



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ELC NO. 37 OF 2012**

**MUSHARU OLE NTUKAI NTOLU.....PLAINTIFF**

**VERSUS**

**1. FRANCIS NGENO**

**2. JOSEPH KIRUI**

**3. PAUL KIPTONUI SIELE**

**4. PAUL LELEI**

**5. KIPKEMOI SIELE**

**6. CHEBOSIT ARAP KETER**

**7. PAUL KIRUI**

**8. LEBOSO ARAP MARITIM.....DEFENDANTS**

**JUDGMENT**

The Plaintiff brought this suit against the defendants on 2<sup>nd</sup> February 2012 seeking among others; a declaration that he is the registered and/or lawful owner of all that parcel of land known as LR No. Trans-Mara/shartuka/187 (hereinafter referred to only as “the suit property), an order for the eviction of the defendants from the suit property, a permanent injunction to restrain the defendants from entering upon, re-entering, trespassing onto, cultivating, building structures or interfering with and/or in any other manner dealing with the suit property and general damages for trespass. In his plaint dated 2<sup>nd</sup> February 2012, the Plaintiff averred that he was the registered proprietor of the suit property which measures 20.64 ha. The suit property is a portion of a former larger parcel of land that was registered in the name of Shartuka Group Ranch. The plaintiff averred that in the months of September and October 2011, the defendants jointly and severally trespassed on the suit property and put up temporary structures thereon. The defendants also started to cultivate a substantial portion of the said property. The plaintiff averred that the defendants’ said activities had denied him the right to enter, occupy and use the suit property.

The plaintiff’s claim was defended by all defendants except the 6<sup>th</sup> defendant. The Plaintiff did not apply for interlocutory judgment against the 6<sup>th</sup> defendant. It is not clear therefore whether he was served with summons to enter appearance or not. The 1<sup>st</sup> to 5<sup>th</sup> defendants filed a joint statement of defence on 23<sup>rd</sup> Mach 2012. The 1<sup>st</sup> to 5<sup>th</sup> defendants denied the plaintiff’s allegation that they trespassed on the suit property in the months of September and October 2011 and commenced cultivation and construction of

structures thereon. The 1<sup>st</sup> to 5<sup>th</sup> defendants averred that they were residing on and carrying out other activities on the parcels of land known as L.R No. Transmara/Shartuka/1228, 1248, 1249 and 1320 (hereinafter referred to Plot Nos. 1228, 1248, 1249 and 1320 respectively). The 1<sup>st</sup> to 5<sup>th</sup> defendants averred that Plot Nos. 1228, 1248, 1249 and 1320 are owned by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants respectively. The 1<sup>st</sup> to 5<sup>th</sup> defendants averred that the 3<sup>rd</sup> defendant was at all material times residing on Plot No. 1228 owned by the 1<sup>st</sup> defendant. The 1<sup>st</sup> to 5<sup>th</sup> defendants denied that they had denied the plaintiff access and use of the suit property. The 1<sup>st</sup> to 5<sup>th</sup> defendants averred that Plot Nos. 1228, 1248, 1249 and 1320 were allocated to them after the dissolution of Shartuka Group Ranch and that they had been occupying, cultivating and grazing their cattle thereon and not on the suit property as claimed by the plaintiff. The 1<sup>st</sup> – 5<sup>th</sup> defendants averred that they had no interest of whatsoever nature in the suit property. In reply to the 1<sup>st</sup> to 5<sup>th</sup> defendants' statement of defence, the plaintiff denied that the 1<sup>st</sup> to 5<sup>th</sup> defendants own Plot Nos. 1228, 1248, 1249 and 1320 and that the said parcels of land exist. The plaintiff averred that the titles for Plot Nos. 1228, 1248, 1249 and 1320 were revoked and nullified through the orders that were issued in Kakamega HC Misc. Application No. 103 of 2003, Kisii HC Misc. Application No. 12 of 2009 and the Kenya Gazette Notice No. 6331 dated 8<sup>th</sup> June 2011.

The 7<sup>th</sup> and 8<sup>th</sup> defendants also filed a joint statement of defence on 9<sup>th</sup> March 2012. Like the 1<sup>st</sup> to 5<sup>th</sup> Defendants, the 7<sup>th</sup> and 8<sup>th</sup> defendants averred that they are strangers to and have no interest in the suit property. The 7<sup>th</sup> and 8<sup>th</sup> defendants averred that the 8<sup>th</sup> defendant was the registered owner of all that parcel of land known as LR. No. Transmara/Njipiship/1172 which originated from Transmara/Njipiship registration section and which had no relationship with Shartuka Group Ranch from which the suit property originated. The 7<sup>th</sup> and 8<sup>th</sup> defendants averred that LR No. Transmara/Njipiship/1172 (hereinafter referred to as "Plot No. 1172") did not share a boundary with the suit property. The 7<sup>th</sup> and 8<sup>th</sup> defendants denied that they trespassed on the suit property and carried out the acts complained of by the plaintiff. The 7<sup>th</sup> and 8<sup>th</sup> defendant averred that all their activities were restricted to Plot No. 1172 which was registered in the name of the 8<sup>th</sup> defendant in 1996 following an adjudication process at Transmara/Njipiship Adjudication Section. The 7<sup>th</sup> and 8<sup>th</sup> defendants denied having cultivated or put up any structure on the suit property or any portion thereof. It is not clear from the record whether the plaintiff filed any reply to the defence by the 7<sup>th</sup> and 8<sup>th</sup> defendants. There is none on record.

At the trial, the plaintiff told the court that he was the registered owner of the suit property and that in the months of September and October 2011 the defendants entered the suit property forcefully and started putting up structures and cultivating a portion thereof. He stated that the defendants have remained on the suit property to date. He stated that he was a member of Shartuka Group Ranch and obtained the suit property from the said group ranch. He stated that Shartuka Group Ranch was involved in many court cases concerning its parcel of land a portion of which was allocated to him. The plaintiff stated that he used to utilize the suit property for cultivation and cattle grazing and had to stop the activities on the suit property and shift to a neighbour's parcel of land after the defendants' invasion of the property. He stated that he is also staying on the said neighbour's parcel of land with his family. The plaintiff stated that the defendants had occupied and were using the whole of the suit property. The plaintiff produced as exhibits a number of documents including a copy of the title deed for the suit property, a copy of certificate of official search on the register of the suit property, a copy of the register for the suit property, copies of rulings which were made in Kakamega High Court Misc. Civil Application No. 103 of 2003 and a judgment of the court of Appeal in Civil Appeal No. 5 of 2004.

The 1<sup>st</sup> defendant (DW 1) gave evidence on his own behalf and on behalf of the 2<sup>nd</sup> to 5<sup>th</sup> defendants. He told the court that the 2<sup>nd</sup> to 5<sup>th</sup> defendants are known to him as they are his neighbours. He stated that the 3<sup>rd</sup> defendant is residing on Plot No. 1228 which is owned by him (the 1<sup>st</sup> defendant), while the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are occupying their own parcels of land. He stated that the plaintiff is not known to him and that he heard of the plaintiff for the first when the plaintiff's advocates on record wrote to him a demand letter. DW 1 denied that they invaded the suit property in the year 2011. He stated that he had occupied the parcel of land now comprised in Plot No. 1228 since 1967 and that all his children were

born on the suit property. He stated that he was registered as the owner of Plot No. 1228 on 14<sup>th</sup> May 2009. DW 1 stated that he was a member of Shartuka Group Ranch and that he was allocated Plot 1228 by the Shartuka Group Ranch's adjudication Committee. He stated that the other defendants were also allocated their respective parcels of land in a similar manner. He stated that Plot No. 1228 measures 20.40 ha. and that he was not aware of the position of the suit property on the ground. He stated that he was residing on Plot No. 1228 and had been carrying out cultivation and other farming activities on the same. He stated that the other defendants were also residing on their respective parcels of land and carrying out similar activities. He denied that his title to the suit property is invalid. He stated that in the year 2011 when the plaintiff claims that they invaded the suit property he had long settled on Plot No. 9228 and had already retired from employment. He denied that they had trespassed on the suit property as claimed by the Plaintiff. He also denied that their titles had been cancelled. He stated that he was not involved in the cases in which the titles of the parcels of land owned by them are said to have been cancelled. He stated further that their parcels of land were not in dispute in the said cases. He stated that the other defendants and he are occupying their own parcels of land and as such there was no basis for the plaintiff's claim against them. DW 1 produced a number of documents as exhibits. These included; a copy of the title deed for Plot No. 1228 in his name dated 14<sup>th</sup> May 2009, a copy of the title deed for Plot No. 1248 dated 18<sup>th</sup> May 2009 in the name of the 2<sup>nd</sup> defendant, a copy of the title deed for Plot No. 1249 dated 3<sup>rd</sup> June, 2009 in the name of the 4<sup>th</sup> defendant and a copy of the title deed for Plot No. 1320 dated 1<sup>st</sup> July 2009 in the name of the 5<sup>th</sup> defendant.

The 8<sup>th</sup> defendant (DW 2) gave evidence on his own behalf and on behalf of the 7<sup>th</sup> defendant. The 8<sup>th</sup> defendant testified that his name is not **LABOSO ARAP MARITIM** as indicated in the Plaint. He told the court that his name is **KIPKURUI ARAP MARITIM**. He produced his identity card to prove this fact. He told the court that he was the owner of Plot No. 1172 and that the plaintiff is not known to him. In proof of his ownership of the said parcel of land, he produced as exhibits, a copy of the register for Plot No. 1172 and a copy of the survey map for Transmara/Njipiship Registration Section. DW 2 stated that he had occupied the parcel of land now comprised in Plot No. 1172 since 1951 and that the suit property is not known to him. He denied that he was occupying the suit property. He stated that Plot No. 1172 measures 22.96 ha.

After the close of evidence, the parties agreed to make closing submissions in writing. All the parties filed their written submissions and the same are on record. The plaintiff framed a total of 14 issues for determination while the 1<sup>st</sup> to 5<sup>th</sup> defendant framed 10 issues. The 7<sup>th</sup> and 8<sup>th</sup> defendants did not frame any issue. Having perused the pleadings, the evidence adduced by the parties and the issues which were framed by the parties, I am of the view that the issues that arise for determination in this suit can be summarised as follows:-

- (i) Whether the defendants trespassed on the suit property in September/October, 2011 and have continued with the said trespass?
- (ii) Whether the Plaintiff is entitled to the reliefs sought?
- (iii) Who is liable for the costs of the suit?

#### **The first issue:**

Trespass has been defined as any unjustifiable intrusion by one person upon the land in the possession of another. See, **Clerk and Lindsell on Torts, 18th Edition at paragraph 18-01**. In the case of **M'Mukanya vs. M'Mbijiwe [1984] KLR 761** it was held that trespass is an infringement of a right to possession. The Plaintiff's claim against the defendants is based on trespass. The onus was upon the plaintiff to prove that he was at all material times in possession of the suit property and that without his permission, consent, authority or any other justifiable cause, the defendants entered thereon. The plaintiff has contended that he was at all material times and still is the owner of the suit. The plaintiff has claimed further that he was at all material times in possession of the suit property until the defendants invaded the same in the months of September and October 2011 and dispossessed him of the same. I am satisfied

from the evidence on record that the plaintiff was the registered owner of the suit property and as such was entitled to possession thereof. I am not convinced however that the defendants did enter the suit property in the months of September and October, 2011 as claimed by the plaintiff or at all. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants contended that they own Plot Nos. 1228, 1248, 1249 and 1320 which are separate and distinct from the suit property. The 1<sup>st</sup> to 5<sup>th</sup> defendants contended that they were occupying and cultivating the said parcels of land and not the suit property. The 1<sup>st</sup> to 5<sup>th</sup> defendants contended that they had occupied the said parcels of land for several years even before they were registered as owners hereof. The 1<sup>st</sup> to 5<sup>th</sup> defendants produced as exhibits copies of title deeds for the said properties in proof of their ownership thereof. The 1<sup>st</sup> and 5<sup>th</sup> defendants denied ever entering the suit property and dispossessing the plaintiff thereof. As I have stated at the beginning of this judgment, this suit was filed on 2<sup>nd</sup> February 2012. From the evidence on record, the plaintiff was registered as the owner of the suit property on 14<sup>th</sup> August 1998. The plaintiff has claimed that the defendants entered the suit property in September/October, 2011 and dispossessed him of the same. From the chronology of events, this suit was filed after the expiry of about 12 years from the time the plaintiff was registered as the owner of the suit property and after about 3 months from the date of the alleged trespass. The Plaintiff did not place any evidence before the court in proof of his contention that he was in occupation of the suit property until September/October 2011 when the defendants forcefully evicted him therefrom. There was no evidence of any development that the plaintiff had carried out on the suit property for the 12 years that the property had been registered in his names. The Plaintiff did not also place any material before the court to show that he reported the defendants' alleged invasion of the suit property to the police. I am inclined to believe the evidence by DW 1 that the 1<sup>st</sup> to 5<sup>th</sup> defendants are occupying Plot Nos. 1228, 1248, 1249 and 1320 which are separate and distinct from the suit property. I am not persuaded by the plaintiff's contention that the titles for Plot Nos. 1228, 1248, 1249 and 1320 were cancelled and nullified by the court. There is no evidence before me that either the plaintiff or the defendants or any of them were involved in the cases that the plaintiff had referred to in proof of his title cancellation claims. There is also no evidence that the suit property or any of the parcels of land said to be owned by the defendants were the subject of the said cases. There is no basis therefore upon which this court can make a finding that the titles for Plot Nos. 1228, 1248, 1249 and 1320 which were registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants were cancelled by the court and as such are non-existent. Section 26(1) of the Land Registration Act, 2011 provides as follows:-

**“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate .....**”

The 1<sup>st</sup> to 5<sup>th</sup> defendants produced copies of their title deeds for Plot Nos. 1228, 1248, 1249 and 1320 in proof of their ownership of the said parcels of land. The plaintiff did not place any evidence before the court to rebut the presumption that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are indeed the absolute and indefeasible owners of the said parcels of land. It is my finding therefore that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are the owners of Plot Nos. 1228, 1248, 1249 and 1320 and that the 1<sup>st</sup> to 5<sup>th</sup> defendants were at all material times occupying the said parcels of land and not the suit property.

Due to the foregoing, I am not satisfied that the 1<sup>st</sup> to 5<sup>th</sup> defendants trespassed on the suit property. The same applies to the 7<sup>th</sup> and 8<sup>th</sup> defendants. The plaintiff had claimed that the 7<sup>th</sup> and 8<sup>th</sup> defendants entered the suit property with the 1<sup>st</sup> to 5<sup>th</sup> defendants in the months of September and October, 2011. In their defence the 7<sup>th</sup> and 8<sup>th</sup> defendants contended that they were in occupation of a parcel of land known as Transmara/Njipiship/1172 (“plot No. 1172”) which is separate and distinct from the suit property. From the evidence on record, Plot No. 1172 was owned by the 8<sup>th</sup> defendant and one, Rosaline Chepkirui Bon. The 7<sup>th</sup> and 8<sup>th</sup> defendants produced in evidence a copy of the register for Plot No. 1172 and a copy of the survey map for Transmara/Njipiship Registration Section which shows that Plot No. 1172 was a product of first registration in Transmara/Njipiship Registration Section which is different from

Transmara/Shartuka Registration Section from which the suit property originated. I am satisfied that the 8<sup>th</sup> defendant is a co-owner of Plot No. 1172 and that is the parcel of land which the 7<sup>th</sup> and 8<sup>th</sup> defendants were occupying. I am not satisfied from the evidence on record that 7<sup>th</sup> and 8<sup>th</sup> defendants trespassed on the suit property and that the trespass was continuing as claimed by the plaintiff.

The upshot of the foregoing is that the plaintiff has failed to prove his case against the defendants on a balance of probabilities. The plaintiff's claim against the defendants lacks merit in the circumstances and the same is accordingly dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants.

**Signed at Nairobi this.....day of.....2016**

**S. OKONG'O**

**JUDGE**

**Delivered, Dated and Signed at Kisii this 15<sup>th</sup> day of April 2016**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of**

.....for the Plaintiff

.....for the Defendants