



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT BUNGOMA**

**CIVIL SUIT NO.74 of 2010 (O.S)**

<b>NELSON KWOPA KHATE</b>	.....	<b>APPLICANT</b>
	~VRS~	
<b>SIMON MARA KHATE</b>	.....	<b>RESPONDENT</b>

**RULING**

The Applicant and the Respondent are brothers. They are among the 10 sons of the late Zedekiah Khate Silenge. The deceased was the registered proprietor of land parcel no.Kimilili/Kibingei/710. He died in 2001. The Applicant filed this suit by way of originating summons under sections 7, 17 and 38 of the Limitation of Actions Act Cap.22 and Order 36 of the Civil Procedure Rules for a declaration that he has acquired land parcel no.Kimilili/Kibingei/4052 by adverse possession since he has been in open, exclusive and continuous possession and occupation of the same without interruption for a period of over 12 years; and that the title of the Respondent over the land has become extinguished. He sought an order that he be registered as the owner of the land in place of the Respondent.

Along with the suit, he filed a chamber application under Order 39 rules 1 and 9 of the Civil Procedure Rules for a temporary injunction to restrain the Respondent, and all those acting under him, from interfering with his quiet enjoyment of the suit land until the case is heard and determined. He also sought to restrain any dealing on the register of the land. In the supporting affidavit he acknowledged that the suit land is registered in the name of the Respondent, but stated that he has lived thereon and his family since 1982. He acknowledged that the suit land was a subdivision of the deceased's Kimilili/Kibingei/710. 710 had been subdivided to get, among other parcels, 3741 which was further subdivided to get, among other parcels, the suit land.

The Respondent stated that he was the registered owner of the suit land. He stated that the deceased had shared out 710 to his sons. The Applicant got his share in what is now 2979 and he got 2983. He subdivided 2983 which gave rise to 3743 which he later subdivided to give rise to the suit land and 4053. He sold 4053 on 30/4/2010 and was left with the suit land. His case is that the fact that the Applicant and his family were staying on what was initially their father's land cannot give rise to a claim in adverse possession. I suppose that such stay was with the permission of their father.

The Applicant did not swear any further affidavit to controvert the contents of the replying affidavit, especially the allegation that their father had shared out 710 to his sons and that the suit land was part of what the Respondent was given.

Further, the Respondent is now the registered proprietor of the suit land. This is since 11/3/2009 under sections 27 and 28 of the Registered Land Act Cap.300 the Respondent has a *prima facie* absolute and indefeasible claim to the land and it would be unusual to injunct such a claimant. In short, bearing in mind the principles governing the grant of an interlocutory injunction as were enunciated in **Giella v Casman Brown & Co. Ltd. [1973] EA 358**, I dismiss the application with costs.

Dated and delivered at Bungoma this 9<sup>th</sup> day of November, 2011

in the presence of Mr. Makokha for the Plaintiff and Mr. Situma for Ms Mumalasi for the Defendants and Lilian Gimose the court clerk.

**A. O. MUCHELULE**

**JUDGE**