

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Case 14 of 2003

MASINDE MARUTI KUKALI.....PLAINTIFF

VS

1. EDWARD PETER ORANGA ONGONGO.....1ST DEFENDANT

**2. ISAAC MARUTI JUMA(Legal
representative of WILLIAM J. MWAYAFU)....2ND DEFENDANT**

R U L I N G

The matter before this court is the summons dated 17th December 2004 in which Masinde Maruti Kukali the applicant herein seeks to restrain Edward Oranga Ongongo and Isaac Maruti Juma, the Respondents from entering, building, ploughing, planting, staying, dealing or selling and or interfering in any other way with the parcel of Land known as Ndivisi/Muchi/763 pending the hearing and determination of this suit. The summons was served and the applicant was granted leave to proceed for hearing ex parte with the application when the Respondents' advocate failed to file a response pursuant to the provisions of Order L rule 16 (3) of the civil procedure rules.

The summons is supported by the affidavit sworn by the applicant dated 17th December 2004. His main ground in support of the summons is that the Respondents are in the process of selling L.R. NO. NDIVISI/ MUCHI/763 to third parties thus defeating the cause of action in court. It is the applicant's submission that the Respondents' intended action will substantially change the status quo which may in turn cause a breach of peace now subsisting on the disputed piece of land.

It is unfortunate that I do not have the benefit of the side of the Respondents' story to enable me make an informed decision. It is the averment of the applicant that the Respondents are bent to sell disputed piece of land to innocent third parties. The principles of granting orders of injunction are well settled. The first principle is that an applicant must show that he has a prima facie case with a probability of success. The applicant states that he is the registered proprietor of the suit premises. He has not annexed any exhibits to his affidavit to show in evidence that he has any proprietary interest over L.R. NO. NDIVISI/MUCHI/763. In fact the affidavit he swore on 17th December 2004 does not mention of the nature of his interest he has over the property. I have only seen the interest disclosed in paragraph 4 of the plaint in which the applicant says he is the registered owner. It was incumbent upon the applicant to establish the nature of his interest over the property in dispute. In the absence of such an averment in the summons and in the supporting affidavit I am not convinced that the applicant has established a prima facie case with a probability of success.

The second principle is that an applicant must establish that he would suffer an irreparable loss unless an order of injunction is granted. The applicant alleges that the Respondents are in the process of disposing of the suit land to third parties. He says that will cause an irreparable loss because the whole suit would be defeated. What I can deduce from this argument is that the applicant is apprehensive that the suit premises would be no more. I am not convinced that the suit would be defeated or would the applicant suffer irreparable loss. I am of the view that the applicant would be slightly inconvenienced in that he would be constrained to amend the pleadings if the allegations turns out to be true. The third principle which a court must consider if it is in doubt is the balance of convenience. The applicant in this application has not shown how he would be inconvenienced. He has failed to establish whether he is in

occupation or not of the suit land both in the summons and in the plaint. In a nutshell the status of the suit property has not proved to enable me issue the order to preserve the status quo.

In the end this application lacks merit consequently the same is dismissed with no order as to costs.

DATED AND DELIVERED THIS 18th DAY OF February 2005

J.K. SERGON

JUDGE