



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

**CIVIL SUIT NO. 38 OF 2003 (OS)**

**EMMANUEL NYONGESA ..... APPLICANT**

**VS**

**JOINA NABANGALA MASASABI ..... RESPONDENT**

***q Advocate should not depone on contested matters***  
***q Failure to disclose sources of dispositions on affidavit renders the affidavit incompetent.***

***q Principles of injunctions.***

**R U L I N G**

Emmanuel Nyongesa, the applicant herein has beseeched this court via a chamber summons dated 24th October 2003 to grant him the following orders:

- (i) An order of injunction to restrain the Respondent by herself, her servants, agents or any other person claiming through her from interfering with the applicants occupation and use of 5 acres comprised in title No. KIMILILI/KIMILILI/561 pending the hearing and determination of this matter.*
- (ii) The status quo obtaining at the time of filing this suit to be maintained.*
- (iii) A prohibitory order to be register ed against L.R. NO. KIMILILI/KIMILILI/561.*

The applicant filed a supporting and supplementary affidavit and two other affidavits one sworn by Ibrahim Wanjala, a former headman and the other by William Amutalla a former Senior Chief of Kimilili location.

The Respondent resisted the summons by relying on grounds of opposition dated 27th November 2003 and the affidavits sworn by Wanyama Wanyonyi the advocate for the Respondent and one sworn by the Respondent.

The gist of the applicant's argument is that he purchased 5 acres of land to be excised from L.R. NO. KIMILILI/KIMILILI/561 from the registered owner Masasabi Wabule on 16th September 1973. He has stated that he took immediate possession and occupation of the aforesaid parcel of land. The registered owner passed on in the year 2003 before giving title to the applicant. The applicant further states that he was shocked to learn from the lands office upon doing a search that the deceased surreptitiously transferred the suit premises to the Respondent, his wife to defeat his claim. He now wants to claim title of the 5 acres by adverse possession. However before the originating summons is heard and determined

the Respondent is said to have engineered actions to have the applicant removed and evicted from the aforesaid land.

The Respondent has denied the applicant's claim. She even denied the fact that the applicant entered into an agreement with her deceased husband. She also denied that the applicant has been in continuous occupation of the land in dispute. She dismissed the applicant's claim as lacking in merit.

Before considering the substance of this application there is a preliminary issue which came out during the hearing of the summons inter partes. The advocate on the part of the applicant took issue with the replying affidavit of Peter Wanyama Wanyonyi sworn on 27th November 2003. It was submitted that Mr. Wanyonyi deponed in his affidavit matters which are contentious and secondly that he did not disclose the sources of his information. It is not denied that the Respondent's advocate deponed on matters which are in controversy and are evidentiary in nature. This puts the advocate in an awkward position in that he may be required to step into the witness box to be cross-examined on his dispositions thus losing his privileged position. This is untenable in law.

A close perusal of the affidavit sworn by Mr. Wanyama Wanyonyi discloses the fact that the learned advocate regrettably failed to disclose the sources of his information. The law under Order XVIII rule 3 (1) of the Civil Procedure rules makes it mandatory for a deponent to disclose sources of his information. Consequently for those two reasons the replying affidavit sworn by Wanyama Wanyonyi is rendered incompetent. The same is ordered struck out.

What now remains on the part of the Respondent to rely in opposing the summons are the grounds of opposition and a further affidavit of Joina Nabangala Masasabi sworn on 11th December 2003.

From the pleadings and the able submissions by learned counsels it is clear that the issue of the applicant's purchase and occupation of L.R. NO. KIMILILI/KIMILILI/561 is hotly contested. The matter of course will be dealt with at the hearing of the originating summons.

The principles 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. In this matter I have come to the conclusion that the applicant has established that he has a prima facie case which is likely to succeed when the substantive hearing takes off. There is some evidence exhibited in the supporting affidavits that the applicant was put into occupation of the suit premises in 1973. There is a possibility that he may establish that he acquired the suit premises by adverse possession.

The second principle is that a party must show that he is likely to suffer an irreparable loss unless an order of injunction is granted. The applicant has averred that the Respondent has threatened to evict him. It is alleged that she has even cultivated the whole piece of land. The Respondent does not deny that there was some attempt to evict the applicant's agent or servant, Philip Mululu, who is the applicant's brother-in-law. It is obvious that if the threatened eviction is allowed to go on the applicant is likely to suffer a loss which is not capable of being compensated in monetary terms. I hold the view that the applicant has proved that he is likely to suffer irreparable loss.

The third principle is that where the court is in doubt it decide on the balance of inconvenience. I will not hesitate to state that the applicant will be more inconvenienced if the alleged eviction is not stopped by this court. Consequently I will grant the order for injunction as prayed. This will obviously maintain the status quo.

The remaining prayer is the order for prohibition. This prayer was conceded by Mr. Wanyama for the Respondent. I will grant it.

In the end, the chamber summons dated 24th October 2003 is allowed as prayed with costs the applicant.

**DATED AND DELIVERED THIS 18th DAY OF June 2004**

**J.K. SERGON**

**JUDGE**