REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KITALE

LAND CASE NO. 149 OF 2014

CLEMENT CHEMONGES :: PLAINTIFF

VERSUS

JOHN MASAI

WILLY KWARAT :: DEFENDANTS

R U LI N G

1. The applicant filed a notice of motion dated 9th October, 2014 in which he seeks an injunction against the respondents from interfering with two acres forming part of Plot No. 42 Cheptenden (suit land). The applicant contends that he bought the suit land on 3/2/2003 from one Ndiwa Naibei Namaswa who is now deceased.
2. In January, 2014, the respondents without any colour of right moved into the suit land and forcefully ploughed and planted on the same. The applicant had taken possession of the suit land soon after he purchased it. The applicant contends that the respondents have no interest on the land and should therefore be restrained from interfering with the possession of the applicant.
3. The application is opposed by the respondents through grounds of opposition filed on 15/12/2014 in which the respondents contend that the applicant's application is misconceived and bad in law and that what the applicant is seeking amounts to a mandatory injunction which if granted will change the prevailing status.
4. I have considered the applicant's application as well as the opposition to the same by the respondents. The respondents are not disputing the fact that the applicant has been in possession of the land since 2003 when he bought it. What the respondents are contending is that since they have moved into the suit land, they should not be removed as to do so will amount to removing them and putting back the applicant into possession.
5. It is clear that the applicant has been in possession of the suit land since 2003 when he bought the suit land. He has erected a temporary structure which is still standing on the suit land. He has fenced the land and therefore he is in possession of the suit land. What the respondents have done is to trespass into the suit land.
6. The principles for grant of a temporary injunction were settled in the famous case of **Giella vs. Cassman Brown & Co. Ltd. 1973 EA 348.** Firstly an applicant must demonstrate that he has a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the applicant will suffer irreparable injury. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.
7. In the present case, the applicant has demonstrated that he bought the suit land from the late Ndiwa Naibei Namaswa. He has exhibited an agreement for sale. The respondents did not file any replying to counter the averments by the applicant. A look at the defence filed shows that the respondents are nephews of the late Ndiwa Naibei Namaswa who claim that the deceased had no child and that the deceased never sold the suit land to the applicant. This is not a ground for the

respondents to invade the applicant's land. Where were they from 2003 when the applicant bought the land. Why did they wait until the deceased died before starting to claim the land?

8. The respondents are contending that since they are on the suit land an injunction preserving the land cannot issue. This agreement is without merits. The applicant was and is in possession of the land. What the respondents have done is to forcefully plough and plant. They now want the court to maintain that position. If courts were to buy such kind of arguments, no injunction will be granted against people who forcefully enter other peoples properties and use the argument that now that they are in the property, they should not be removed. The entry into the suit land by the respondents was wrong in the first place. It was the applicant who was and is legally in possession of the same. The applicant has demonstrated that he has a prima facie case with probability of success. Even the balance of convenience tilts in favour of the applicant. The authorities cited by the respondents are distinguishable. In those two suits the applicants came to court seeking restraining injunctions against those who were already in possession.

Even the balance of convenience was considered. In the present case, the applicant was in possession even before he filed the present application. He came to court after the respondents forcefully moved into his land. The applicant is entitled to the injunction sought. I allow the application in terms of prayer (2) and (3) of the application dated 9/10/2014.

It is so ordered.

[Dated, singed and delivered at Kitale on this 21st day of January, 2015.]

E. OBAGA.

JUDGE.

In the presence of Mr. Tigogo for applicant.

Court clerk – Kassachoon.

E. OBAGA.

JUDGE.

21/1/2015.