

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 102 of 2006

JULIUS USWEKHA SHITAKHWA :::::::::::::::::::::PLAINTIFF

VERSUS

1. SAUL MASAVILA SHITAKHWA)

2. BENARD SHITELO SHISILVOTO)::::::::::::::::::: DEFENDANTS

RULING

The plaintiff, JULIUS USWEKHA SHITAKHWA, filed the suit herein on 21.11.2006 seeking orders that the title to land No. Isukha/Shinyalu/1296 be cancelled because it was wrongfully transferred to the 2nd Defendant, Bernard Shitelo Shisilivoto, by the 1st Defendant, Saul Masavila Shitakhwa, who was holding it as a trustee for the plaintiff. The plaintiff also sought an order that he be registered as the proprietor thereof.

On 20-3-2007, the plaintiff made an application by way of Chamber Summons dated 20-3-2007 seeking injunction to restrain the Defendants in the suit herein “**from fencing, ploughing, constructing on the said land or interfering with the title Number Isukha/Shinyalu/1296 until the hearing and determination of the suit.**” The application was supported by an affidavit sworn on 20-3-2007 by the plaintiff. In it, the plaintiff states that he will suffer irreparable loss unless the injunction sought is granted.

Both Defendants filed replying affidavits opposing the application. The 2nd Defendant averred that he is the absolute owner and proprietor of the suit land and has exclusive right to its occupation and use and peaceful enjoyment. The 1st Defendant averred that he had transferred title to the said land to the 2nd Defendant and is not in possession of it.

During the hearing of the application on 21-5-2007, Mr. Aturo, learned counsel for the applicant, urged the court to allow the application and grant the injunction sought.

The 1st Defendant did not attend court but the 2nd Defendant who attended court asked the court to dismiss the application.

I have perused the application and duly considered the submission made by the plaintiff’s counsel and the 2nd Defendant.

Injunctions are discretionary remedies that courts issue to protect legal and equitable rights of parties to litigation. It has been said that “**the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainly were resolved in his favour at the trial.....**” see the speech of *Lord Diplock in American Cyanamid Co. versus Ethicon Ltd. (1975) AC 396 at pp 406*. The conditions for the grant of interlocutory injunctions have been stated in *GIELLA v. CASSMAN BROWN & CO. LTD (1973) EA 358 at page 360* as first, existence of a prima facie case with a probability of success, and secondly, proof that the applicant will suffer irreparable injury which would not be adequately compensated by an award of damages and thirdly

that the balance of convenience is in favour of granting the injunction where the court is in doubt.

In the instant application, the applicant's alleged interest to the suit land is yet to be proved and clearly the applicant cannot at this stage claim to have legal or equitable interest that should be protected by an order of injunction. The conditions for the grant of interlocutory injunction have not yet been established. In the circumstances, I decline to grant the orders sought. I dismiss the application. Costs shall be in the cause.

It is desirable however that pending the hearing and determination of this case, the title to the suit land does not change hands. It is in the interest of justice that the title to the land which is the subject matter of this suit is not transferred to a third party. So that the ends of justice are met, I invoke the provisions of section 63 (e) of the Civil Procedure Act, Cap 21, and hereby order that an interlocutory order shall issue forthwith inhibiting until this suit is determined registration of any dealing with the land including transfer, charge, lease or any dealing whatsoever.

Dated at Kakamega this 8th day of November, 2007.

G. B. M. KARIUKI

J U D G E