IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 86 OF 2002

DOUNE FIRM LTD……..……PLAINTIFF

VERSUS

RICHARD SOI……...….1ST DEFENDANT

JOSEPH RUNYA CHUMA…….……..2ND DEFENDANT

JACKSON MUTAI…….…..3RD DEFENDANT

CHRISTINE LABOSO…….…….4TH DEFENDANT

RICHARD K. SITENEI……5TH DEFENDANT

RULING

By the application dated 20/2/2012, the defendants/applicants seek an order of injunction against the plaintiff, to restrain the plaintiff, his servants and agents from trespassing, fencing, planting trees, demolishing, denying the defendants and their servants or agents from accessing the suit land, using police to harass them and in any other way intermeddling with the defendants' quiet possession and use of the suit property namely L.R. No. 9045/9. The applicants allege that the plaintiff has threatened to plant trees on the said land, has denied the defendants and their families from accessing the land to cultivate and that the plaintiff has used police to harass them and have them charged with trespass. The application is premised on the affidavit of Richard Soi, the 1st defendant. He annexed copies of the charge sheets from Molo Magistrates Court whereby Sarah Tuwei and Zeddy Cheruiyot have been charged with creating disturbance contrary to **Section 95(1)(b)** of the **Penal Code** and Nancy Chemutai was charged with trespass upon private land contrary to **Section 3(1)** of the **Trespass Act**.

The application was vehemently opposed by the Director of the plaintiff, Richard James Kay Muir, who filed a replying affidavit dated 28/2/2014 in which he deposed that the application is bad in law and incompetent; that there is no nexus between the trespassers who have been charged in court and the defendants herein; that the trespassers are not party to this suit; that the defendants have no locus standi to bring this application just like the applicaiton dated 18/4/2013 which was dismissed by this court. He deponed that trees have already been planted on the land on which he has resided since 2001. In his view, this application is brought at the behest of the Interested Party whose suit HCC 1561/2002 (NRB) was dismissed after several applications for injunction were dismissed in High Court Nairobi. The plaintiff invited the court to visit the locus in quo.

Having considered the rival arguments, this being an application for an order of injunction, the applicants have to meet the threshold set down in the case of **Giella v Cassman Brown (1973)EA 358.** The

applicants have to demonstrate that: (1) they have a prime facie case with a high probability of success; (2) that if the order of injunction is not granted, the applicants will suffer irreparable loss; (3) if the court is in doubt, the case be decided on a balance of convenience.

From the pleadings on record, the plaintiff is the registered owner of the suit land which is said to measure about 173 acres. As pointed out in the ruling delivered in this case in the application filed by the Interested Party dated 18/4/2013, the applicants have not bothered to demonstrate which part of the parcel of land they occupy and how many acres does each one of them hold. The plaintiff is also in occupation. He claims to have been in occupation since 2001 and has already planted trees which action the defendants are objecting to. Infact the plaintiff wanted the court to visit the land to see what he has been doing on the land, something that the defendants did not refute. For an order of injunction to issue the plaintiffs should have been specific in their prayers as to the portion of land the plaintiffs should be barred from interfering with. They cannot seek a blanket prayer of injunction to bar the plaintiff from enjoying, or using his land

Whether the defendants will suffer irreparable harm; the defendants did not attempt to demonstrate what irreparable harm they will suffer if the order is not granted. In the application dated 18/4/2013, the Interested Party sought similar prayers, alleging that the defendants are its members who were threatened with imminent eviction and that the plaintiff was fencing, subdividing, felling trees and cultivating the land. That application was brought by the Interested Party trying to promote the interests of the defendants. The plaintiff being the owner of the land, having purchased it and being the registered owner, its title is indefeasible until proved otherwise. It is the plaintiff who stands to suffer irreparable loss if the court were to make a blanket order of injunction to restrain the plaintiff from using its land.

In whose favour does the balance of convenience tilt? As observed by the plaintiff's counsel, this application is similar to the one brought by the Interested Party which this court dismissed on 30/9/2013. The orders sought therein were meant to protect the interests of the defendants. Bringing a similar application and camouflaging it as if brought by different parties is an abuse of the court process. An order of injunction being an equitable remedy, he who comes to equity must come with clean hands. The defendants have not come with clean hands. When the Interested Party failed to secure the orders of injunction, they are now moving through back door to attempt to obtain the same orders. The balance of convenience does not favour the defendants.

The defendants allege that they are being harassed by the plaintiff and they attached charge sheets of three people allegedly charged before Molo Court. Sarah Tuwei and Zeddy Cheruiyot are charged with creating disturbance. This is way back in April 2013. The other charge relates to Nancy Chemtai who is charged with trespass. Both offences were committed way back in April 2013. Firstly, there is no evidence as to how the people charged are related to the defendants. They are not parties to this suit. Further, the charges were preferred way back in April 2013. This application was only filed in February 2014, about 10 months later. The delay in moving the court for intervention has not been explained.

On 30/9/2013, this court directed that this matter should proceed to hearing, the same being partly heard so that the matter is fully determined at once. It seems the defendants want to delay this matter by filing one application after the other which this court must say no to.

In the end, I find that the defendants have not satisfied the conditions required for grant of an order of injunction. The application lacks merit and is hereby dismissed. As directed, earlier I repeat that this matter should proceed to full hearing instead of the defendants wasting this court's time filing one application after another. Costs to be in the cause. There is already a hearing date of 1/7/2014 and the parties should allow the case to proceed.

DATED and DELIVERED this 6th day of June, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Kipkoech for the plaintiff/respondent

Mr. Mwangi holding brief for Mr. Orina for the defendants/applicants

Kennedy – Court Assistant