



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Civil Case 20 of 2009**

**ALFRED OLINDO SHITEMI ::::::::::::::: PLAINTIFF**

**VERSUS**

**MARGARET MUNALITSI MBUNI ::::::::::: DEFENDANT**

**RULING**

The applicant filed this application on 17<sup>th</sup> February 2009 seeking orders restraining the respondent from among other things utilizing or disposing of Plot **NO. TIRIKI/SHAMAKHOKHO/864** pending the hearing and determination of the suit and that an inhibition be placed on the suit property pending the finalization of this suit.

Mr. Anziya, Counsel for the Applicant, submitted that the applicant filed Originating Summons claiming Plot **NO. TIRIKI/ SHAMAKHOKHO/864** through adverse possession. The Plaintiff has been in occupation of the suit land and would like to remain in occupation until the suit herein is fully heard and determined. In his supporting affidavit, the applicant states that he has been utilizing the suit property until recently when the defendant demolished the houses and fenced the land. The applicant states that he has utilized the property for a period exceeding 35 years.

Mr. Musiega for the respondent opposed the application. He relied on the affidavits of the respondent and one Paul Waweru. Mr. Musiega submitted that Paul Waweru bought the property at an auction conducted by the Kenya Commercial Bank after the applicant's father failed to discharge a loan. The Originating Summons is yet to be heard and determine the applicant's claim and that all the structures on the land were demolished in November, 2008. The applicant will not suffer any irreparable loss that cannot be compensated by way of damages.

The main issues for determination herein is whether the applicant has established a prima facie case with a probability of success, whether the applicant will suffer irreparable damage or loss and what is the balance of convenience.

The applicant's position is that the property belonged to his father and that he has been utilizing the same with his brothers for a long period, that the respondent has not occupied the suit premises. The respondent demolished the shops on the plot and fenced it off. The applicant's family also owns plot **NO. TIRIKI/SHAMAKHOKHO/372** where they have planted tea bushes.

On the other hand, the respondent argues that she bought the suit plot from one Paul Kahi Waweru and in August, 2008 she started using the land. There was a dilapidated old shop on the plot that had no doors and used to harbour criminals. The respondent pulled down the building and cleared the plot. The respondent states that the applicant has never utilized the property and that he has his houses with his brothers on plot **NO. TIRIKI/SHAMAKHOKHO/372**. An affidavit by Paul Kahi Waweru shows that the property was sold to the respondent on 20/8/2008 for Kshs.170,000/= and the respondent fully paid the consideration by way of a bankers cheque.

The applicant admits that the respondent demolished the structures that were on the suit property. No photograph has been exhibited to prove that there are structures existing on the property.

Given the above scenario, it does not serve any purpose to grant the orders being sought. If the suit property belonged to the plaintiff's father, the plaintiff has to establish his case first by way of adverse possession instead of restraining the owner who also claims to be in occupation. The applicant will not

suffer any irreparable loss or damage as he confirms that his family owns plot No. Tiriki/Shamakhokho/372 and the respondent has stated that the applicant lives in that plot.

The applicant has not shown what loss he will suffer or what rental proceeds he has been getting from the alleged shops on the suit property or alternatively what commercial activities are being carried on the property. It is the respondent who will be inconvenienced if the orders are granted.

On the end I do find that the application has no merit and the same is dismissed with costs. The interim orders are hereby discharged.

*Dated, Signed and Delivered at Kakamega this 23<sup>rd</sup> day of July, 2009*

**SAID J. CHITEMBWE**

**J U D G E**