



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT BUNGOMA

CIVIL SUIT NO.88 OF 2009 (O.S)

<b>SARAH SIAKILO WASUNGUI</b>	:.....: <b>PLAINTIFF</b>
	~VRS~
<b>ZABLON WASUNGUI MUYABI</b>	:.....: <b>1<sup>ST</sup> DEFENDANT</b>
<b>BEATRICE BIKEYO WALUKHU</b>	:.....: <b>2<sup>ND</sup> DEFENDANT</b>
<b>SYLVESTER SIMIYU W. MUTORO</b>	:.....: <b>3<sup>RD</sup> DEFENDANT</b>

RULING

The Plaintiff is the 3<sup>rd</sup> wife of the of the 1<sup>st</sup> Defendant. They got married in 1959. She states that the 1<sup>st</sup> Defendant allocated her 5 acres of his land parcel no. Bokoli/Kituni/247 which she has since occupied and utilized with her children continuously and without interruption, but that in February 2009 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants came and forcefully fenced the portion and ploughed it. When asked, they told her that they had bought the land from the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant agrees that on 11/2/2009 he sold the 5 acres to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for Ksh.800,000/= . The land has since been formally transferred to the two Defendants and the new title is Bokoli/Kituni/1591. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants indicate that they have since taken possession and are utilizing the land.

On 19/11/2009 the Plaintiff filed this suit by way of originating summons under Order 36 rule 3D of the Civil Procedure Rules and sections 7, 17 and 38 of the Limitation of Actions Act Cap.22 seeking a declaration that she has become entitled to the 5 acres by adverse possession on account of having been on the land since 1959 and the claim of the Defendants having been extinguished. With the suit was filed an application under Order 39 rules 1,2 and 9 of the Civil Procedure Rules, sections 3A and 63 of the Civil Procedure Act and section 128 of the Registered Land Act Cap.300 for a temporary injunction against the Defendants and for an order of inhibition to stop the district Land Registrar from registering any transaction on the land until the suit is heard and determined. The application was opposed by the Defendants who were represented by Mr. Omukunda. The Plaintiff was represented by Mr. Situma. Counsel filed written submissions which I have considered along with the respective affidavits.

The basis upon which the court will grant an interlocutory injunction is that the applicant has demonstrated a *prima facie* case with a probability of success; that he might otherwise suffer irreparable loss or injury; and, if the court is in doubt, that the balance of convenience is in his favour. **(Giella v Cassman Brown & Company Ltd [1973] EA 358).**

The Plaintiff is the wife of the 1<sup>st</sup> Defendant. Ideally, the land she claims is their property. Any interest that she claims in the property will crystallize upon her husband's death when, as a beneficiary, she can lay claim to the estate. It is unlikely that she can succeed in the claim for adverse possession against her husband. This is, however, a preliminary view of the dispute.

By the time the Plaintiff came to court she had apparently been dispossessed of the suit land by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who had come and fenced off the land and have since been utilizing it. A claim of adverse possession may not be sustained under those circumstances. Further, an injunction is an equitable remedy. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants laid claim to the suit land in February 2009. The Plaintiff came to court in November 2009. The delay of about 9 months was not explained. It would be difficult to grant an interlocutory injunction given these facts.

Lastly, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have since become registered in respect of the suit land. Under sections 27 and 28 of the Registered Land Act they have acquired a *prima facie* absolute and indefeasible

claim to the land. It would be unusual to grant an injunction against such a claimant.

In conclusion, I find that a case for an interlocutory injunction has not been made by the Plaintiff against the Defendants. The application is dismissed with costs.

Dated and delivered at Bungoma this 8<sup>th</sup> day of November, 2011 in the presence of Mr. Situma for the Plaintiff and Defendants and Lilian Gimose the court clerk.

**A. O. MUCHELULE**  
**JUDGE**