

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Suit 82 of 2005

SAMWEL WAFUNAFU WACHILONGA.....PLAINTIFF/APPLICANT

VS

JOHN MAKOKHA SAKWA.....DEFENDANT/RESPONDENT

RULING

The matter before this court for determination is a summons filed pursuant to Order XXXIX rules 1, 2 and 3 of the civil Procedure rules in which Samwel Wafunafu Wachilonga the plaintiff herein, seeks to restrain John Makokha Sakwa, the defendant herein, from entering, developing or carrying out any improvements or demotion on L.R.NO.KIMILILI/KIMILILI/813 pending the hearing and determination of this case. The summons is opposed by the defendant who filed a replying affidavit plus grounds of opposition.

The facts leading to this application can easily be deduced from the pleadings laid before this court. The plaintiff filed an originating summons seeking to be declared to have acquired L.R.NO.KIMILILI/KIMILILI/813 by adverse possession from one Kefa Sakwa Wafunafu, the defendant's father, vide Bungoma H.C.C.C NO.153 of 1999. The plaintiff claimed in the O.S that he purchased the aforesaid parcel of land in 1964 from the defendant's father after which he immediately took up possession and that he has been in continuous and peaceful occupation. The suit between the plaintiff and Kefa Sakwa Wafunafu is partly heard. In fact the Court is yet to visit the locus quo before the plaintiff concludes giving his testimony. While the suit was pending for hearing, Kefa Sakwa Wafunafu successfully applied for a caution which had been lodged by the plaintiff against L.R.NO.KIMILILI/KIMILILI/813 to be removed by a court Order. Upon the removal of that caution, Kefa Sakwa Wafunafu proceeded to transfer L.R.NO.KIMILILI/KIMILILI/813 to John Makokha Sakwa, the defendant herein, on the 11th day of February 2004. Upon obtaining title, the plaintiff alleged that the defendant invaded the land with hired goons where they destroyed crops and other developments ostensibly with the intention to have him evicted from the land. These series of events prompted the plaintiff to file this action contemporaneously with the summons, the subject matter of this ruling. In the main suit the plaintiff prays for a permanent injunction and for an order of declaration that the defendant's title had been extinguished by adverse possession. The defendant file a defence to deny the plaintiffs claim.

Having given a brief summary of the dispute before this Court, it is now necessary to consider the merits of the summons. Basically the plaintiff is seeking for a temporary order of injunction. The principles for granting an order of injunction are well settled. First, that an applicant must show a prima facie case with a probability of success. In this matter the plaintiff has alleged that he is likely to prove at the trial that the defendant's title had been extinguished by the time Kefa Sakwa Wafunafu allegedly transferred the title while a suit challenging the title was pending before this Court. The defendant on his part alleged that the plaintiff has not shown that he has no bonafide claim over the property in dispute. The defendant sought to paint the plaintiff as a fraudster who forged documents to justify his claim. He pointed out that the agreement between his father, Kefa Sakwa Wafunafu and the plaintiff had been altered. In my view the matters raised by the defendant can ably be addressed and settled when Bungoma HCCC no.153 of 1999 is heard and determined. The issues cannot be sorted out in this matter. Furthermore the defendant was not privy to the agreement he now seeks to dispute unless he shows that he is holding brief for his father Kefa Sakwa Wafunafu. It is not denied that there is a long protracted dispute between the plaintiff

and the defendant's father over the ownership of L.R.NO.KIMILILI/KIMILILI/813 which culminated to the filing of a claim before a panel of elders whose decision gave the land to the plaintiff and which decision was later quashed by this Court. All these factors gave rise to the filing of Bungoma H.C.C.C no.153 of 1999 which is undeniably still pending for hearing. The defendant denies the plaintiff's assertion to the effect that he has been in continuous occupation of the suit land since 1964. The defendant however admits in his defence at paragraph 8 that the plaintiff has been in occupation of part of the land in dispute since 1999.

The sum total of this matter is that I am satisfied that the plaintiff has shown that he has a prima facie case with high chances of success.

The second principle is that a party must show that he is likely to suffer irreparable loss if an order of injunction is not granted. The defendant is of the contrary view that the plaintiff will be sufficiently compensated by way of damages. In my mind the issue is straightforward. The crux of the matter is that the plaintiff has complained that the defendant has moved onto the land with hired goons destroying crops and developments on the land. At the back of my mind I am not satisfied that the plaintiff will be adequately compensated by way of damages because the defendant's actions if not injuncted may lead to the destruction of vital evidence required by the plaintiff to prove his claim against the defendant and of course the defendant's father Kefa Sakwa Wafunafu. In my view and on the basis of the facts and circumstances of this matter that substantial injury may be occasioned to the plaintiff which cannot be adequately remedied or atoned for by damages. It is trite law that the purpose of a temporary order of injunction is to preserve the status quo until the dispute is arbitrated upon.

The final principle is to the effect that when the Court is in doubt it will decide the application on a balance of convenience. Though the parties did not address me over this principle, I can say the issue was left for this court to be decided from the pleadings. The defendant alleges in his replying affidavit that he has been utilizing the land since 1983 and that the title deed was in his possession. He said he would be most inconvenienced if the order of injunction is issued. He however admits that the plaintiff has been in occupation of part of the land since 1999. After weighing the two rivaling positions, I am convinced that the plaintiff will be more inconvenienced than the defendant because he is likely to lose his developments and most importantly his evidence which are apparent on the land which the defendant is likely to destroy.

The end result therefore is that, the summons dated 23rd September 2005 is allowed as prayed with costs to the plaintiff.

Dated and delivered this 16th day of November 2005.

J. K. SERGON

JUDGE

In the presence of Mr. Were holding brief for Mr. Khakula for the applicant.

NA for Mr. Kraido for the respondent.