

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 28 of 2009

CHARLES TEMBA SAKWA PLAINTIFF

VERSUS

JOSEPHAT AMBALE ASWANI.....DEFENDANT

R U L I N G

In his application dated 31st March, 2009 the Plaintiff/Applicant is seeking orders against the Defendant/Respondent that he be removed from the parcel of land NO. KISA/MWIKALIKHA/1666 and all plants planted on the plot plus construction materials be removed. The application is supported by the applicant's affidavit sworn on 31st March, 2009 and a Supplementary affidavit sworn on 18th June, 2009.

Mr. Amasakha, counsel for the applicant, submitted that the applicant is the Administrator of the Estate of Hoesa Sakwa. The defendant invaded the property on 15th February, 2009, ploughed it and planted crops. The Plaintiff's father became the owner of the suit property after Succession Cause No. 135 of 1984 was finalized. The Plaintiff's deceased father had bought the land.

Counsel submitted that the defendant had brought construction materials on the plot and urged the court to order that the crops on the plot either be removed or be left on the land but when ready be harvested by a court bailiff and the proceeds be deposited in court. The applicant stands to suffer irreparable damage as the defendant is a trespasser. Counsel relied on the case of *SHELL B.P. LTD. VS KINGS MOTORS LTD., NAKURU HCCC NO. 265 OF 2004*.

Mrs. Change, Counsel for the Respondent opposed the application. She relied on the replying affidavit of the defendant sworn on 24th April, 2009. Counsel submitted that the defendant is a grandson of the late KUTA OMORE and that the Defendant's mother, EMILY NANDWA MBUTO was the only surviving child of the late KUTA OMORE. The suit land is the defendant's ancestral land and the Plaintiff's father had leased part of the land.

Counsel further submitted that the defendant's mother conducted a search at the Land Registry and found that the Plaintiff's father had been registered as the owner of the land. She filed a claim before Khwisero Land Disputes Tribunal but she passed on before the proceedings were concluded. The defendant's brother, Boaz took over the proceedings but also died before the award was adopted by the Court. Counsel further submitted that the defendant's family has been residing on the land ever since and that the defendant was born on the land. He had put up a house that was demolished by the Plaintiff.

The main issue for determination is whether to issue a mandatory injunction against the defendant. The Plaintiff's claim arises from a Succession Cause where his father, HOSEA SAKWA inherited the suit land. The land was initially owned by one KUTA OMORE and the Plaintiff contends that his father bought the land from the previous owner. On the other hand, the defendant contends that he is the grandchild of the late KUTA OMORE and his mother was the only person who could have succeeded him. He contends that he was born on the land and that the plaintiff's father only used to lease portions of the land.

The main prayer in the Plaint is for a Permanent Injunction against the defendant restraining him from interfering with land parcel NO. KISA/MWIKALIKHA/1666. The defendant has filed a defence and counter-claim alleging that the plaintiff's deceased father had himself registered as the proprietor of the suit land fraudulently.

The Grant in respect of the Estate of the late KUTA OMORE was not exhibited. It is not clear how the Plaintiff's deceased father had himself registered as the owner of the suit property. The extract from the Land Registry show that KUTA OMORE was registered as the owner on 1st of March, 1965. HOSEA SAKWA got registered on 9th December, 1985 and a title deed was issued on 8th January, 1986.

I am not convinced that the applicant herein will suffer irreparable damage if the orders are not granted or that he has established a Prima facie case against the defendant. There is need to hear all the parties orally together with their witnesses, if any. There is also need to see the documents used in the Succession Cause for the late KUTA OMORE. I do find that it is not proper to issue a mandatory injunction against the defendant at this stage.

In the end the Plaintiff's application dated 31st March, 2009 is hereby dismissed.

Each party shall meet his own costs.

Delivered, dated and signed at Kakamega this 27th day of October, 2009.

SAID J. CHITEMBWE

J U D G E