



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Case 158 of 2009

JACOB SHIEUNDA MISAKA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

V E R S U S

NELSON MURAMBA MARAKHA

ISAACK WABUKO NABUTI ::::::::::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

1. The Applicant seeks a temporary injunction under **Order XXXIX Rules 1 and 2** of the Civil Procedure Rules to restrain the Defendants/Respondents, their agents and/or servants or whosoever claims title No. **Marama/Shinamwenyuli/1991** from selling, sub-dividing, transferring or in any way dealing with the said parcel of land until the suit herein is heard and determined.
2. It is the Applicant's case that title No. **1991** aforesaid was originally part of title No. **Marama/Shinamwenyuli/1284** and that by a Sale Agreement dated 28.8.1999, it was agreed that the 1st Defendant would purchase ½ acre to be excised from that parcel of land and in furtherance thereof, the ½ acre was excised and a boundary demarcating it, was fixed. That the 1st Defendant paid the full consideration but no Land Control Board consent to sub-divide and transfer the ½ acre was sought by the Applicant and he was surprised when the Defendants together with the Assistant Chief, Imanga Location, invaded the land and purported to destroy the demarcated boundary and insisted that the 2nd Defendant had obtained a title document which indicated that title No.1991 was one acre, a fact, unknown to the Applicant. That he is "apprehensive that the defendants may transfer the said portion of land to a third party without" his knowledge and without considering his interest in the land.
3. The Defendants/Respondents in a Replying Affidavit sworn on 5.3.2010 by the 2nd Defendant and with the authority of the 1st Defendant argue that the 1st Defendant indeed purchased one (1) acre of land from the

Applicant vide the Sale Agreement dated 28.8.1999 and the 1st Defendant by another Sale Agreement dated 10.11.2008 sold the same parcel of land to the 2nd Defendant. Subsequently, the 2nd Defendant obtained title to parcel No.1991 and he has no intention of disposing it to anyone.

4. The matter before me is fairly straight forward because the issue that is contested, is whether the 1st Defendant bought ½ acre or 1 acre of land from the Plaintiff. Before me are copies of two Sale Agreements both dated 28.8.1999. One is exhibited by the Plaintiff and the other by the Defendants. What is baffling is that whereas the one by the Applicant refers to ½ acre, the one by the Defendants refers to one (1) acre. I only have copies of the agreement(s) to guide me but even a layman can tell that the copy tendered by the applicant appears to have been altered so that the Swahili word “*moja*” for “*one*” has been removed and the Swahili word “*nusu*” for “*half*” has been inserted in its place. I say this from what I can see and without any professional guidance at all. At this stage, I am merely guided by the prima facie evidence before me and to my mind, even if my reliance on the faulted Sale Agreement is improper, on the evidence before, the Applicant’s case on the whole is prima facie very weak. I say so because he admits the sale transaction but purports, without any basis at all, to fault the transfer to the 1st Defendant and thereafter to the 2nd Defendant. Further, he says that the land may be transferred to a third party but gives no basis for his “apprehension” in that regard. Lastly I am not convinced that the Applicant has met the principles for grant of an injunction as set out in Giella vs Cassman Brown [1973] E.A. 358. In that case and as was approved in National Bank of Kenya Ltd. vs Lawrence Otweyo Gumbe [2006] eKLR, Spry, V.P had this to say;

- Held “(i)**
- (ii)**
- (iii)**
- (iv)** *an applicant must show a prima facie case with a probability of success;*
- (v)** *an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;*
- (vi)** *when the court is in doubt, it will decide the application on the balance of convenience.”*

5. I am dutifully guided and I have said that I see no prima facie case with a probability of success and I have not been told why damages are not an adequate remedy and in any event on a balance of convenience, equity must favour the Defendants/Respondents.

6. However, while I shall order that the Application dated 22.2.2010 be and is hereby dismissed with costs, I shall order the Defendants to submit the agreement(s) dated 28.8.1999 to a document examiner to conclusively prove the authentic one before directions can be given as to the hearing of the main suit.

7. Orders accordingly.

Delivered, dated and signed at Kakamega this 16th day of June, 2010

ISAAC LENAOLA
J U D G E