



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Appeal 79 of 2008

BENSON ONG’ALE NAMAI-----APPELLANT/APPLICANT

VERSUS

ELIJAH ANDATI ETEMESI-----RESPONDENT

R U L I N G

The applicant has filed an appeal to challenge the judgment of the trial court, which declared the respondent hereinto be the rightful owner of the suit land, **L.R. NO. MARAMA/SHIRAHA/1037**. The Memorandum of Appeal was filed on 16th October 2008.

Having filed the appeal, the applicant has now filed a chamber summons dated 24th February 2009. By that application, the applicant asks this court to grant an interlocutory injunction to restrain the respondent from tilling the suit land, cultivating, alienating, selling or in any other manner interfering with the status quo on the ground. It is the wish of the applicant that the interim injunction, if granted, should remain in force until the appeal was heard and determined.

It is the applicant’s contention that he is in actual occupation of the suit land. And he blames the respondent for interfering with his said occupation. Indeed, the respondent is said to be cutting down trees, uprooting trees, demolishing or destroying graves, burning charcoal and generally wasting the land.

If the destruction were to continue, the applicant believes that he would suffer irreparable damage and loss, as graves are irreplaceable.

Meanwhile, as the applicant’s appeal is directly challenging the respondent’s alleged ownership of the land in issue, the applicant believes that the land should be preserved.

In answer to the application, the respondent pointed out that he is the registered proprietor of the suit land. He also asserted that he had been in occupation of land since the year 1994.

The respondent insisted that the applicant had not been in occupation of the suit land.

Therefore, even if this court were to order that the status quo be maintained on the ground, the respondent contends that that would mean that he remains on the land.

If the court were to order that the land should not be cultivated, the respondent submits that that would cause him to suffer greatly, as the applicant is said to have been out of the land since the year 2005.

The respondent submitted that the balance of probability favours him, as it is he who is in actual possession.

Finally, the respondent denies the contentions that he was wasting the land in any manner. He said that all he does on the land is to plant food crops. He concluded by saying that he was not averse to an order for the maintenance of the status quo.

Having given due consideration to the application, the first point of note is that the two parties herein are not in agreement about what the status quo prevailing currently is. Each of them insists that it is he who is in actual occupation of the suit land.

In those circumstances, if the court simply ordered that the status quo be maintained, it would not be useful to either party, as each of them may interpret the order to suit their own positions.

In the replying affidavit, the respondent said that he had been in occupation of the suit land since 1994. Yet a quick perusal of the evidence which he tendered before the trial court, on 18th October 2005, reveals that the respondent said;

“I have never used the land.”

But it is equally true that the applicant herein said;

“I am not using the land now. I used to use it. I came to learn that the plaintiff had taken the land.”

It therefore follows that the parties herein have not maintained similar stands now, as they stated during the trial. At that time, each of them said that they were not in occupation of the suit land. Now, each says that they are in occupation, and that they had been in occupation for many years.

In those circumstances, it is not easy for me, at this stage, to determine what the status quo is.

However, I am convinced that as the appeal is pending, the property should be preserved. Therefore, I do now order that the respondent shall be restrained by an injunction, from selling, alienating or encumbering the title of the suit land, **L.R. NO. MARAMA/SHIRAHA/1037**. The respondent should further be restrained from cutting down trees, uprooting trees, demolishing or destroying graves, burning charcoal or in any other manner causing wastage of the said suit land.

These orders shall remain in force until the appeal is heard and determined. The costs of the application shall abide the outcome of the appeal.

In the event, if the appeal succeeds, the costs of this application shall be awarded to the applicant herein. But if the appeal should fail, the costs of the application would go to the respondent.

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 29th day of April, 2009

FRED A. OCHIENG

J U D G E