



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**Civil Suit 15 of 2009**

**BELISI EVAYO OLAKA .....APPLICANT/PLAINTIFF**

**VERSUS**

**HOSKIN INDIMULI OLAKA .....RESPONDENT/DEFENDANT**

**AND**

**LAWRENCE OJIAMBO MUGENI .....INTERESTED PARTY**

**RULING**

The application before the court is dated 22.2.2010 and is brought by the Plaintiff. The Plaintiff seeks the following reliefs:-

- a) *That one Mr. Ipapu Advocate be disqualified from any further appearing and acting for the defendant and Interested Party in this matter.*
- b) *That a permanent order of injunction be granted against the Defendant and the Interested Party from occupying, remaining upon, trespassing on, transferring and/or in any manner whatsoever, tampering with plot No. Busia Municipality/125 until the hearing and final determination.*
- c) *That the Defendant and the Interested party be condemned to pay costs of this applications.*

The application is grounded on the reasons on the face of the application and on the supporting affidavit of the Plaintiff herein.

The affidavit in support shows that the Plaintiff is the mother of the defendant. She is a widow of the defendant's father who owned the suit property since 1949. It is on record that the Plaintiff's husband was declared a bankrupt. The Plaintiff further deposes that, her husband did not donate any power to the Defendant to do anything in relation to his estate.

As to the sale and transfer of L.R. No. Busia Municipality /1215 by the Defendant, the Plaintiff avers that the former had not been given powers to sell it and that any sale thereof through Ipapu Jackah Advocate, was a forgery which was reported to the police and is under investigations. Accordingly, she argued, Mr. Ipapu Jackah Advocate who drew the documents of sale and transfer, should meanwhile withdraw from acting, since he is in a position of a witness. But that since he has refused to so withdraw, he should be ordered by this court to stop acting until the circumstances of the sale and transfer are fully investigated.

The applicant further deposed that there is another suit pending at Kisumu between the same parties on the same subject matter, and an order of injunction dated 26.10.2009 exists, barring the Defendant from transferring the property to the Plaintiff, herein the Interested party,

until the suit is heard and determined. The plaintiff also deponed that this court had as well, by an order of injunction dated 26.11.2009, prevented the Defendant herein, from occupying, leasing, letting, or in any other manner tampering with the suit property until the final hearing and determination of this suit.

I have carefully examined the record. The injunction order issued by this court was so issued on 24.11.2009 by Muchemi, J. It was an interim order pending the hearing, not of the main suit as portrayed thereon, but on interim basis until the application dated 23.11.2009 is heard and determined. Whoever extracted the order, therefore, erred by showing that the orders were right or correct pending the hearing of the suit (matter). Clearly the application has never been heard inter partes and the said order in its present form (i.e. pending a date of hearing to be given by the Deputy Registrar, is incompetent under the Order 39 of the Civil Procedure Rules. Orders under the said Order, in my humble view, are limited to a life span of not more than 14 days except where they are extended, usually by consent of both parties. I accordingly rule that Muchemi's Judge's order afore mentioned was not intended to last beyond 14 days and I so declare

As to the Kisumu orders, I have little to say since the Kisumu court file is not before me. However, the orders clearly stayed the Kisumu High Court's orders to transfer L.R. No. Busia Municipality No. 7983/125 to the Plaintiff therein, Lawrence Ojiambo Mugeni. What is saddening however is that the property is shown to have been actually transferred to Lawrence Ojiambo Mugeni on the same day when the stay orders were given. If the transfer was effected hours after or before the court stay order was made, is a matter of evidence to be produced before this court.

The Interested Party's advocate Mr. Ipapu Philip Jackah, filed a replying affidavit sworn on 25.2.2010. He argues that there is no good ground upon which he should withdraw acting for the Defendant or the Interested Party. He says that the father of the Defendant i.e. John Kayeli, a bankrupt, transferred the suit property to the Defendant far back on 5.9.2002, when the registration was effected. That the transfer has never since been challenged or questioned until recently when the Defendant, with all his proprietary rights intact, transferred the property to the Interested Party on 16.11.2009. He further avers that there is no dispute between the Defendant and the Interested Party. That the Plaintiff herself has no *locus standi* as she has no specific or registered interest on the land. In these circumstances, argues Mr. Ipapu Philip Jackah, he sees no reason to withdraw from the suit.

I have carefully considered the application. Mr. Ipapu does not deny the fact that he or his office prepared the Sale Agreement and Transfer of the suit premises to the Interested Party. He does not deny that the transfer and sale agreement are being challenged and termed forgeries, whether that is so or not. It is my view and finding, therefore, that until the Sale Agreement and the Transfer to the Interested Party is cleared by this court, Mr. Ipapu is likely to be called as a witness even if it will only be to state that he drew the same and effected the registrations. He cannot therefore rightly and /or validly continue acting as an advocate, lest he be embarrassed.

The Advocates Practice Rules, rule 9 provides as follows:-

***“No advocate may appear as such before any court or Tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence .....he shall not continue to appear.***

***Provided that this rule does not prevent an advocate from giving evidence .....on formal or non-contentious matter of fact in any matter in which he acts, or appears.”***

A clear reading of the above rule give the advocate a discretion to decide to act or withdraw on non contentious matters. In contentious matters however, the advocate in my humble view, has to decide not to act or appear because he is a potential witness.

In this case the appearance or acting of Mr. Ipapu, is already contentious by Mr. Miano's judgement. Mr. Miano has indicated that Mr. Ipapu will be called as a witness. I find no way Mr. Ipapu can argue against a serious contention like that. Indeed Mr. Ipapu has to be made of steel if he thinks he can still continue to act or appear in this case.

Since Mr. Ipapu has contested his withdrawal from acting in this case and if left alone, would continue to act, it behoves this court to tell him to withdraw.

The applicants second prayer is to have an injunction stopping the Interested Party and the Defendant from in any way alienating the suit property until ownership is fully decided. Since the transfer to the Defendant Hoskin Indimula Olaka was completed on 16.11.2009, whether validly or not, this court cannot presently order a reverse of it. All it can do is freeze the ownership where it is presently, i.e with the Interested Party.

The result then is that this application must succeed. I make the present orders.

**ORDERS:-**

1. The Defendants/Interested Party's advocate Mr. Ipapu Phillip Jackah, is hereby ordered out of this suit as such advocate and except as a witness, forthwith, with liberty to the Defendant and/or Interested party to appoint another advocate of their choice.
2. A temporary injunction to issue against the Defendant and/or Interested Party preventing him/them from transferring, alienating, charging or in any manner interfering with L.R. No. Busia Municipality/7983/125 until this suit is heard and finally determined.
3. The following suits-
  - a) Kisumu HCCC No.151 of 2009
  - b) Busia PMCC No.453 of 2009
  - c) Bungoma HC Misc. Civil Application NO.961 of 2009
  - d) Any other suit in this court or elsewhere in Kenya, be and are all consolidated to be heard under this suit.
  - e) Deputy Registrar to recall all the above files for above consolidation and hearing.

Costs in this application be met by Mr. Ipapu Philip Jackah personally.

Dated and delivered at Busia this 23rd day of June, 2010.

**D.A. ONYANCHA**

**J U D G E**