



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO.110 OF 2010 (O.S.)

JACOB JOSEPH WAMBAYA suing on his own behalf and on behalf of the estate of SPERANCE PERSIDE WAMBAYA.....PLANTIFF

VERSUS

FRANCISCA OWUOR.....1ST DEFENDANT
RODA JEBIAMA KARANI.....2ND DEFENDANT
KIPKENY ARAP ABWAO.....3RD DEFENDANT

RULING

The applicant **JACOB JOSEPH WAMBAYA** moved the court by way of an Originating Summons on the 7th of July, 2010 on his behalf and that of his deceased mother **ESPERANCE PERSIDE WAMBAYA** claiming ownership of **Nandi/Kapsengere.149, 150 & 162** by way of adverse possession sought for orders that he be registered as the sole and absolute indefeasible proprietor of each of the said parcels, and for costs. The applicant sued **FRANCIS OWUOR, RODA JEBIAMA KARAN** and **KIPKENY ARAP ABWAO**. Later by an application dated 8th February, 2011 a 4th defendant **ESTHER ACHIENG MUSUMBA** was enjoined to the suit.

Pending ruling is an application by the applicant dated 24th March, 2011 and amended a day later on the 25th of March 2011 by way of a Notice of Motion brought pursuant to Order 40 Rule 1 & 2 of the Civil Procedure 2010, and Sections 1A & 3A of the Civil Procedure Act seeking for the following order:

(1) That the application be certified as urgent and placed for service thereof be dispensed with in the first instance;

(2) That pending hearing and determination of this application and thereafter the main suit, orders of injunction do issue, directed at the 2nd and 4th defendants restraining them by themselves, their servants, agents or other persons purporting to derive authority from them or any of them from entering into, developing remaining in or in any other manner interfering with the plaintiff's quiet possession and enjoyment of land parcel numbers Nandi/kapsengere/150 and 162.

(3) That a restriction be placed against the titles in this suit namely, Nandi/Kapsengere/149,150 & 162.

(4) Costs.

The application is supported by the affidavit of the applicant and on the grounds that: land parcel **Nandi/Kapsengere/150** and **162** are the subject of this suit, **2nd** and **4th** defendants have entered the property and have commenced cultivation, the applicant stands to suffer irreparable damage, the **4th** respondent fraudulently obtained title, the respondent's action are calculated to defeat the plaintiff's claim.

The **2nd** respondent **Roda Jebiama Karan** opposed the application by way of a replying affidavit dated 20th April, 2011, arguing that the applicant has not enjoyed uninterrupted use of the land parcel **Nandi/Kapsengere/150** as alleged, his late mother did not purchase the land but had merely leased the same, that she was utilizing the land until she received the court order.

On her part the **4th** respondent also objected to the application by filing a replying affidavit dated 22nd March, 2011 stating as follows: that she bought parcel **No.Nandi/Kapsengere/162** from one **Benjamin Koech Keny**. She annexed a copy of a sale agreement and title document in her name.

The conditions necessary in issuing an injunction are well settled. They are enumerated in the case of **Giella versus Cassman Brown (1969)**. The three conditions are that the applicant must prove a prima facie case with a probability of success, secondly that he is likely to suffer irreparable damage not likely to be compensated by way of damages and lastly where the court is not clear it must decide the matter on a balance of convenience.

The applicant makes a claim of adverse possession. He claims the mother bought the suit premises. Three issues emerge:

(1) Where is proof of the purchase? So far no document has been placed before court.

(2) Has he or his mother had uninterrupted use of the land? He alleges that his mother bought the land in 1994 (no proof). He has been in occupation since his mother died on 14th December 2004.

(3) He is in occupation and he will suffer. No proof that he is in actual occupation and no demonstration of the likely loss.

On the other hand the **4th** defendant has title, the **2nd** defendant claims she has been cultivating the land

and only leased the same out and the 3rd defendant has title.

In my view the applicant has failed the test necessary in order to find favour with the issuance of an injunction. I therefore decline to grant prayer 2.

However in order to preserve the land subject matter pending hearing I will grant prayer 3. prayer 1 was spent. As for prayer 4, costs do abide the out come of the case.

Dated and delivered this 19th day October 2011

**ALI-ARONI
J U D G E**

In the presence of:

.....**counsel for plaintiff**
.....**counsel for defendant**