



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

**AT KAKAMEGA**

**Civil Case 84 of 2007**

**SEVERINUS MBAYAKI SISA ..... PLAINTIFF**

**VERSUS**

**FELIX MUNAMI NGAMIA ..... DEFENDANT**

**R U L I N G**

The application before me has been brought by way of Chamber Summons, pursuant to the provisions of **sections 3A** and **63 (e)** of the Civil Procedure Act, as read together with **Order 39** of the Civil Procedure Rules. The application first came up before the court on 27/11/2007, under a certificate of urgency, and the same was duly certified urgent.

Indeed, the learned judge proceeded to grant an interim injunction, *ex parte*, after giving due consideration to the applicant's submissions.

Finally, the application came up for *inter partes* hearing on 21/4/2008. By that date the defendant had filed no defence although he had been served with a plaint and summons to enter appearance. Also, the defendant had filed no replying affidavit or grounds of opposition, in response to the application.

In any event, the defendant failed to attend court, during the hearing of the application. In effect, the application was uncontroverted.

In those circumstances, Mr. Fwaya, advocate for the plaintiff, simply asked the court to grant the orders sought.

The question therefore is, what orders are being sought by the Plaintiff?

The answer is that the plaintiff seeks the following two orders:-

- (i) Eviction of the defendant, his family, agents and any other person claiming on his behalf; and
- (ii) An injunction to restrain the defendant, his family, agents or any other person claiming on his behalf from interfering with the plaintiff's use and occupation of the suit property, **L.R. NO. BUNYALA/SIDIKHO/827.**

According to the applicant, the suit property measures about 4.05 Hectares. And to verify not only the size but the ownership thereof as well, the plaintiff exhibited a certificate of Title which shows that he was the sole registered owner, since 25/6/1980.

There are records which show that the defendant did file **KAKAMEGA HCCC NO. 77 of 2003**, which was a case against the plaintiff herein, and two other defendants. In the plaint in that case, the defendant herein acknowledged that the suit property had been sold by his brother, **JOSEPH WEKULO NGAMIA**, to the plaintiff herein. However, the defendant herein also asserted that there was another person who acquired the suit property together with the plaintiff herein.

The details of that case are not otherwise significant, save that that case was still pending. And as the substantive prayers in that suit are for the claim of a portion of the said property, it is my humble tentative view that until and unless that case were determined in favour of the defendant herein, he would have no legal basis for laying any claim over the property vis-à-vis the plaintiff herein.

Meanwhile, it is also noteworthy that the subject matter of this suit is **parcel No. 827**, whereas the subject matter of **HCCC No. 77/03** is **Parcel No. 363**. In other words, even if the plaintiff in **HCCC No. 77/03** were to succeed in that suit, he could only lay claim to the subject matter of this suit if he were to prove that the two properties were one and the same.

To my mind, the plaintiff was obliged to file this suit, as opposed to using **HCCC No. 77/03** as a vehicle to obtaining the reliefs sought because it may well be that the two suits relate to different subject matter.

For now, and on the basis of the uncontroverted evidence placed before the court, I am satisfied that the plaintiff has established a prima facie case with a probability of success. And, as the plaintiff has lived upon the suit property with his family since 1980, and also because he has a contract with Mumias Sugar Company Limited, which contract can only be executed if the plaintiff continued working on the suit property, I find and hold that if the defendant was not restrained from trespassing onto the said land, the plaintiff will suffer irreparable loss and damage.

In the circumstances, I now order that an injunction shall issue forthwith restraining the defendant from interfering with the plaintiff's exclusive use and occupation of the suit property **L. R. NO. BUNYALA/SIDIKHO/827**, until this suit is heard and determined. This order shall apply in equal force to the family and agents of the defendant, and also to any other person laying claim on his behalf.

However, at this stage in the proceedings I decline to grant an order for the eviction of the defendant. My reason for so deciding is that if the said order were to be granted, this court would already have determined the substantive suit, in that respect.

It must however be emphasized that in my considered opinion the wording of the injunctive relief which I have granted herein is wide enough to address the concerns of the plaintiff, as regards the defendant's entry upon or usage of the suit property. I have deemed it necessary to make that clarification because there is no lacuna which may permit the defendant to use the property which, on a prima facie basis, belongs to the plaintiff.

Finally, the costs of the application are awarded to the plaintiff.

*Dated, Signed and Delivered at Kakamega this 27<sup>th</sup> day of May, 2008.*

**FRED A. OCHIENG**

**J U D G E**