

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO.40 OF 2015

REUBEN OCHIEMO OBWORA PLAINTIFF

VERSUS

**TIMOTHY CHERANGIS NAIBEL.....
DEFENDANT**

R U L I N G

1. The applicant brought a notice of motion dated 19.3.2015 in which he sought an injunction restraining the respondent from constructing a house or anything whatsoever in a portion measuring six acres being part of LR. No.Samakolo 27434/2 at Endeless. The applicant is a beneficial owner of part of that portion of land which belonged to his late father.
2. On 26.6.2013 the applicant entered into a sale agreement with the respondent in which the applicant sold 6 acres being part of his entitlement to the defendant at a consideration of 1,020,000/=. The applicant contends that the respondent paid a deposit on execution of the agreement and that he has since failed to clear the balance. The applicant further contends that the respondent went underground and that he recently resurfaced and threatened to take over the six acres and construct a house on the piece of land.
3. The applicant depones that he tried to offer the respondent 3.6 acres being equivalent of the amount already paid but the respondent declined. The applicant therefore contends that the respondent is in breach of the agreement and that he has since repudiated the contract and offered to refund the amount already paid but that the respondent has declined to take the money. The applicant depones that the respondent is a police officer and that he is using his position to intimidate him and that he has threatened to mobilize people to assist him construct a house on the disputed land.
4. The respondent has opposed the applicant's application through a replying affidavit sworn on 8.4.2015. The respondent contends that the applicant's application is an abuse of the process of the court. The respondent contends that he is remaining with a balance of Kshs.400,000/= which he is willing to pay the applicant but that the applicant has declined to take the money and is only offering to give him less land than what he bought. He contends that he explained the applicant why he was not able to clear the balance as agreed. He further contends that the applicant was attempting to give him an alternative area which is rocky and unproductive. He denies that he has bought construction materials as alleged. He depones in his affidavit that he only ploughed the land and planted maize on part of it before the applicant came and stopped him.
5. I have gone through the applicant's application together with supporting affidavit and submissions of his counsel. The only issue which arises for determination is whether on the material given by the applicant, he is entitled to grant of injunction. The principles for grant of an interlocutory / temporary injunction were well set out in the celebrated case of Giella vs Cassman Brown & Co. Ltd (1973) E.A. 358

Firstly an applicant must demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which may not be compensated in damages. Thirdly, if the court is in doubt it will decide the application on a balance of convenience. In the instant case the applicant is seeking a permanent injunction restraining the respondent from constructing a house on the suit land. He is also seeking an order rescinding the contract on grounds of breach.

6. The applicant annexed a copy of the agreement entered between him and the respondent. A look

at the said agreement shows that the respondent paid kshs.520,000/= on execution of the agreement. The balance of kshs.500,000/= was to be paid on or before 28.2.2014. Clause 3 of the agreement provided that the respondent was to take possession of the land immediately after the execution. The applicant contends that there is a balance of Kshs.420,000/= whereas the respondent contends that the balance is Kshs.400,000/=. The plaintiff did not explain at what stage the respondent paid Kshs.80,000/= as to leave a balance of 420,000/= . Equally the respondent is silent as to when he paid Kshs.100,000/= as to leave a balance of Kshs.400,000/=. However be that as it may, it was upon the applicant to demonstrate that he has a prima facie case with probability of success against the respondent. The applicant is contending that the applicant forcefully moved into the property. I do not understand how a person who was expressly permitted to take possession of the property immediately upon execution of the agreement can be said to be entering the same without permission. The agreement did not specify what the respondent was permitted to do or not do. If the agreement allowed him possession upon payment of the first instalment, the respondent could not be heard to say that he was not allowed to construct on the land. The extent of possession was not defined and the applicant cannot be allowed to restrict the respondent on what to do when the agreement was clear.

7. The respondent has been ready and willing to pay the balance but the applicant is refusing to take it. The applicant has not demonstrated that he has a prima facie case with probability of success. I do not even see what harm the applicant will suffer which will not be compensated in damages if an injunction is not granted. I find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondent. It is so ordered.

Dated, signed and delivered at Kitale on this 6th day of May, 2015.

E. OBAGA

JUDGE

In the presence of Mr. Teti for Plaintiff and Mr. Onyancha for M/S Bett for defendant. Court Clerk - Isabella.

E. OBAGA

JUDGE

6.5.2015