

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 47 of 2008

JAPHETH BUNYOLI PLAINTIFF

V E R S U S

CHRISPINUS MOTOKA)

JACKSON WANYAMA)..... DEFENDANT

R U L I N G

The Plaintiff filed his application dated 4th June 2009 seeking orders of injunction restraining the defendants from leasing, alienating, disposing off, wasting, cultivating or in any way dealing with parcel NO. BUTSOTSO/INDANGALASIA/4222 pending the hearing and determination of this suit. The application is supported by his affidavit sworn on 4th June, 2009.

The applicant's contention is that he is the absolute registered proprietor of the suit plot and he exhibited his title. He bought the suit land in 1986 from one ALPHONCE TSIKHUNGU MURUNGA and JOSEPHAT MURUNGA for Kshs.24,300/-. Mr. Kiveu, counsel for the applicant, submitted that the land is registered under the Registered Land Act and being the registered owner, he has a prima facie case. He urged the court to uphold the sanctity of a title deed and that the case pending before the Chief Magistrate Court at Kakamega CMCC No.333 of 2007 does not involve the defendants.

Mr. Momanyi for the respondents opposed the application and submitted that the defendants have been in occupation of the suit land since 2000. The Plaintiff's case is for eviction and if the court was to grant the orders prayed for then that would be tantamount to deciding the case before it is heard. The defendants would suffer irreparable loss. Defendants counsel further submitted that the Plaintiff's title is being challenged in the Chief Magistrate's court as the same was obtained through forgery. If the title is cancelled then the plaintiff's ownership will be affected.

The Plaintiff has exhibited a sale agreement dated 1st May, 1986. It shows that he bought land measuring 46ft by 35ft by 262ft. He obtained his title deed on 7th June, 2007 for a plot measuring 0.98 Hectares. I have perused the Plaintiff for Civil case No. 333/07 before the Kakamega Chief Magistrate court and note that the suit land was part of the estate of the late MURUNGA MUCHILWA and was initially Plot No. BUTSOTSO/INDANGALASIA/240. The plaintiff in this suit is the 2nd Defendant in the suit before the Chief Magistrate. The Plaintiff in the lower court case claims that Plot BUTSOTSO/INDANGALASIA/240 was fraudulently subdivided and created two portions one being BUTSOTSO/INDANGALASIA/4222. This was done before the grant was confirmed.

Given the above scenario and not to delve deep into the merits or demerits of the case before the lower court, it is clear that the plaintiff's absolute ownership of the suit land is being questioned. Should he lose in that case then the prima facie case he contends to have will collapse. Further, for the interest of justice, it will be better to have this case fully heard as granting the orders being sought would mean concluding the case in an indirect way. This is not a clear case where the court can grant the orders being sought. If it is shown that the property was part of the estate of the late Murunga Muchilwa, then sections 107 and 122 of the Registered Land Act will take effect.

I therefore find that despite having a title to the suit property the plaintiff has not established a prima facie case with a probability of success. The plaintiff has also not established what loss he would suffer should the court decline to grant the orders prayed for. This application is dismissed with costs to the respondent.

Dated, Signed and Delivered at Kakamega this 23rd day of July, 2009

SAID J. CHITEMBWE

J U D G E