



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO: 240 OF 2012 (0.S)**

**SAMSON PAUL ONUNGA.....PLAINTIFF**

**VERSUS**

**RAPHAEL WECHE OKUBO.....DEFENDANT**

**RULING**

The application dated 16/5/2013 seeks an order of injunction against the plaintiff in respect of plot number **WEST BUNYORE/BUSIEKWE/517**. The application is supported by the defendant's affidavit sworn on the same date. The plaintiff filed a replying affidavit sworn on 6<sup>th</sup> July 2013.

Mr. Shifwoka, Counsel for the applicant submitted that the defendant is the registered owner of the suit land. The registration was done in 1995. The applicant is therefore entitled to enjoy the rights of a registered owner. He has a prima facie case against the plaintiff. The respondent alleges to have bought the land from one Ezekiel but did not attach any Sale Agreement or sue the said Ezekiel. He should therefore be stopped from unlawfully working on the land. The defendant allowed the plaintiff to harvest his crops and there has been several disputes between the parties. The plaintiff is a mere trespasser and parties have tried to settle the dispute.

Mr. Fwaya, counsel for the plaintiff opposed the application. Counsel contends that the plaintiff's claim is based on adverse possession. The plaintiff has been on the land since 1984 but the defendant claims to have discovered his presence in 1996. Counsel maintains that since 1996, its over 12 years and the plaintiff has been using the land for all this time. The issue being raised can be determined at the main hearing.

The plaintiff filed the originating summons in September, 2012, seeking to be declared as having acquired title to the suit land by way of adverse possession. In his supporting affidavit to the originating summons, it is indicated that he took possession of the suit land since 1984 and he has four houses on the land. He cultivates the land. The essence of a claim for adverse possession is that the occupation by the claimant is generally unlawful as it is not sanctioned by the registered owner. The occupier of the land would therefore wish to have his unlawful occupation made lawful through the operation of the law on limitation of actions. It is therefore clear to me that an issue relating to the plaintiff's stay on the land is the main subject for determination. Granting an injunction at the time is tantamount to setting the dispute summarily. In essence, the plaintiff is contending that the plaintiff's tile has become extinct. Such a claim has to be heard and determined. The plaintiff's only claim is that he is in occupation of the land. The defendant seems to recognize that fact and that is why he would like to stop the plaintiff, from using the land. Whether the plaintiff's occupation of the suit land was authorized by the defendant is to be determined during the full hearing the same applies to the issue as to whether parties have had several disputes.

In the end, I do find that the application dated 16/5/2014 lacks merit and the same is disallowed Costs shall follow the outcome of the main suit.

Dated, delivered and signed at Kakamega this 8<sup>th</sup> day of October 2014.

**SAID J. CHITEMBWE**

**JUDGE**