NO. 2752

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 331 OF 2010

JOHN OLE KANCHUEL.....PLAINTIFF

-VERSUS-

PHILIP LEMISO KANCHUEL.....1ST DEFENDANT

WILSON MEITEKINI KANCHUEL.....2ND DEFENDANT

RULING

In his plaint dated 17th November, 2010 but filed in court the following day, the plaintiff averred, interlia that at all material times to this suit, he was and still is the registered proprietor of all that piece or parcel of land known as **Trans-mara/Olalui/12** hereinafter ***"the suit premises".*** By virtue of such registration, he was entitled to exclusive rights over the same to the exclusion of all and sundray, the defendants not excepted. However in the month of September and October, 2010, the defendants without any lawful cause, basis or any colour of right whatsoever and or howsoever, trespassed on to the suit premises, erected temporary structures thereon, commenced to cultivate and graze on a substantial portion of the same. Consequently the plaintiff had been dispossesed and or deprived of a substantial portion on the suit premises and has therefore suffered loss and damage, hence the suit for declaration of ownership of the suit premises, order of eviction of the defendants, permanent injunction against them, General damages and costs of the suit.

Contempreneously with the filing of the suit, the plaintiff took out under certificate of urgency, a chamber summons application in the main praying for a temporary injunction pending the hearing and determination of the application interpartes, temporary injunction pending the hearing and final determination of the suit and mandatory injunction pending the hearing and final determination of the suit.

The grounds in support of the application were that the plaintiff was the registered proprietor of the suit premises and therefore entitled to exclusive possession and occupation thereof pursuant to the provisions of sections 27 and 28 of the **Registered Land Act**, the defendants had in or about September and October, 2010 respectively entered the suit premises and erected thereon temporary structures, and in the process alienated and taken possession of a portion of the suit premises which act amounted to trespass. The activities and actions of the defendants aforesaid were bound to affect and or alter the

character and or texture of the suit premises, infact it amounted to a violation of the plaintiff's indefeasible rights over the same which are sanctified in law. In the premises the plaintiff had established a prima facie case against the defendants as the acts of the defendants complained of would occasion irreparable loss to him. The defendants had no valid claim over the suit premises and therefore this was a fit and proper case for the grant of the orders of mandatory and temporary injunction. The final ground advanced in support of the application was that in the interest of justice the application ought to be allowed ***Ex-Debito Justitiae***.

The plaintiff also swore an affidavit in support of the application. The supporting affidavit was merely a rehash of the plaint and the grounds in support of the application aforesaid. Suffice to add that, following the trespass complained of the plaintiff had lodged a complaint with the District Surveyor, Trans-mara District who visited the suit premises, demarcated and planted the perimeter boundary. He thereafter prepared a report attesting to the encroachment. Following, the visitation, the defendants desisted from further trespass but had since returned and resumed the trespass.

On 25th November, 2010 having been served with the application and suit papers, the defendants through the 2nd defendant filed a replying affidavit in terms that the plaintiff had deliberately misled the court and deposed to falsehoods in his affidavit with a view to sway the mind of the court into believing that they were trespassers when they were not. That the plaintiff and defendants were relatives. Infact the plaintiff was their uncle from Kanchuel family. Hitherto the suit premises had been family land which was subdivided and titles deeds issued including that of the suit premises owned by the plaintiff and **Transmara/Olalui/113** and **114** owned by the defendants respectively. The three parcels of land however share common boundaries. Otherwise the plaintiff and defendants had been living together in their respective positions on the ground for over 60 years and could not therefore have trespassed into the suit premises in the months suggested . That there had been problems in the Olalui adjudication area as land within the area was never surveyed and title deeds were just issued to parties without proper survey and the parties herein, who were all members of Olalui Group Ranch had since moved to court in **Nakuru HCCC.NO. 129 of 2004** wherein the Government has been sued for the said anomaly with a view to having the irregular title deeds nullified and the plaintiff is among the plaintiffs in that suit. The title deed that the plaintiff is relying on in this suit is among those sought to be nullified. Prior to the registration and issuance of title deeds in respect of the suit premises and their respective parcels of land, the defendants and plaintiff had co-existed peacefully until the plaintiff in 2009 secretly had a surveyor compile a report dated 27th October, 2009 as a basis of laying his claim to their respective parcels of land. Otherwise the plaintiff was trying to use dubious and unorthodox means to evict them from their ancestral home that they had occupied for over 40 years under the pretext that they had trespassed on his suit premises which was not true. The District surveyor's report was based on an erroneous data/index map and the said surveyor did not hear them on the issue. Instead he compiled the report unilaterally and therefore it cannot be an authority on the issue in dispute. In the alternative, the defendants deposed that even if the issue of title and area map were to be put aside, the suit premises was family land and the plaintiff therefore holds the same on their behalf and in trust for them as their uncle. The plaintiff having lodged a suit at Nakuru wherein he contends that the title deed he owns in respect of the suit premises was issued prematurely and fraudulently, he cannot again use the very same title as the basis of this suit. In any event the suit was even time barred.

On 30th November, 2010, the defendants filed their defence and counterclaim to the plaintiff's claim. The defence is a repetition of their replying affidavit. By way of counterclaim, however the defendants pleaded that in the event that it transpires that the records held at the lands and survey offices reveal that the disputed portion form part and parcel of the suit premises, then he is registered as such in trust for Kanchuel family which includes both parties herein and sought a declaration in those terms. Otherwise this suit was subjudice **Nakuru HCC.NO. 129 of 2004.**

The application was first placed before me on 18th November, 2010 and I certified it as urgent but directed that the same be set down for interpartes hearing on priority basis. However I declined to grant a temporary injunction pending the hearing and determination of the application interpartes as had been sought by the plaintiff. By this decision, prayers 1 and 2 on the face of the application are now spent. I shall therefore in this ruling confine myself to determining prayers 3,4 and 5 of the application.

When the application came before me for interpartes hearing on 30th November, 2010, **Mr. Oguttu** and **Mr. Otieno**, learned counsels for the plaintiff and defendants respectively consented to canvassing the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

The principles governing the grant of interlocutory injunction are well settled. See **Giella .v. Cassman Brown & Co. Ltd (1973) E.A. 358, Carl Ronming .v. Societe Navale Chargeurs Delmas Veljeux (1984) KLR1 Mrao Ltd .v. First American Bank of Kenya Ltd & 2 others (2003) KLR 123** and **Kitur & Another .v. Standard Chartered Bank & 2 others (2002) KLR 640**. Essentially those principles are that the power of the court in an application for interlocutory injunction is both discretionary and equitable. It will be denied where a party seeking it deliberately misleads the court, swears false affidavits, withholds facts from the court or otherwise comes before court with unclean hands. Such discretion is however judicial. And as is always the case, judicial discretion has to be exercised on the basis of law and evidence but not whimsically, capriciously nor gratuitously. Two, the applicant must show a prima facie case with probability of success, three, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages and finally, if the court is in doubt, it will decide the application on the balance of convenience. In the case of **Mrao Ltd** (**supra**) the Court of Appeal observed further ***"…..A prima facie case in a civil application includes but it's not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter…"*** It must also be appreciated that the conditions aforesaid are not conjunctive but disjunctive.

Applying the said principles to the circumstances of this case, I must say that nothing has been brought to my attention as would tilt my hand in favour of allowing the application in the exercise of my unfettered discretion. No doubt there are allegations that the applicant has not been above board and or has been economic with the truth. He has been accused for material non-disclosure of facts and hiding some material particulars of the suit. If the allegations are true, they warrant the denial of the exercise of my discretion in his favour. I have no doubt at all that the allegations are true, for instance in his pleadings, the plaintiff complains that the defendants only trespassed on the suit premises in or about the months of September and October, 2010. Yet by his own admission contained in his annexture **JOO 2** in his affidavit in support of the application it is quite apparent that the dispute between the parties is actually a boundary dispute which has been raging ever since 2004. In the premises by the applicant stating that the dispute only came to the fore in the months aforesaid he is consciously and deliberately hiding from or misrepresenting facts to the court. The plaintiff even failed to disclose his relationship with the defendants. The defendants have stated that they together with the plaintiff are members of the same family, Kanchuel family. The plaintiff is infact their uncle. This fact has not been disputed by the plaintiff. The defendants too have stated that all the land in Olalui adjudication section was initially the property of Olalui Group Ranch and all members of the group ranch including the parties herein obtained their titles from the subdivision made from the common land. Prior to that the parties had resided in their respective portions of the land as members of the Kanchuel family for over 40 years. Following the subdivision the suit premises and the defendants parcels of land share common boundary. Besides there is a suit, **Nakuru HCCC NO. 129 of 2004** in which the plaintiff is a party . That suit challenges the validity of the title of the suit premises in possession of the plaintiff and the manner in which the title to the land the subject of the claim was obtained and both parties herein are either directly or indirectly involved in

the suit. In the plaint herein the plaintiff had the audacity to aver that ***"…….the plaintiff avers that there is no suit between him (plaintiff) and the defendants and neither have there been any premises proceedings between him and the defendants, in any other court concerning the same subject matter….."*** Having looked at the plaint in Nakuru HCCC.NO.129 of 2004, I entertain some doubts whether this averment reflects the correct position. For all the aforesaid conscious and deliberate misrepresentation of material facts to this court, the plaintiff is undeserving of the orders sought in the application.

Even if I was to ignore the foregoing, has the plaintiff however established a prima facie case against the defendants? I do not think so. The plaintiff's title to the suit premises is the subject of challenge in **Nakuru HCCC.129 of 2004**. It's validity therefore hangs in the balance. Much as the plaintiff claims that the same is a first registration which is not liable to be defeated on any account, it does however appear that it is perhaps a second registration, for the first registration may have been in favour of Olalui Group Ranch. In any event and by the plaintiff's own admission, the defendants have not trespassed and occupied the entire suit premises, rather they only occupy a portion thereof. The plaintiff claims ownership of the portion in dispute. Similarly the defendants claim the same portion. It would appear then that at the end of the day, the dispute may turn into adjustment of common boundaries between the three parcels of land depending on who among the three disputants emerges tops. Should that turn out to be the case, then there are elaborate mechanism within the **Registered Land Act** to deal with such disputes. Then there is the issue of whether this suit is viable in the light of **Nakuru HCCC.No. 129 of 2004**. The said suit has been brought by Olalui Group Ranch, for and on behalf of its members who include the defendants against several defendants therein including the plaintiff. One of the prayers in that suit is that ***"….A declaration that the subdivision and transfer of parcels No. 10 into parcels Nos, 12, 13 and 14 respectively and transfer of parcel Nos 12 and 14 to the 3rd and 2nd defendants respectively were fraudulent, null and void and parcels Nos. 12 and 14 be transferred by 2nd and 3rd Defendants to the plaintiff Group Ranch……"***

Itis instructive that in that suit, the 3rd defendant is the plaintiff and his parcel of land sought to be retransferred as aforesaid is the suit premises. Finally one wonders why the plaintiff found it necessary to mount this suit in this court when he was well aware that a suit in which he was involved as well as the defendants was pending in the High Court of Nakuru. That suit touched on the suit premises as in this one. The same firm of advocates involved in this suit is also involved in that suit. What then informed the plaintiff's decision to lodge this case here! I only hope that he was not on a fishing expedition for a favourable judicial officer. The foregoing then informs the decision I have reached that the plaintiff is far from establishing a prima facie in the circumstances of this case.

As to whether or not the plaintiff will suffer irreparable loss notcompesatable by an award of damages if the injunction is denied, I am satisfied that no such irreparable damage will come in the way of the plaintiff. From what I have so far seen, the defendants seem to have been in occupation of the disputed portion for a while. In the premises if injunctive orders are not issued at this stage, no loss irreparable or otherwise will result to the plaintiff. For the very, very reason, the balance of convenience tilts in favour of the defendants.

In a nutshell, the plaintiff has not made out a case for the grant of the prayers sought in the application. Accordingly, the application is dismissed with costs to the defendant.

Judgment dated, signed and **delivered** at Kisii this 31st March, 2011

ASIKE-MAKHANDIA

JUDGE