



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KAKAMEGA**

**Civil Case 49 of 2008**

**CHRISTOPHER MURUNGA KHALAKULI ..... PLAINTIFF**

**V E R S U S**

**SEJERO ASIEBELA alias**

**SEJERO ASIEVERA ..... 1<sup>ST</sup> DEFENDANT**

**MATHEWS KAWA SAJERO ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The applicant filed his application dated 17<sup>th</sup> September, 2008 seeking injunctive orders against the respondents pending the hearing and final determination of the suit. He is also seeking prohibition against the suit property, Plot No. **KAKAMEGA/ILEHO/565**. The application is supported by the applicant's affidavit sworn on 11<sup>th</sup> September 2008.

Mr. Mukavale, counsel for the applicant submitted that the applicant is in actual possession of the suit property and has fenced it together with his other property. He has used the property for over 12 years. The property is registered in the names of the 2<sup>nd</sup> respondent. The respondents have been sending prospective buyers to the property and this has made the applicant to be apprehensive.

Mr. Atulo, counsel for the respondents opposed the application. The 2<sup>nd</sup> respondent is the registered owner having been given the land by the 1<sup>st</sup> respondent as a gift on 17<sup>th</sup> October, 2005. The person who purportedly sold the land to the applicant was not owner of the land and was a trespasser. Counsel for the respondents further submitted that the applicant is in actual possession. He relied on the affidavit of the 1<sup>st</sup> respondent sworn on 10<sup>th</sup> March 2009. Counsel submitted that the applicant has not established a prima facie case as required by the law for an injunction to be granted. He relied on the case of **KENYA HOTELS LTD. -VS- KENYA COMMERCIAL BANK LTD. 2004 1 KLR 80**. There is no proof that the applicant has a house on the property or that he is in possession. If he is in possession then it was through forceful entry which is illegal.

In his supporting affidavit the applicant contends that he bought the land from one Ernest Muruli

Shichane in 1989. He has exhibited a sale agreement dated 1<sup>st</sup> December, 1989. He contends that the said Ernest Muruli Shichane had bought the land from the 1<sup>st</sup> respondent in 1975 and has exhibited a sale agreement dated 15<sup>th</sup> March, 1975. In that sale agreement the seller is Segero Asievela and the buyer is Ernest Namunyu. The agreed consideration is KShs.11,000/=. The plot No. is described as Plot 565.

The applicant contends that Ernest Namunyu took possession of the land and used it until 1989 when he sold the land to the applicant. He avers that since 1989 he has been in possession of the land and has used the same peacefully to the exclusion of the respondents.

Although the applicant urged the court to expunge certain paragraphs in the 1<sup>st</sup> respondent's replying affidavit. I do not see any good reason for doing that. Although some paragraphs are not in the first name as required, it can be deduced from the entire affidavit that it contains the averments of the deponent. The applicant further contends that the affidavit is scandalous and oppressive. I do find that the affidavit is proper and the same or the alleged scandalous paragraphs shall not be expunged.

In his replying affidavit, the 1<sup>st</sup> respondent denies selling the suit land to one Ernest Namunyu. The 1<sup>st</sup> respondent contends that the 2<sup>nd</sup> respondent is the one in occupation.

From the submissions and the documents annexed to the applicant's affidavit, I am satisfied that the applicant has established a prima facie case with a probability of success. The validity of the sale agreement between the first respondent and the said Ernest Namunyu shall be determined during the hearing. The applicant contends that he has fenced the plot but the respondents are stating that they are in actual possession. If that was to be the case then the only issue would be to maintain the status quo with each party utilizing the plot he is occupying. However, counsel for the respondent contends that the applicant's entry was forceful and therefore illegal. Whether this is the position will be determined during the hearing.

In the end I do grant the application dated 11<sup>th</sup> September, 2008 as prayed in prayers 1 and 2 thereof. Each party shall meet his costs.

***Delivered, Dated and Signed at Kakamega this 12<sup>th</sup> day of November, 2009***

**SAID J. CHITEMBWE**

**J U D G E**