



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE NO. 89 OF 2011

**PATRICK ADERA CHORA (*suing as personal Representative And*
Administrator of the Estate of the late ELKANA OSUKA OSUKA
(Deceased)).....PLAINTIFF/APPLICANT**

VERSUS

KIZITO OTUOMA T/A BAYA FARM CARE.....DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion application dated 19.7.11 seeks orders that pending the hearing and determination of this suit *interpartes*, a temporary order of injunction be issued restraining the Respondent either by himself, partner, associate, agent, employees, workers or anybody working for and on his behalf from taking occupation of, making improvements, doing any business, placing temporary structures and/or interfering in any way with the applicant's premises in land parcel No. LR NO. KAKAMEGA/TOWN/BLOCKB1/53 (Plot No. 136) situated within Kakamega Municipality.
2. The application is based on the grounds stated in the application and is supported by the supporting affidavit of PATRICK ADERA OTUOMA, the Plaintiff/Applicant
3. The application is opposed as per the replying affidavit of OTUOMA, the Defendant/Respondent.
4. Mr. Nyawiri Advocate appeared for the Applicant while Ms Osodo Advocate appeared for the Respondent.
5. I have considered the application, the reply to the same and the submissions made by the counsels.
6. The factual background to the application is that the applicant is the son of the late ELKANA CHORO OSUKA alias ELKANA OSUKA OSUKA. The applicant has filed the suit herein as a personal representative and administrator of the estate of his late father. The estate includes Land parcel No. LR NO. KAKAMEGA/TOWN/BLOCK B1/53 (Plot 136) and the other premises herein. The applicant's case is that the respondent without any colour of right or justification entered the suit premises and started making improvements thereon and writing their business name on the suit premises with the intention of occupying and conducting business on the suit premises.

7. The Respondent claimed to have leased the suit premises from one **MESHACK OWIRA**, a step brother to the applicant. The Respondent contends that the said step brother acted on the applicant's instructions when he leased out the premises to the Respondent. The Respondent avers that he has entered and occupied the suit premises and has commenced carrying out his business there. According to the Respondent the applicant started harassing him demanding more money from him in terms of goodwill and threatening to evict him.
8. It is not in dispute that the suit property forms part of the estate of the father to the applicant. It is also not in dispute that the applicant is the Administrator of the said estate which includes the suit property.
9. The bone of contention is whether the Respondent entered the suit premises with the consent/authority of the Applicant. The applicant denies having instructed his aforesaid step brother to enter into a Lease Agreement with the Respondent. On the other hand the step brother in question MESHACK OSUKA has sworn an affidavit (annextrue "K08") in which he avers to have entered into a Lease agreement with the Respondent following express authority given to him by the applicant who was held up at his place of business in MASENO and that the applicant benefited greatly from the goodwill paid for the Leased Premises.
10. There is however nothing in writing concerning the said authority. There are also legal issues that arise since the lease agreement is not signed by the Administrator of the estate. No receipts or any acknowledgment of any kind by the Applicant as the Administrator of the estate have been exhibited to demonstrate any payments made to the estate.
11. While the squabbles relating to the estate are ranging, the Respondent contends that he has already entered the suit premises and commenced the carrying of business therein. That evidence by the Respondent as per the replying affidavit is not controverted by any other evidence.
12. The Respondent has exhibited a Single Business Permit (Annexure "KO6") issued on 20.7.11 by the Municipal Council of Kakamega for the business name reflected which is "BAYA FARM CARE" on Plot No. B1/53 which is the same plot Number as the suit premises herein.
13. The Application herein seeks restraining orders. The application is premised on the Plaintiff herein which also prays for judgment for an order of permanent restraining orders. Has the Plaintiff established *prima facie* case with a high chance of success?
14. I have considered the principles set out in the case of *Giella vs. Cassmsn Brown [1973] E.A. 358*. The view of this court is that if the Respondent is already in occupation of the suit premises and carrying out business therein, I would agree with counsel for the Respondent that the application has been overtaken by events.
15. The averments by the Respondent in paragraph No. 15 of his replying affidavit that he is in occupation of the said premises and carrying on business there have not been rebutted. I therefore reach the conclusion that the Respondent is already the occupant and carrying on business at the said premises. The balance of convenience would therefore favour the Respondent in the circumstances.
16. The application fails with costs to the Defendant/Respondent. Orders accordingly.

Dated, delivered and signed at Kakamega this 15th day of November, 2011.

B. THURANIRA JADEN
J U D G E