



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

**Civil Case 19 of 2005**

**JUSTUS MUNUVE KILONZO ..... PLAINTIFF**

**VERSUS**

**JOSEPH MUTUNGU MUNUVI ..... DEFENDANT**

**RULING**

Before me is the Chamber Summons dated 27/1/05 in which the applicant seeks an order of injunction to restrain the defendant himself, his servants or agents from wasting, damaging, alienating, selling or disposing or trespassing onto or interfering with the plaintiff's peaceful enjoyment and use of land parcel No. Nzau/Kalamba/551 which the applicant has been in possession for over 13 years without interruption.

The application is based on grounds found in the body of the application and an affidavit filed by the applicant, Justus Munuve Kilonzo.

The above application was expressed to be brought under Order 39 Rules 1, 2 and 3, Order 50 Rule 7 Civil Procedure Rules and Section 3 A Civil Procedure Act.

This application was not opposed as there was no reply to the application nor was there any appearance by the defendant/Respondent at the hearing. The court having satisfied itself that the Respondent was properly served in terms of the Return of Service filed here on 14/7/05 and dated the same day, the court went ahead to hear the applicant ex parte.

The remedy sought is a discretionary one and before its grant, the court has to satisfy itself that the applicant's case has a high probability of success, that if the order is not granted the applicant is likely to suffer irreparable harm which would not be adequately compensated for by damages. If the court is in doubt, it will decide the case on a balance of convenience (***GIELLA versus CASSMAN BROWN CO. LTD. 1973 E.A 358***). Even in the absence of the Respondent the applicant has to satisfy the above stated principles.

The applicant's case is that he purchased the said land from the defendant on 6/7/91. He annexed a sale agreement written in Kikamba language and translated to English language dated 6/7/91. That he took over possession, planted trees, grass, orange trees and annexed photographs to support that claim. He denies that there has been any dispute over his occupation of the said land since 19991 but that the defendant has entered into the said land and started destroying it and has threatened to take over the land that he cultivates. That he has acquired prescriptive rights over the said land and should be registered as the owner and the Respondent be restrained from interfering.

As per the sale agreement annexed to this application and dated 6/7/91, it is not specific how much land the Respondent allegedly sold to the applicant. The agreement merely states a portion of the suit land. As the agreement indicates, it is over 13 years since he took possession of the said land. Though he does not state it in this application, in the affidavit annexed to the Originating Summons, it is stated that the Respondent started interfering with the said land in December 2004. Without evidence to the contrary, the applicant has shown that he has been in uninterrupted occupation of the land for over 12 years and has therefore demonstrated that has a prima facie case with probability of success.

The dispute herein involves land. If the applicant were to be removed from the land at this time, he

would not be in a position to get such land for such value and would suffer irreparable harm. For the above reasons, I do grant the prayer for injunction restraining the Respondent from interfering with the applicant's occupation of the portion of land sold to the applicant by defendant, pending hearing and determination of this suit.

**R.V. WENDOH**

**JUDGE**

Dated at Machakos this 17<sup>th</sup> day of August 2005

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**