



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KITALE

E & L CASE NO. 82 OF 2017

SIMEON KIBICHI CHESANG.....PLAINTIFF

VERSUS

LEKITARI ARAP CHERUIYOT.....1ST DEFENDANT

LEONARD KIPKORIR CHERUIYOT.....2ND DEFENDANT

RULING

Simeon Kibichi Chesang (*hereinafter referred to as the plaintiff*) has come to court against **Lekitari Arap Cheruiyot** and **Leonard Kipkorir Cheruiyot** (*hereinafter referred to as the defendants*) for orders that an interim injunction do issue restraining the defendants/respondents, its servants, agents, employees, assigns or anybody acting for or through them from entering into, trespassing onto, dumping any building material of any nature, constructing, demolishing and erecting any structures, planting, weeding and or harvesting any crop, evicting, or otherwise interfering with the plaintiff's quite possession of Trans-Nzoia/Siyoi/72 pending the hearing and determination of this application inter parties and thereafter, pending the hearing and determination of the main suit and that an interim injunction do issue restraining the defendants/respondents, its servants, agents, employees, possessions, assigns or anybody acting for or through them and the Trans-Nzoia County Registrar from charging, transferring, licensing, selling, leasing, sub-leasing or in any way interfering with the title of Trans-Nzoia/Siyoi/72 pending the hearing and determination of this application inter-parties and thereafter pending the hearing and determination of the suit.

Moreover, that an interim injunction do issue restraining the Assistant Chief, Milcah Limo, Sitatunga Location and or members of the local administration from supervising, assisting and/or providing protection to the defendants/respondents, its servants, agents, employees, possessions, assigns or anybody acting for or through them in trespassing, evicting, burning down and all or any other illegal and unlawful activities over Trans-Nzoia/Siyoi/72 pending the hearing and determination of this application inter-parties and thereafter pending the hearing and determination of the suit.

Lastly, that the OCS, Sibanga Police Station do ensure compliance of these orders pending the hearing and determination of the suit. The application is based on grounds that the plaintiff is the absolute beneficial owner of Trans-Nzoia/Siyoi/72 and has been in continuous and uninterrupted occupation of and use of Trans-Nzoia/Siyoi/72 1st April, 1983 after purchasing the same lawfully from the 1st defendant. The defendants/respondents have illegally, unlawfully trespassed onto Trans-Nzoia/Siyoi/72 with the assistance and supervision of the local administration on 20th April, 2017 and 21st April, 2017 who support the illegal actions of the defendants in ploughing, planting and cultivating the applicant's land.

The plaintiff contends that the defendants/respondents are now desirous and have in writing and verbally threatened to unlawfully and extra-judicially evict the plaintiff and his entire family from Trans-Nzoia/Siyoi/72 on 30th April, 2017 and that the defendants/respondents' actions have set a precedent which is very dangerous and should be frowned upon and discouraged by this Honourable court. The defendants/respondents have no valid title or claim over the suit property and in any even they ought to have followed due procedure before un-ceremoniously evicting the plaintiff/applicant from Trans-Nzoia/Siyoi/72. That it is only fair and just that the orders sought be granted. That the plaintiff has a prima facie case with high probability of success.

The application is supported by the affidavit of the plaintiff who states that he has been in continuous and uninterrupted occupation and use of the suit land since 1983 after buying the same from the 1st defendant. The applicant later made a payment of Kshs.16,000/= towards the settlement of the loan with the Trans-Nzoia Settlement and Fund Trustee Office to facilitate expeditious transfer and registration of the suit property in his names. Ultimately, the 1st defendant executed transfer forms and application for Land Control Boards consent which was approved.

The applicant contends that upon taking possession in 1983, he did construct and erect a permanent building on the land among other developments. However, instead of the defendants transferring the property into the plaintiff's name, they caused the same to be registered in their names. The plaintiff contends further that the defendants have trespassed into the land, ploughed and planted and have threatened to evict the plaintiff. The plaintiff is apprehensive that the property might be disposed off, charged and/or subdivided. The 1st defendant states that the plaintiff is a stranger and a trespasser as he is not the registered owner of the parcel of land. The 2nd defendant has taken possession of 4 acres, planted maize when is due for weeding. The 1st defendant denies having sold the land to the plaintiff and states that the registration to the 2nd defendant's name was not done fraudulently.

M/s Cheso learned counsel for the plaintiff submits that the applicant has established a prima facie case with a probability of success as the applicant has been in possession since 1983 and has been ploughing the land since then. The defendants have invaded the land this year and ploughed the same to the detriment of the plaintiff and destroyed some structures. Furthermore, that the plaintiff is likely to suffer irreparable harm as the Suitland is his only source of livelihood. On the issue of balance of convenience, she submits that it tilts towards granting the injunction sought as the plaintiff is in possession.

Mr. Tarus **learned counsel for the** defendants submits that the plaintiff's case has no basis as there is no evidence that the land belongs to the plaintiff. According to counsel the land belonged to settlement fund trustees until June 2015 when it was registered in the names of the defendants and that adverse possession does not apply against settlement fund trustees as the latter is a government agency holding land on behalf of the government. On the issue of irreparable harm, the defendant argues that the loss suffered by the plaintiff if any can be adequately compensated in damages. On balance of convenience, counsel submits that it tilts towards dismissing the application as it is the defendants who are the registered owners.

Time and again, this court has relied on the case **Giella Vs Cassman Brown** the locus classicus case on grant of temporary injunctions. The applicant has to satisfy three conditions before a temporary injunction is granted.

- (1) That he has a prima facie case with likelihood of success.**
- (2) That if injunction is not granted he is likely to suffer Irreparable harm that cannot be adequately compensated with damages.**
- (3) If in doubt, the court has to determine on a balance of convenience.**

I have considered the application and rival submissions and do find that the plaintiff is not the registered owner of the parcel of land in dispute as the property was initially registered in the names of Settlement Fund Trustees., until the 24.6.2015 when the same was registered in the names of the 1st defendant and

consequently transferred to the 2nd defendant on the same date. The plaintiff's claim is based on adverse possession; however, the defendants were registered as proprietors in 2015 and therefore, the principle of adverse possession does not apply as adverse possession is a prescriptive right that matures after 12 years of possession and acts both as a sword and shield against the registered owner of the land. Moreover, the principle cannot apply against the Settlement Fund Trustees as the same cannot apply against the Government. I do find that it is not clear whether the plaintiff's claim is based on fraud or adverse possession and therefore I'm in doubt as to whether the plaintiff has established a prima facie case with a likelihood of success. The plaintiff has to choose between a claim based on fraud and adverse possession as the same cannot be enjoined.

On irreparable loss that cannot be compensated by way of damages, I do find that the plaintiff has not demonstrated that the defendant has no means to pay damages and that damages will be inadequate to compensate him.

On a balance of convenience, I do find that it tilts towards maintaining status quo due to the fact that the defendants have already planted maize on 4 acres of parcel of land and therefore, they should be allowed to maintain the crop, however, since the plaintiff has already constructed a house on the parcel of land he is hereby allowed to remain in possession of one acre of the suit parcel of land and a road of access measuring 4 meters wide shall be created to allow him access to the main road from the portion he is in occupation. The defendants are restrained from selling the parcel of land, charging the same, dumping any building material of any nature, constructing, demolishing and erecting any structures or dealing with the same in any manner whatsoever, until hearing and determination.

Moreover, that an interim injunction is hereby issued restraining the Assistant Chief, Milcah Limo, Sitatunga Location and or members of the local administration from supervising, assisting and/or providing protection to the defendants/respondents, its servants, agents, employees, possessions, assigns or anybody acting for or through them in respect of any action or activity over Trans-Nzoia/Siyoi/72 pending the hearing and determination of the suit.

Lastly, that the OCS, Sibanga Police Station do ensure compliance of these orders pending the hearing and determination of the suit. Costs of the application be in the cause. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF MAY, 2017.

A. OMBWAYO

JUDGE