

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL SUIT 50 OF 2008

PAUL ISHMAEL AKETCH.....PLAINTIFF

~VRS~

ROSEMARY NASAMBU.....1ST DEFENDANT

MARGARET NANJALA WAFULA.....2ND DEFENDANT

VICTORIA NAKHANU WAFULA.....3RD DEFENDANT

PETER SIMIYU MALEWA.....4TH DEFENDANT

RULING

The Plaintiff is the registered proprietor of land parcel no.W. Bukusu/S. Mateka/1716 which he bought from the deceased Joseph Wafula Wakhungu who was the husband of the 1st, 2nd and 3rd Defendants. His case is that on the land was a portion on which was erected a butchery and which, although forming part of what he bought from the deceased, the 1st to 3rd Defendants have continued to occupy and use. He says that they purported to sell it to the 4th Defendant. This is why he filed this suit for the eviction of the Defendants, for permanent injunction and for costs.

The 1st to 4th Defendants filed a joint defence to admit that the land parcel no.W.Bukusu/S.Mateka/1716 belongs to the Plaintiff who bought it from the deceased. They, however, deny that the portion, which they say is plot no.7 at Wamunyiri market under Bungoma County council, forms part of that title. They state that the deceased was a lessee of the plot which is a distinct portion and whose boundary with the Plaintiff's land is the borne of contention. They pleaded that they have a proprietary claim over the plot which they can assign or transfer, but denied that they have made any attempt to dispose of it.

The Plaintiff filed an application under Order 39 rules 1, 2 and 9 of the Civil Procedure Rules and sections 3, 3A and 63 (e) of the Civil Procedure Act for a temporary injunction to restrain the Defendants, and all those acting under them, from ploughing, attempting to plough, cutting down trees, or in any way blocking the access road or in any other way interfering with his right of peaceful occupation and user of the land parcel. The 1st Defendant filed a response to the application repeating what was stated in the joint defence.

The questions that will occupy the mind of the court during trial are whether the portion in question forms part of the land parcel no.W.Bukusu/S.Mateka/1716 or it is a distinct and separate plot leased from the Bungoma County Council, and whether the Plaintiff bought the portion together with the parcel. What is clear is that, although this suit was filed on 10/9/2008 the Plaintiff has had title to W.Bukusu/S.Mateka/1716 since 18/6/2003. The agreement to buy this parcel from the deceased must have been earlier. The agreement was not exhibited to see whether it made any reference to the portion in dispute. Whatever is the case, the portion had a butchery at purchase and the 1st to 3rd Defendants have continued to occupy and operate it. It is not clear whether after the purchase, there was any understanding between the parties regarding the portion. In short, at this stage the court has not been persuaded that the Plaintiff has a *prima facie* case against the Defendants in regard to the ownership of the portion. Both parties will have to call evidence and the same to be interrogated before a decision is made either way.

There was no plea or proof that if the application is not granted the Plaintiff will suffer such harm or injury that damages cannot sufficiently compensate. I find that the balance of convenience tilts in favour of refusing the application. I dismiss the application with costs.

Dated, signed and delivered at Bungoma this 11th day of July, 2012.

A. O. MUCHELULE
JUDGE