



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO**

**Civil Case 64 of 2008**

1. Land case

2. Subject of main suit:- Land LR Transmara/Kimintet 'D'/29

i) Declaration defendant's encroachment is unlawful.

ii) Injunction to restrain defendant from being on land.

3. Civil Practice and procedure

i) Application for an injunction order XXX IX r 1, 2, 3 Civil Procedure Rules

Section 3A CPA.

ii) Applicant/plaintiffs registered owner of land parcel Trnsmara/Kimintet 'D'/29.

iii) Claim that defendant trespassed and encroached on land on 28th November, 2008 and ploughed 10 acres and continues to do so seeks injunction to restrain the defendant from entering trespass ploughing land.

4. **In reply**

iv) Respondent bought land in 1994 for Kshs. 425,000/= from Plaintiffs comprising 13 acres. Payments completed in August, 2005.

v) Plaintiff declined to sub-divide 13 acres from 33 acres.

vi) Letter 26<sup>th</sup> November, 2008 of demand denied. Caution placed (purchaser's interest 26.11.08)

5. **Held:** - Where non-disclosure of material facts, no injunction is to be issued.

6. **Case Law**

a) **Samwel Ondieki Obiero v Teresa Kwamboka Motindi**

**b) Giella v Cassman Brown & Co. Ltd**

(1973) EA 358

**7. Advocates**

W.R. Kiprono advocate instructed by M/S W.R. Kiprono & Co. advocates

for the Plaintiff/Applicant – present

O.M. Otieno advocate instructed by M/S O.M. Otieno & Co. advocates

for the Defendant/Respondent – present

**JONATHAN KIMUTAI MIBEI .....PLAINTIFF**

**VERSUS**

**PHILIP KIPYEGON LELEI ..... DEFENDANT**

**RULING**

**Application for injunction**

**I: Background procedure**

1. The subject of the main suit herein is LAND. The Applicant/Plaintiff seeks orders from this Court, that as the owner of land parcel LR Transmara/Kimintet 'D'/29, the Defendant encroached onto the land unlawfully and a declaration to this effect be given. That there be an injunction against the Defendant restraining him, his agents and or servants from being on the land.
2. This suit was filed on 23<sup>rd</sup> December, 2008. By a certificate of urgency of 23<sup>rd</sup> December, 2008 the Applicant/Plaintiff filed an application of injunction seeking to be heard during the Court vacation and further seeking prayers of injunction to restrain the Respondent/Plaintiff by himself servants, agents representative from trespassing, encroaching and entering --- ploughing onto the plaintiffs land parcel No. Transmara/Kimintet 'D'/29.
3. On the 24<sup>th</sup> December, 2008 this Court admitted the application for hearing but directed that it be first served upon the respondents. No interim orders were granted.
4. The Respondent/Defendant entered appearance through his advocate and filed his reply. The inter parte hearing, on 19<sup>th</sup> January, 2008 was heard.

**II: Application. 23<sup>rd</sup> December, 2008**

5. The applicant stated that on 28<sup>th</sup> November, 2008 the defendant without colour of right nor with the plaintiffs consent trespassed onto the portion of his land LR Transmara /Kimintet 'D'/29 and ploughed 10 acres. This was on the original 33.54 ha of land that belonged to the applicant. The applicant was apprehensive that the defendant may build structures thereafter. He sought an injunction and relied on the case law of **Giella v Cassman Brown & Co. Ltd (1973) EA 358.**

### **III: In reply**

6. The Respondent stated that the application was indirectly seeking a mandatory injunction to evict the respondent from the land. He relied on the case law of **Samuel Ondieki Otiemo V Teresa Kwamboka Motindi unreported HCCC. 22/2005 (Kisii) Kaburu Bauni J** a case in which the Hon. Judge declared that the said injunction sought, amounted to indirectly seeking an eviction order.

7. The facts before Court which is, the parties had entered into an agreement of sale of the land in 1994. That thereafter 13 acres was allocated to the Respondent by the Plaintiff for a consideration of Kshs. 425,000/=. The Respondent took 11 years to pay for this land. It was until 2005 that this payment was complete and he sought to have a sub-division effected. The applicant resisted and any agreement by the elders was not adhered to.

8. The said applicant then filed this suit to Court and he prayed that no injunction be issued.

### **III: Opinion**

9. Both parties relied on the case law of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358**

which lays down the principle in which the Court may consider in granting an injunction. This is that the Court uses its discretion in issuing an injunction and it must not be interfered with. The applicant must show a probability of success, that the applicant would suffer irreparable injury and that if the Court is in doubt the application would be decided on a balance of convenience.

10. In this application before me, the applicant failed to disclose material facts to this court. The facts are that the respondent had bought the land from the applicant in 1994. This court has held in the past that material non-disclosure to court in an application for injunction should not entitle the applicant to injunction orders.

11. The letter of demand dated 26<sup>th</sup> November, 2008 was altered to read 29<sup>th</sup> November, 2008. This in itself is sufficient to show that the applicant may not have been truthful in his application.

12. The rescinding of the land sale is an issue that arises for trial but not mentioned by the applicant.

13. An injunction herein has not been satisfied to this court to be issued to the applicant. The same is rejected and dismissed with costs to the Respondent/Defendant.

**DATED** this 4<sup>th</sup> day of February, 2009 at **KERICHO**

**M.A. ANG'AWA**

**JUDGE**

**Advocates**

W.R. Kiprono advocate instructed by M/S W.R. Kiprono & Co. advocates

for the Plaintiff/Applicant – present

O.M. Otiemo advocate instructed by M/S O.M. Otiemo & Co. advocates

for the Defendant/Respondent – present