



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

**CIVIL CASE 74 OF 2003**

**SAMSON KHASIANI AMUSIBWA.....PLAINTIFF**

**V E R S U S**

**ALPHOSE MUSOTSI AMBALI.....1<sup>ST</sup> DEFENDANT**

**ROBERT MULO GOSI.....2<sup>ND</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

The injunction order sought by Samson Khasiani Amusibwa, **the applicant** in the application dated 29.9.2003, was inelegantly couched thus:-

*“an injunction restraining the defendants, their agents and/or servants from interfering and/or transferring L.R. No. Kakamega/Shiru/818.”*

Messrs Alphose Musotsi Ambali, Robert Mulogosi, and the District Land Registrar were the Respondents/Defendants (**the Respondents**).

The grounds for the application were stated to be-

- (1) that the Applicant had bought half of an acre [of the suit land] from the 1<sup>st</sup> Respondent and
- (2) that the 2<sup>nd</sup> Respondent had through deceit obtained title for the entire land and threatened thereafter to evict the Applicant there-from.

The affidavit of the applicant in support of the application set out the details of the purchase of the half acre portion of the land comprised in title No. Kakamega/Shiru/818 from the 1<sup>st</sup> Respondents. It also alleged collusion between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to defraud the Applicant of the half acre portion of land.

In his replying affidavit, the 1<sup>st</sup> Respondent admitted having sold half an acre of the land comprised in the title No. Kakamega/Shiru/818 to the Applicant and the other half to the 2<sup>nd</sup> Respondent who, he alleged, duped him into signing Land Control Board and Transfer forms in favour of the 2<sup>nd</sup> Respondent for the whole parcel instead of half portion.

The 2<sup>nd</sup> Respondent did not file any replying affidavit or grounds of opposition.

In his plaint in this suit, the Applicant alleges fraud on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with regard to the transfer of the Applicant's half acre portion and seeks a declaration that the title held by the 2<sup>nd</sup> Defendant should be cancelled and the 2<sup>nd</sup> Defendant ordered to transfer half an acre of the land comprised in title No. Kakamega/Shiru/818 to the Applicant and the register of the suit land rectified accordingly.

The application shows that the applicant purchased half an acre of the said land from the 1<sup>st</sup> Respondent and obtained consent of the Land Control Board on 21.9.97 following an application made on 21.9.97. The whole parcel of land including the half acre sold to the Applicant was transferred to the 2<sup>nd</sup> Respondent. The Applicant alleges he is still in possession of the half acre portion bought by him but he is fearful the second Respondent is intent on ejecting him.

When the application came up for hearing before me on 20<sup>th</sup> September, 2005, Mr. Nyaberi, learned counsel for the Applicant, urged me to grant the applicant the order sought. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents who appeared in person told the court they had nothing to say. Mr. Njoroge, learned counsel for the 3<sup>rd</sup> Respondent, submitted that no injunction could be issued against the 3<sup>rd</sup> Respondent in view of section 16 of the Government Proceedings Act, Cap 401.

The principles on which a court of law grants interlocutory injunction are predicated on the need to preserve the suit property and maintain the status quo pending final determination of the rights of the parties. **THOMPSON v. PARK (1944) 2 All E.R. 477** is the authority for the proposition that a litigant cannot lawfully and illegally bring about a state of affairs and then apply to the court to preserve that state of affairs as the status quo. This is not the case here, as the Applicant seeks relief on account of illegal and fraudulent acts of the Defendants. In Thompson's case Goddard L.J. said in part

*....."it is a strange argument to address to a court of law that we ought to help the defendant who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injunction."*

**THOMPSON v. PARK** was followed in **KIBIY arap YEGO v. EMILLY TUIYA** and in **KAMAU MUCHUHA v. THE RIPPLES CIVIL APPLICATION NO. NAIROBI 186 OF 1992** in which the Court of Appeal in Kenya observed that -

*" a party, as far as possible, ought not to be allowed to obtain a position of advantage that it obtained through a planned and blatant unlawful act and, without in any way attempting to pre-decide the intended appeal or to influence a decision thereon, I am of the view that the order of the learned judge granting the prohibitory and mandatory injunctions ought not to be disturbed at this stage ....."*

In the instant case, the 2<sup>nd</sup> Respondent holds the title to the land known as L. R. Kakamega/Shiru/818 half an acre of which is claimed by the Applicant who is in its possession. The 2<sup>nd</sup> Respondent is not in need of any assistance from this court. He owns the entire piece of land. He said in court he had nothing to say. Unlike in Thompson v. Park and Kirby's and Kamau Muchuha's case, where the fraudulent party sought protection for the wrongs committed by him, here, the Applicant seeks help for wrongs committed against him.

The conditions for the grant of an interlocutory injunction are that the applicant must (1) show probability of success of his claim; and that he will suffer irreparable damage if the injunction is not granted and that damages would not adequately compensate him for the loss or injury and, if in doubt, then on a balance of convenience. Quoting Lord Diplock in **AMERICAN CYANAMID v. ETHICON LTD. [1975], 1 All E.R.504 IN MUREITHI v. CITY COUNCIL OF NAIROBI [1981] KLR 332**, Madam JA, as then was, cited with approval the following excerpt;

.... “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 uncertainty were resolved in his favour at the trial .... if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage.”

It is also said that injunctions are equitable discretionary remedies granted by court to protect legal and equitable rights. Where, as here, a title is obtained by the Respondent through alleged fraud and the Applicant is left with a right in equity, should interlocutory injunction be granted? There is considerable wisdom in equitable maxims and equitable principles in decisions on injunction cases. But unlike wine, case law does not get better with age. It has to give way for change so as to keep in tandem with unfolding societal aspirations and values. That this is so is exemplified by many leading cases whose decisions and proposition of law stood unchallenged for many years only to be overruled later as not reflecting sound legal principles. Examples can be found in cases on many branches of the law including the law of torts and contract.

The statement therefore that “if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage” – would appear to me questionable where the

Respondent has allegedly committed the breach complained of with impunity. Sometimes, money is not the only thing that matters in law and wanton violations of the rights of the financially less endowed cannot always be compensated by money awards.

In the present application, the competing interests are legal on the Respondent’s part and equitable on the Applicant’s part. The Applicant however is also in possession of the half acre portion of land comprised in the title Kakamega/Shiru/818. He cannot obtain specific performance of the contract of sale against the 1<sup>st</sup> Respondent who has parted with the title. According to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent bought the land comprised in the said title less the Applicant’s half acre. The 1<sup>st</sup> Respondent alleges that the 2<sup>nd</sup> Respondent duped him into transferring the whole parcel to him. Will the court deny the Applicant injunction thereby leaving him at the mercy of the 2<sup>nd</sup> Respondent or should the court grant the order to prevent the 2<sup>nd</sup> Respondent from ejecting the Applicant from the half acre he occupies pending hearing and determination of the suit. Should he be allowed to retain advantage he has illegally obtained merely because he has legal title and may be capable of refunding the purchase price to the Applicant and pay damages? The application is not opposed by the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent’s retort to the application supports the applicant’s allegation of the alleged fraud by the 2<sup>nd</sup> Defendant.

It is my view that the applicant has established a prima facie case with a probability of success, and that unless injunction is granted, he will suffer irreparable loss and damage. Further, monetary award would not adequately compensate the Applicant. In any case, the balance of convenience is in favour of granting the injunction as the Applicant is in possession, and the 2<sup>nd</sup> Respondent not having bought or paid for the half acre whose title he now holds, it would be tantamount to allow the 2<sup>nd</sup> Respondent even at this interlocutory stage to retain an advantage which on the face of it he has not lawfully obtained. The allegations of fraud were not denied by him.

I grant the application dated 29.9.03 and order that the 2<sup>nd</sup> Respondent, his servants, and/or agents and persons claiming through him is restrained from interfering with the Applicant’s occupation and use of the half acre occupied by him comprised in the title No. Kakamega/Shiru/818 or transferring the same to any person before the determination of this suit.

Contrary to the view expressed by Mr. Njoroge, the learned State Counsel who appeared for the 3<sup>rd</sup> Respondent, an order of injunction can be made against a Land Registrar to restrain violation or breach of

the law .

The costs of this application shall abide the outcome of the main suit.

Dated at Kakamega this 7<sup>th</sup> day of October, 2005.

**G. B. M. KARIUKI**

**J U D G E**