



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

Civil Case 21 of 2009

ANDREW MBAKAYA BULINDA ::::::::::::::::::::::: PLAINTIFF

VERSUS

NATHAN CHITUI WIJENJE ::::::::::::::::::::::: DEFENDANT

RULING

The Applicant is the registered owner of Plot No. ISUKHA/SHISWA/1198 having been issued with a Title Deed on 11th March, 2008. On 17th February 2009 the applicant filed the current application seeking restraining orders against the defendant stating that the defendant had forcefully and without his consent moved onto the suit land and started ploughing in preparation of the planting season.

The Plaintiff's application was supported by this affidavit sworn on 17th February, 2009 and a further affidavit sworn on 7th April, 2009.

Mr. Nandi, learned Advocate for the Plaintiff submitted that the applicant was the registered owner of plot No. ISUKHA/SHISWA/1198 and that on 9th February 2009 the respondent trespassed on the property and started ploughing in preparation of the rainy season without the applicant's consent.

Learned counsel submitted that the defendant's action has infringed on the applicant's right of enjoyment of the property and an injunction would assist in preserving the property. Learned counsel relied on the case of **MRAO LTD. VS FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS, 2003, KLR, 589**. The Plaintiff did confirm that he bought the property from the heirs of the deceased original owner.

Mr. Nandi submitted that the respondent alleges to have planted trees worth one million and that that was an indication that the respondent had not planted any seasonal crops. He urged the court to allow the application and restrain the defendant from interfering with the plaintiff's peaceful occupation of L.R. ISUKHA/SHISWA/1198 pending the hearing and determination of this suit.

Mrs. Muleshe, Advocate for the Respondent objected to the application and relied on the defendant's replying affidavit sworn on 18th March, 2009. Learned counsel submitted that the defendant is claiming equitable ownership having purchased the suit land from the deceased owner on 10th October, 1995. It was submitted for the defendant that he has been using the property for over fourteen (14) years and that he was given vacant possession in 1995. Defendant contended that he has planted Eucalyptus trees on the property and that the value of the trees is over Kshs. One (1) million.

Defendant further argued that by the time the plaintiff obtained his title, the defendant was already in occupation and that it will be the defendant who will suffer should an order of injunction be issued. It was also contended that the plaintiff has never been in occupation of the suit property. Learned counsel

urged the Court to disallow the application.

The main issues for this court to consider is whether the plaintiff has established a prima facie case with a probability of success, whether the plaintiff will suffer irreparable damage or loss if the injunction is denied and what is the balance of convenience.

One the first issue of Prima facie case, the plaintiff is the registered owner of plot No. ISUKHA/SHISWA/1198 measuring 0.87 Hectares. He exhibited his title deed that was issued to him on 11th March 2008. It is clear that the plaintiff has a prima facie case with a probability of success being the registered owner of the suit property.

With regard to the second aspect governing the grant of injunction, the plaintiff submitted that he is being denied the enjoyment of his property and that the defendant's action of trespassing on his land is unlawful. On the other hand the defendant has exhibited a sale agreement dated 10th March, 1995 wherein it is indicated that he bought a portion of the suit property from the original owner, the late ELIAD WIDUNDU MUSOLOLI for Kshs. Thirty eight thousand. The agreement was witnessed by the deceased's wife, SOPHIA KHALWALI EDWARD and son SAMWEL WIDUNDU ELIAD. On the date of the sale Agreement, the defendant paid a deposit of Kshs. Twenty thousand (Shs.20,000/-) while the balance was paid in three installments as follows:

November, 1995 - Kshs.4,500/=

25th December, 1995 - Kshs.4,500/=

10th March 1996 - Kshs.5,000/=

According to the exhibited sale agreement, by the time the last installment was being made in March 1996 the original owner had died. The defendant contends that he took possession of the property from 1995 and has planted Eucalyptus trees thereon.

The Plaintiff contends that he bought the property from the inheritors of the original owner. The title deed was issued on 18th March, 2008. It is clear that the plaintiff must have noted the presence of the defendant's trees and ought to have raised the matter with the sellers of the property. I am satisfied that both parties herein are basing their claims on the same property and it cannot be held that what the defendant is claiming is different from the plaintiff's property. Indeed the defendant is not claiming the entire property. According to the sale Agreement, the defendant bought a plot measuring 170 by 21, the term used is miguu, it is upto the surveyors to determine the extent of that description.

In short therefore the inheritors of the late ELIAD WIDUNDU MUSOLOLI had no right to sell the portion already sold by the deceased to the defendant. The defendant's rights are recognized under the Succession Act as a creditor. I therefore find that the Plaintiff shall suffer no irreparable damage with regard to the portion occupied by the defendant. It has not been proved to me that the defendant has taken the entire suit property.

On the balance of convenience, the defendant shall be inconvenienced if he is not allowed to utilize the portion sold to him. Similarly the plaintiff will be inconvenienced if the defendant were to be allowed to utilize the entire suit property.

The outcome is that the Plaintiff's application dated 17th February, 2009 is disallowed. However, the defendant shall be restricted to utilize only the portion he bought and shall have no authority to utilize the entire plot No. ISUKHA/SHISWA/1198. Each party shall be at liberty to apply to court for any further orders. Costs of the application shall be in the cause.

DATED, SIGNED AND DELLIVERED this 25th day of June, 2009.

SAID J. CHITEMBWE

J U D G E