



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Suit 324 of 2009**

**DAVIS MWASHAO JOME.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**DAMARIS KARANJA.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff came before the Court by way of Chamber Summons dated 17<sup>th</sup> September, 2009 and brought under Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules, and ss.3A and 63(e) of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The applicant was seeking a temporary injunction against the defendant whether by herself, her agents or otherwise, restraining such persons from encroaching, entering upon or in any way interfering with the property known as Plot No. MN/III/2654 until the suit has been heard and determined.

The grounds in support of this application were as follows:

- (i) that the applicant is the lawful proprietor of the suit property;**
- (ii) that the respondent's entry upon the suit property is without the applicant's consent;**
- (iii) that unless the respondent is restrained, there will be a compromise to the plaintiff's rights of ownership and possession and the plaintiff will suffer irreparable loss and the plaintiff's property will be exposed to waste;**

Learned applicant's counsel, **Mr. Mwakisha**, urged that the plaintiff is the indefeasible owner of the suit property, being the bearer of the original title document issued under the Registration of Titles Act (Cap. 281, Laws of Kenya) – and by s.23 thereof, it is declared that such holding of title provides conclusive evidence of ownership. Counsel urged that whereas the respondent was relying on some sale agreement as her justification for encroaching upon the suit land, “that sale agreement comes long after the plaintiff's interest accrued.”

In all the circumstances, **Mr. Mwakisha** urged, the plaintiff had a *prima facie* case, with a probability of success.

Learned counsel **Mr. Owino**, for the respondent, submitted that the respondent's case rested on a sale agreement of 4<sup>th</sup> October, 2009 – and that the respondent had entered into the agreement with the registered owner, and consequently the respondent had become the rightful owner of the suit land. Counsel asked that the application be dismissed with costs. The milestones of this case, at this interlocutory stage, in my opinion, show the side on which *bona fides* lie. The applicant claims ownership over land, in respect of which he is duly registered – and so registered in priority to the basis of claim upon which the respondent relies. The applicant has gone further and signed a formal undertaking filed in Court – that if his claim for an interim injunction turns out to be groundless, then he shall indemnify the respondent in damages. This undertaking deepens the colour of *bona fides* which, in my opinion, already stands in favour of the plaintiff.

In these circumstances the proper order to make, and which I hereby make, is one that allows the plaintiff's application. The costs shall be in the cause.

**Orders accordingly.**

**SIGNED:**

**DATED and DELIVERED at MOMBASA this 5<sup>th</sup> day of March, 2010.**

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**J.B. OJWANG  
JUDGE**