REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 51 OF 2010

RICHARD BIRIR BWOGO…….....……..……..
APPLICANT

-VERSUS-

PHIBIAN CHEPKOECH MIBEI …...…….....…… 1st
RESPONDENT

JULIUS KIPKIRUI CHELULE …….....…….2nd
RESPONDENT

JUDGMENT

According to **Richard Birir Bwogo**, ***"the applicant",*** he is the registered proprietor of land parcel **Transmara/Njipiship/1145**, ***"the suit premises"*** measuring approximately 26.51Ha. The suit premises were allocated to him during land adjudication and demarcation in Njipiship area. Subsequent thereto, the suit premises were transferred and registered in his name and title deed duly issued to him on or about 29th April, 1996. He immediately thereafter took possession of the same. However, in or about January or February, 2010 **Phibian Chepkoech Mibei** and **Julius Kipkurui Chelule**, ***"the respondents"*** trespassed on to the suit premises and commenced to cultivate the same without his permission and or consent. They went ahead to destroy the buildings and or structures constructed on the suit premises by the applicant. This compelled the applicant to mount this suit for a declaration that he is the registered owner of the suit premises, an order of eviction and demolition of the structures erected on the suit premises by the respondents, permanent injunction, general damages for trespass costs and interest.

The respondents denied the applicant's allegations. They stated that they had no knowledge whatsoever of the process of land adjudication and demarcation in the area and they were not aware that the suit premises had been allocated to the applicant. They denied trespassing on the applicant's suit premises. The respondents had otherwise restricted their activities on their respective parcels of land. Since the respondents had no interest whatsoever in the suit premises, the suit was misguided.

On 22nd September, 2010, the applicant filed an application under certificate of urgency seeking temporary injunction restraining the respondents from entering into, trespassing onto, cultivating, building structures, interfering with and or in any other manner, whatsoever dealing with the suit premises until the hearing and final determination of the suit. That application which was expressed to be brought under Order XXXIX rules 1, 2A and 9 of the **Civil Procedure Rules**, sections 1A, B, 3A and 63 of the **Civil Procedure Act**, 27 and 28 of the **Registered Land Act** and **All Enabling provisions of law** was necessitated by the fact that upon filing the suit, the respondents had temporarily desisted from trespassing on the suit premises. However on 15th September, 2010, they had without any colour of right reverted onto a portion of the suit premises and commenced cultivating and building structures thereon. On 18th September, 2010 they destroyed the applicant's buildings standing on the suit premises. As a result, the applicant had been deprived and or dispossessed of the suit premises and rendered destitute. The respondents were bound to continue with their trespass unabated unless restrained by court.

In reply, the respondents deponed that the application was an abuse of the court process, as it did

not meet the requirements of granting temporary injunction and that their activities were restricted to their land parcel numbers **Transmara/Shartuka/1280 and 1354** respectively. Thus they had no interest in the suit premises. That the District Land Registrar, Transmara had indicated that the suit premises were under restriction because there had been complaints by members of Shartuka Group Ranch over a boundary that is an overlap and the problem was being sorted out at District level because it involves several parcels of land from Njipiship overlapping Shartuka Group Ranch. Should the application be allowed, the respondents would suffer irreparable loss which no amount of compensation can remedy as they solely depend on the two parcels of land for their livelihood. That the aim of the applicant was to grab the parcel of land belonging to members of Shartuka Group Ranch, an act he knows to be illegal and meant to antagonize community members and in contravention of the right to own property.

When the application came up for interpartes hearing on 12th November, 2010, parties agreed to canvass the same by way of written submissions. They filed and exchanged those written submissions which I have carefully read and considered.

Giella –vs- Cassman Brown & Company Limited (1973) E.A 358 sets out the principles upon which a court grants an interlocutory injunction. The court will grant such injunction on condition that the applicant has shown that he has a prima facie case with probability of success, that unless he is granted the injunction he might otherwise suffer irreparable loss and if the court is in doubt, it will decide the application on the balance of convenience. I doubt whether the applicant has met any of the above conditions. It appears to me that the dispute between the applicant and the respondents is really a boundary dispute. Perhaps it is a matter which ought to be dealt with assuming there is such jurisdiction under the **Land Disputes Tribunal Act**. It matters not the prayers sought in the plaint. They were purely calculated to clothe this court with jurisdiction to hear and determine the case which otherwise should probably be the subject of local Land Disputes Tribunal established under the Land Disputes Tribunals Act. This fact alone makes it doubtful as to whether really the applicant has established a prima facie case.

The respondents are categorical that their interests are in Land parcel numbers **Transmara/Shartuka/1280** and **1354** respectively. In view of the District Land Registrars sentiments expressed in his letter which sentiments have not been challenged by the applicant, issuing an injunction sought in the circumstances will as correctly submitted by counsel for the respondents, subject the respondents to irreparable injury which no amount of atonement can remedy. The respondents have restricted their activities on their respective parcels of land. Apparently those parcels of land overlap with the applicant's. To grant the applicant an injunction in circumstances will cause more harm to the respondents than the applicant. It is instructive to note that as a result of the boundary, dispute, the District Land Registrar, Transmara District have placed restriction on the applicant's suit premises. To grant an injunction in the premises will tantamount to going round the restriction. The dispute is being sorted out at the district level and it is only fair that the dispute be left to be resolved as aforesaid. In the circumstances the balance of convenience does not tilt in favour of granting the injunction sought by the applicant.

For the above reasons, I find the application unmerited. Accordingly it is dismissed with costs to the respondents.

Ruling dated, signed and **delivered** at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA
JUDGE