



**REPUBLIC OF KENYA**

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

**ELC NO. 53 OF 2009**

**PHILIP KIPSIGEI RUTO.....PLAINTIFF**

**VERSUS**

**DAVID TORE PIRRIDE.....1<sup>ST</sup> DEFENDANT**

**KINGASUNYE ENOLE LEPORE.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

It is not clear from the evidence on record as to when Olosakwana Group Ranch in the former Trans-Mara District was declared an adjudication section. However, as at the year 2000, the land adjudication process in the section was at the objection stage. During the demarcation and recording of interest in land within the said adjudication section, Plot No. 433 Olosakwana Group Ranch adjudication section (“**Plot No. 433**”) was recorded in the name of the 2<sup>nd</sup> Defendant, Kingasunye Enole Lepore as the owner while Plot No. 434 Olosakwana Group Ranch adjudication section (“**Plot No. 434**”) was recorded in the name of one, Lepoi Olentamo Ole Kiputia, deceased (“**Ole Kiputia**”) as the owner thereof. The 1<sup>st</sup> Defendant is the son of Ole Kiputia. The Plaintiff herein had objected to the recording of the two parcels of land in the name of Ole Kiputia and the 2<sup>nd</sup> Defendant in objection cases no. 36 and no. 23. The Plaintiff’s objection concerning Plot No. 434 was successful while the objection relating of Plot No. 433 was dismissed. Following the outcome of the objection proceedings aforesaid, Plot No. 434 was recorded in the name of the Plaintiff as the owner thereof while Plot No. 433 remained in the name of the 2<sup>nd</sup> Defendant. The Plaintiff’s two (2) objections were determined on 26/10/2000. By the time of the hearing of the said objections, Ole Kiputia was deceased. The Plaintiff was not satisfied with the decision of the District Land Adjudication Officer in the objection relating to Plot No. 433 and lodged an appeal to the Minister on 28<sup>th</sup> November 2000. Ole Kiputia is also said to have lodged an appeal to the Minister with regard to the decision of the District Land Adjudication officer in the objection relating to Plot No. 434. It is not very clear from the material on record as to when this appeal was filed. It is common ground however that the two appeals are pending hearing and determination by the Minister.

The Plaintiff brought this suit against the Defendants in the year 2009 seeking a permanent injunction to restrain the defendants from trespassing on or interfering with the Plaintiff’s peaceful enjoyment of Plot No. 434 and damages. In his amended plaint dated 23<sup>rd</sup> March 2009, the Plaintiff averred that he is the registered owner of Plot No. 434 and that from January, 2009, the Defendants through the use of violence have trespassed on Plot No. 434 and prevented him from cultivating the same thereby interfering with his peaceful use and enjoyment of the said parcel of land. The Plaintiff averred that as a result of the Defendants’ said illegal acts, he has suffered loss and damage. It is on the account of the foregoing that he moved the court for the reliefs sought. The Defendants filed a joint statement of defence on 11/4/2013 in which they denied the Plaintiff’s claim in its entirety.

When the suit came up for hearing, the Plaintiff gave evidence and closed his case without calling any witness. On their part, the defendants called one witness. None of the defendants gave evidence. The Plaintiff told the court that during the adjudication and demarcation of land at Olosakwana Group Ranch, he lodged two (2) objections; one for Plot No. 433 and the other for Plot No. 434. He was successful in the objection that related to Plot No. 434 and the said parcel of land was recorded in his name as the owner. He lodged an appeal to the Minister against the decision in the objection that related to Plot No. 433. His objections were against the 2<sup>nd</sup> Defendant and one, Lepoi Olentamo Ole Kiputia (“Ole Kiputia”) who was the father of the 1<sup>st</sup> Defendant. He lost the objection against the 2<sup>nd</sup> Defendant and succeeded in the objection against Ole Kiputia. He stated that he was not aware that Ole Kiputia had lodged an appeal against the decision that was made in the objection relating to Plot No. 434. The Plaintiff stated that after the decision in the objection that related to Plot No.434, Ole Kiputia kept off the said parcel of land.

The Plaintiff stated that the 1<sup>st</sup> Defendant entered Plot No.434 with a group of people and burnt his house and store and effectively evicted him from the property. He stated that the 1<sup>st</sup> Defendant was grazing his cattle on the Plot No.434 and had prevented him from entering the property by threatening his life. He stated that the 1<sup>st</sup> Defendant was not involved in the objection proceedings and that he had sued the 1<sup>st</sup> Defendant because he is the one who has trespassed on the disputed property. As concerns, the 2<sup>nd</sup> Defendant, he stated that he had no interest in Plot No. 433 owned by the 2<sup>nd</sup> defendant and that the 2<sup>nd</sup> defendant had not interfered with Plot No.434.

The defendant’s witness was one, Dickson Karuna Piride (DW1). DW1 told the court that the 1st Defendant is his brother and that Plot No.434 was allocated to their father, Ole Kiputia by the adjudication committee. The allotment was however reversed when the plaintiff lodged an objection against the same. His father, Ole Kiputia died before the objection was heard and when a decision was made against his father, his uncle, one Lepore Ole Kiputa filed an appeal against the same to the Minister which appeal was still pending hearing and determination. After the close of evidence, the parties were directed to make closing submissions in writing. Both parties filed their submissions and the same are on record.

The parties did not agree on the issues for determination. The plaintiff framed a total of five (5) issues while the defendants did not come up with any. From my perusal of the pleadings and the evidence that was adduced by the parties, the following in my view are the issues that arise for determination in this suit.

- i. Whether the parcel of land known as Plot No. 434 was demarcated and recorded in the name of the plaintiff as the owner thereof.
- ii. Whether the defendants had trespassed on the said parcel of land?
- iii. Whether the Plaintiff is entitled to the reliefs sought?
- iv. Who is liable to pay the costs of the suit?

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

From the evidence on record there is no doubt that Plot No. 434 Olosakwana adjudication section (“the suit property”) was demarcated and recorded in the name of the plaintiff as the owner thereof. Although the defendants had denied this fact in thier statement of defence, in his evidence, DW1 admitted that although the adjudicating committee had allocated the suit property to his deceased father, Ole Kiputia, the allocation was reversed following an objection by the plaintiff and the Plaintiff was awarded the suit property following the said objection. The plaintiff’s exhibits 1, 2 and 3 are clear that Plot No.434 was recorded in the name of the plaintiff as the owner following the outcome of the said objection proceedings.

#### **The second issue:**

The statement of defence which was filed by the defendants was “a mere denial”. The defendants did not

respond specifically to any of the allegations that were made against them in the plaint. At the trial, none of the defendants gave evidence. DW1 who gave evidence on behalf of the defendants did not dispute the plaintiffs claim that the 1<sup>st</sup> defendant had invaded Plot No.434 in the company of a group of people and evicted the plaintiff therefrom. He did not also deny the plaintiff's claim that the 1<sup>st</sup> defendant had denied him access to Plot No.434 and that the 1<sup>st</sup> defendant had been grazing his cattle on the said property. DW1 did not contest the photographs that the plaintiff produced in evidence which showed what was said to be the 1<sup>st</sup> defendant's cattle grazing on the suit property. The claims in the plaint were directed against the 1<sup>st</sup> defendant personally. I failed to understand how DW1 who was not a party to the suit could have responded to the same on behalf of the 1<sup>st</sup> defendant. From the evidence on record, I am satisfied that the 1<sup>st</sup> defendant entered Plot No.434 without the plaintiff's permission and evicted the plaintiff therefrom. The 1<sup>st</sup> defendant also prevented the plaintiff from entering the said property. Trespass has been proved against the 1<sup>st</sup> defendant. As concerns the 2<sup>nd</sup> defendant, it is not clear to me why she was sued. In his evidence, the plaintiff stated that she has no interest in the suit property and has not interfered with the plaintiff's occupation thereof. Trespass has therefore not been proved against the 2<sup>nd</sup> Defendant.

### **The third issue:**

The plaintiff has sought only one relief against the defendants namely, an injunction. The plaintiff has proved that the 1<sup>st</sup> defendant trespassed on the Plot No.434. I am satisfied that the plaintiff is entitled to an injunction to stop the 1<sup>st</sup> defendant's acts of trespass. In their written submissions, the defendants submitted at length and cited a number of authorities to the effect that the plaintiff's suit is incompetent for want of consent from the Adjudication Officer under Section 30(1) of the Land Adjudication Act, chapter 284 Laws of Kenya. This issue was raised by the defendants for the first time in their submissions. It was neither pleaded nor put to the witnesses at the trial. I am of the opinion that it would not be fair to determine the rights of the parties to the suit herein based on that issue. Order 2 rule 4(1) of the Civil Procedure Rules provides as follows:

**“A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing irregularity:-**

- a. **which he alleges makes any claim or defence of the opposite party not maintainable;**
- b. **which, if not specifically pleaded, might take the opposite party by surprise; or**
- c. **which raises issues of fact not arising out of the preceding pleading”.**

Order 2 rule 4(2) of the Civil Procedure Rules provides that:-

**“Without prejudice to sub rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”**

In his case of, **Nairobi City Council vs. Thabiti Enterprises Limited, Nairobi Court of Appeal, Civil Appeal No. 264 of 1996**, the court stated as follows:

**“In the case of Charles C. Sande vs. Kenya Co-operative Creameries Ltd. Civil Appeal No. 154 of 1992, (unreported) this court... held as recently as on 24<sup>th</sup> January 1994 that a judge had no power or jurisdiction to decide an issue not raised before him”.**

The court went on to emphasise that;

**“In our view the only way to raise issues is through the pleadings and as far as we are aware that has always been the legal position”.**

For the foregoing reasons, I would not consider the issue as to whether the plaintiff's suit is incompetent

for want of consent of the adjudication officer since the issue was not pleaded. Having made a finding that the plaintiff has proved that the 1<sup>st</sup> defendant had trespassed on the suit property, the injunction sought by the plaintiff would issue accordingly.

In conclusion I hereby enter judgment for the plaintiff against the 1<sup>st</sup> defendant as prayed in the paragraph (a) of the amended plaint dated 23<sup>rd</sup> March 2009. The claim as against the 2<sup>nd</sup> defendant is dismissed. Each party shall bear its own cost of the suit.

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