



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
LAND AND ENVIRONMENT CASE NO. 29 of 2012

HUMULTONE MARAKIA WAMBEYE

[suing as the administrator of **AINEA WAMBEYE WAKHABU(DECEASED)**..... **PLAINTIFF**

VERSUS

SAUL MASIKA MAKASI.....**1ST DEFENDANT**

ENOCK MUKHWANA WANYONYI.....**2ND DEFENDANT**

DAVID WALIAULA KIPEI **3RD DEFENDANT**

SOLOMON SIFUNA**4TH DEFENDANT**

RULING

The applicant has sued the four defendants by a plaint and has filed an application within the suit under Order 40 seeking temporary orders of injunction. During the hearing of the application, what is for determination is prayer (d) and (e) of the application which is;

(d) THAT the Defendants/Respondents by themselves, their servants, agents and or relatives or any other persons claiming through them be restrained from encroaching on, constructing on, cultivating on and or in any way interfering with the Plaintiff's/Applicant's land parcel number BOKOLI/CHWELE/204 pending the hearing and determination of this suit.

(e). THAT costs of this application be provided for.

The Applicant depones that he is the legal administrator of the estate of his father AINEA WAMBEYE WAKHABU - deceased He depones further that the defendants have unlawfully and without any justification entered and trespassed on L.R. BOKOLI/CHWELE/204 constructing structures and cultivating the same without his consent. Finally that the defendants purport to have purchased land from persons who had no capacity to deal, therefore the estate of the deceased is likely to suffer irreparable loss and damage should construction proceed.

The defendants have opposed the application. The 1st defendant deponed on behalf of 2nd & 3rd defendant that they have been using the suit portion of land since time of purchase (13.12.2003 & 6.10.03). They want title deeds for the sold portion issued to them and have no intention of alienating the

land. At paragraph 7, 1st defendant depones that granting the orders amount to constructive eviction.

The 4th defendant's case is that he purchased a portion of his land from the 1st defendant. He also opposed the application. He depones at paragraph 6 that he is in occupation of the land and has constructed a residential house and other developments on it. He does not know the plaintiff/applicant. According to him, the applicant is trying to settle scores with the 1st defendant and he should not be made part of it. He avers the applicant has not met the basic principles for granting injunctions.

The applicant submits the defendants' use of the land is unlawful. This may be so but it seems this application was filed long after the defendants moved into the suit land. This is deduced from the pleadings, in prayer (a) of the plaint, the applicant is seeking eviction orders. The applicant did not file further affidavit to contest the issues raised in the replying affidavits especially the 4th defendants averment that he lives on this land.

Mrs. Mumalasi submitted that the 2nd defendant is erecting a permanent structure. The court is not told the nature of other structures already built on the land. However this fact has not been denied by the 2nd defendant. Although the defendants are already in occupation, it will be in the interest of justice that pending determination of this suit, they be restrained from undertaking new activities/developments on the suit land. Given the circumstances of this case, I can only allow prayer (d) partially, to the extent that the defendants by themselves, servants, agents and relatives claiming through them be restrained from carrying out any construction on or disposing of the suit land pending the determination of the suit. As regards prayer on cultivation, the status quo to remain. The costs of the application shall abide by the outcome of the suit.

RULING DATED, SIGNED AND DELIVERED in open court this 5th day of November, 2013.

A. OMOLLO

JUDGE.