

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Suit 87 of 2005

ROSE N. KITAYI.....PLAINTIFF

~VRS~

MERCY N. KHAEMBA.....DEFENDANT

~AND~

DR. WILLIAM OUMA.....APPLICANT

RULING

This is a ruling on a preliminary objection dated 19/03/2009 and filed in court on 20/3/2009 brought by Kraido & Co. Advocates for the Defendant against the hearing of the Applicant's application dated 16/3/2005. The preliminary objection is grounded on two issues:

- a) *That the application is incompetent and bad in law.*
- b) *That it is an abuse of the due process of the court.*

Mr. Kraido for the Defendant argued that, the said application seeks to set aside the judgment entered between the Plaintiff and the Defendant. It also seeks that, the Applicant be enjoined as a party to the suit. The Applicant be enjoined as a party to the suit. The Applicant challenges the judgment without saying that it was entered irregularly. Her contention is that, the suit was filed in court without her being informed.

The material facts herein is that, the Plaintiff sued the Defendant herein for orders of specific performance of a portion of 200 ft x 200 ft to be excised from *Parcel No. EAST BUKUSU/SOUTH KANDUYI/103*. The parties later entered into a consent judgment where the Defendant agreed to transfer the said portion to the Plaintiff upon her removing a caution on the above named parcel of land she had lodged earlier. The Plaintiff was to present to the Land Registrar mutation forms relating to the suit land. The consent is dated 30/12/2006.

The Applicant came to court on 16/3/2006 seeking to be enjoined in this suit as a Defendant so that he could defend his interests. He depones in his supporting affidavit that he bought land from the Defendant *EAST BUKUSU/S.KANDUYI/11712* which land he has now developed. He annexes photographs of permanent structures to his application. In the replying affidavit, the Defendant states that she sold a certain parcel of land to the Applicant on her land *EAST BUKUSU/S.KANDUYI/103* but not on *EAST BUKUSU/S.KANDUYI/11712*. Yet the Applicant maintains that the portion he bought is on the land which is the subject matter of this case.

I appreciate the points raised in the preliminary objection that the Applicant should file his own suit to get his relief from the Defendant. However, I am of the opinion that since there is a dispute or misunderstanding between the Applicant and the Defendant, it is not in the interests of justice to shut the doors of justice for the Applicant through a preliminary objection. The Applicant ought to be given a chance for his application to be heard inter parties. I note that, the preliminary objection raised,

addresses the issue of incompetence of the application. However, I am not convinced that the application is incompetent. I therefore reject the preliminary objection and direct that the application be fixed for hearing.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Bungoma this 8th day of July 2009 in the presence of Mr. Kraidu for defendant / Respondent.