



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL SUIT NO.117 OF 2010

ISAAC KUTONDO WASHIKO **PLAINTIFF/APPLICANT**

~VRS~

WILLIAM MUUYI NYONGESA **1ST DEFENDANT/RESPONDENT**
JOSHUA WANDILI NYONGESA **2ND DEFENDANT/RESPONDENT**

RULING

The Plaintiff, Isaac Kutondo Washiko comes to court in his power as a holder of a power of attorney dated 27th October 2010 given to him by one Susan Khayenzeli Washiko in respect of land reference number Ndivisi/Mihuu/309. The Plaintiff seeks for an interlocutory injunction against the Defendants to restrain them from interfering with, trespassing, working, tilling the land Ndivisi/Mihuu/309 until the determination of this suit.

In his supporting affidavit and on the face of the application, the Plaintiff sets out the grounds he relies on. Firstly, the Plaintiff is the father of the registered proprietor Susan Khayenzeli Washiko who is living in the United Kingdom. His daughter bought the land in question from one Wafula Walela Chesori. The land was registered in Susan's name on the 19/10/10 as shown by a copy of register. The Defendants have interfered with the Plaintiff's use of the plot claiming that the land was being sold to them by the former proprietor. The Plaintiff seeks that the Defendants be restrained from that interference.

The Respondents oppose the application. In the replying affidavit of the 1st Respondent, it is deponed that one Richard Lusweti who is the same person as Wafula Walela Chesoli sold a portion of 6.5 acres out of Nidivisi/Mihuu/309 to the Defendants' father in 1969. The father of the Defendants one Jotham Nyongesa took possession of the land and resided on it for over 30 years. Jotham died leaving the Defendants as his survivors who have been pursuing the portion of the land their father bought and not without evasiveness from the said Wafula Walela. The Defendants came to learn later that the whole parcel Ndivisi/Mihuu/309 had been sold to someone else.

Armed with the power of attorney a copy of which is annexed to the application, the Applicant/Plaintiff herein has capacity to sue. The person who has given the power of attorney is the registered owner of the land Ndivisi/Mihuu/309. Documentary evidence was produced to that effect. The Respondents possess no documents of ownership. Annexed to the replying affidavit is a handwritten land sale agreement between one Richard Lusweti and Jotham Nyongesa dated 1st October 1969. Under the

Registered Land Act section 27 and 28 the registered proprietor of the land's rights are protected. Being the absolute owner, he is entitled to all rights and privileges in relation to the land. These rights have been denied the registered proprietor by the Respondents who have taken over the land thus preventing the applicant from using it.

I have considered the facts and arguments of the parties and their counsels in this application. The Applicants must prove the following before the orders sought are granted:

- a) **That he has made a prima facie case;**
- b) **That he will suffer irreparable loss if the orders are not granted;**
- c) **If the court is in doubt, it will decide on the balance of convenience.**

The Applicant has established through documentary evidence that Susan Khayenzeli who has given him the power of attorney is the registered owner. With title documents, the Applicant's case has good chances of success thus satisfying the first condition.

The Plaintiff requires to use the land for which his daughter is the registered proprietor. He has been denied access by the Respondents. The rights of the proprietor and by extension to the holder of the power of attorney are being violated. This leads to loss which is substantial and which may not be compensated by way of damages. I am satisfied that the Applicant has satisfied the second requirement. This means that in the event that the orders sought are not granted, the Applicant will suffer substantial loss.

The court is not in doubt and will not therefore delve into the third condition.

It is my finding that the Applicant has satisfied the principles of **GIELLA VS CASSMAN BROWN AND CO. LTD 1973 E. A 358** for granting an injunction. I therefore find the application merited and allow it with costs to the Applicant.

**F. N. MUCHEMI
JUDGE**

Ruling dated and delivered on the 7th day of June, 2011 in the presence of Mr. Murunga for Plaintiff and Mr. Situma for Defendant.

**F. N. MUCHEMI
JUDGE**