



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

**Civil Case 4 of 2004**

**CHARLES MUKA ANYANGA .....PLAINTIFF**

**V E R S U S**

**NYANGWESO OMUMANI alias PETER NYANGWESO OMUMANI S/O OMANI .....DEFENDANT**

**R U L I N G**

On 15.1.2004 the Applicant, Charles Muka Anyanga, made an application by way of Chamber Summons dated 12.1.2004 premised on Sections 128 and 136 of the Registered Land Act, Cap 300 of the Laws of Kenya seeking an order that “an inhibition and restriction be issued inhibiting, and restricting registration of any dealing with land parcel Nos.L.R.BUTSOTO/SHIKOTI/10002, 10003, till the hearing and final determination of the suit.”

The application was made firstly on the grounds that the Respondent was in the process of further sub-dividing and disposing of the said parcels of land and secondly that the said parcels of land might be transferred to third parties. The application was supported by the affidavit of the Applicant sworn on 12.1.2004. In it, the applicant averred that he had commenced the suit in which he claims 5 acres of the land comprised in the titles Numbers Butsotso/Shikoti/1002, 1003 and 1004 which were excised from land title No.Butotso/Shikoti/1314. He alleges in the suit that he bought the land from the Respondent who now demands more money than was agreed on as the purchase price. He averred that the Respondent is intent on selling the said parcels to third parties and has delayed the process of obtaining consent of the land Control Board ostensibly to subvert the sale of the said parcels to the applicant.

In his Replying affidavit, the Respondent denied ever having sold the said land to the Applicant who has been his neighbour. He alleged that the was in exclusive possession of the suit land. He averred that the Applicants claim is a tissue of lies.

When the application came up for hearing before me on 22/3/2004 Mr. Fwaya, learned counsel for the applicant, urged me to issue the orders so as to prevent disposal of the suit land, a development that would render the suit nugatory. He pointed out that the Respondent had in paragraph 10 of his replying affidavit averred that he had no intention of selling the suit land and therefore that it can be inferred that no inconvenience will be suffered by him if the orders are granted. In Mr. Fwaya’s submission, the suit property should be preserved as the Applicant has a good case. Mrs. Osodo, the learned counsel for the Respondent, opposed the application and sought reliance on the replying affidavit by the Respondent. She submitted that the applicant had not shown he has a good case with regard to adverse possession nor had he shown he is entitled to the orders he seeks. She urged me to dismiss the application as there was no basis for the orders sought.

The Applicant’s case for the orders sought is that he bought from the Respondent in 9774, five (5) acres of land comprised in title No. Butsotso/Shikoti/1314 at a price of Kshs.6500/= which the Respondent accepted. He alleges that he took possession of the said land in 1974 and has occupied it since. He has not exhibited any documentary evidence to prove this fact and it remains a seriously contested issue as the alleged sale is labeled a lie by the Respondent. The Applicant alleged that the Land Control Board had granted consent to the sale but for reasons he cannot fathom the transfer of the plot in his favour was not registered. This was also dismissed as a lie by the Respondent who denied both ever having attended the land control Board and existence of subdivided portions Butsotso/Shikoti/1739 and 1740. The Respondent however, maintained he is the absolute registered owner of land parcels Butsotso/Shikoti/10002, 10003 and 10004 which he maintained have been in his possession to the exclusion of the Applicant.

I have duly perused the application and the Replying affidavit and have considered the submissions made by both counsel. There is pending in this court a suit in which the applicant seeks orders that he is entitled to be registered as the proprietor of the parcels of land known as Butsotso/Shikoti/10002, 10003 & 10004 under the provisions of the Registered Land Act by virtue of his adverse possession of more than 12 years. The applicant claims to be in possession of the said land. The Applicant’s claim is not based on contract. If it were, I would agree with Mrs. Osodo that there would be no contractual basis for the grant of the orders sought in absence of evidence of possession. But contract is alluded to show the genesis of the claim for adverse possession. At this interlocutory stage, the Applicant cannot be required to tender evidence to establish adverse possession conclusively. If it turns out later after evidence is led that the allegations by the Applicant had no truth, his claim shall be dismissed and an appropriate order for costs made. The court has a duty at this stage to preserve the suit properties. All that the Applicant has to show at this stage is a prima facie case or an arguable case. The allegations made by the Applicant have been vehemently denied by the Respondent. The Applicant has tendered nothing to show that he purchased the parcels of land in question, or that there existed a consent from a Land Control Board as alleged by him, or that there were transfer documents that were not

registered as he alleges, or that he is the one who is and has been in possession of the land in question.

These issues are controversial and the truth shall not be ascertained until parties adduce evidence. In the meantime, all that the Applicant has to show the court is that his claim is not frivolous or a non-starter and that on the face of it the Applicant has an arguable case in law. A claim for adverse possession succeeds or fails depending on whether there is evidence to show that the Applicant occupied the suit land adversely to the title of the owner continuously and exclusively for a period of not less than 12 years. This is what the Applicant has alleged. As stated earlier, whether or not he will succeed will depend on evidence to be adduced at the trial. In the meantime, the court is enjoined to preserve the suit property pending the determination of the suit.

In the circumstances, I am inclined to and do grant the application but the costs thereof shall abide the result of the main suit. It is so ordered.

No doubt the parties will move with haste to seek directions and to list the case for hearing without undue delay to expedite the hearing and determination of this suit.

Dated at Kakamega this 24<sup>th</sup> day of September, 2004.

**G. B. M. KARIUKI**

**J U D G E**

24/9/04

Coram: G. B. M. Kariuki, J.

Mudoto, cc

Mr. Fwaya for the Plaintiff/Applicant

Mr. Nyikuli for Mrs. Osodo for Defendant/Respondent

Ruling read on 24.9.2004 in Chambers as court in the presence of both counsel.

**G. B. M. KARIUKI**

**J U D G E**

24/9/04