READ AND DELIVERED** in open court this 19<sup>th</sup> day of DECEMBER 2012.

**A. OMOLLO**

**JUDGE**