



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 62 OF 2014

OLE SAPUDA JONATHAN LESHAU PLAINTIFF

VERSUS

DANIEL LEKILABU OLKEDIANYE DEFENDANT

RULING

1. What I have before me is the plaintiff's application dated 21st August 2014 that was brought by way of Notice of Motion under Order 40 rules 1, 2, 3 and 10 of the Civil Procedure Rules, 2010 and sections 24, 25 and 26 of the Land Registration Act No. 3 of 2012 seeking the following orders:-

1. Spent

2. Spent

3. Spent

4. The honourable court be pleased to grant an order of temporary injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from entering into, trespassing onto, cultivating, planting sugarcane/crops, fencing, grazing, building structures, felling trees, interfering with and/or in any other manner whatsoever, dealing with the suit land, that is LR No. Transmara/Shartuka/45 and or any portion thereof, pending the hearing and determination of this suit.

5. In the alternative and without prejudice to the foregoing, the honourable court be pleased to grant the order for maintenance of the status quo over and in respect of LR No. Transmara/Shartuka/45, more particularly, pertaining to the occupation thereof and restraining and/or prohibiting the cultivation and/or fencing thereon, whatsoever and/or howsoever pending the hearing and determination of the instant suit.

6. The orders of this honourable court be enforced and/or implemented by the OCS Kilgoris Police Station, or such other officer as the honourable court may order and/or direct.

7. Cost of this application be borne by the defendant/respondent.

8. Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is supported by the affidavit of the plaintiff, Ole Sapuda Jonathan Leshau sworn on 21st August 2014 in which he has stated that he is the absolute registered owner of all that parcel of land known as **LR No. Transmara/Shartuka/45** (hereinafter referred to as “**the suit land**”). He has stated further that on 17th October 2013, the defendant encroached on the suit land and commenced to cultivate a substantial portion thereof. Following the said activities by the defendant, he was forced to lodge a complaint with the area chief, Oronkai location so that he may intervene and stop the defendant from continuing with the trespass and encroachment complained of.

3. The plaintiff has stated that the defendant refused to heed the counsel of the area chief and continued with trespass and even resorted to threats with a view to perpetuating the said trespass. The plaintiff was constrained in the circumstances to file the instant suit. The plaintiff has stated that upon filing this suit and service of the court summons upon the defendant, the defendant stopped the offensive activities. The plaintiff has stated that on 20th August 2014, the defendant again started cultivation on the suit land and went further to fence a substantial portion of the same with barbed wire. The plaintiff has contended that the defendant’s actions aforesaid are calculated to deny him his rights and interests over the suit land, and are bound to affect/alter the character of the suit land and as such the orders sought are necessary to arrest the situation.

4. The plaintiff’s application was opposed by the defendant through a replying affidavit sworn on 8th September 2014. The defendant has contended that the plaintiff’s application is ill intentioned, full of gross exaggerations and oppressive. The defendant has contended that the application does not meet the conditions for granting an interlocutory injunction as the plaintiff owns land on paper only but not on the ground. The defendant has contended that he was Shartuka Group Ranch member number 2011 and that he is and has always been in occupation of all that parcel of land known as **LR No. Transmara/Shartuka/936** which land was allocated to him by Shartuka Group Ranch. The defendant has contended that he has held, tilled and occupied **LR No. Transmara/Shartuka/936** (hereinafter referred to as “**Plot No.936**”) since the year 1987 and that the said parcel of land is separate and distinct from the suit land. The defendant has denied cultivating the suit land and has contended that since the court issued interim orders herein on 27th August 2014, his cattle, sheep and goats are unable to venture and graze on Plot No. 936 as he fears being cited for contempt of court.

5. The defendant has discredited the chief’s letter dated 20th August 2014 annexed to the plaintiff’s affidavit contending that the chief of Oronkai location is against him and the said letter together with others that he had written before were written without authority of the deputy county commissioner Trans-Mara West Sub-County. With regard to the barbed wire fence complained about by the plaintiff, the defendant stated that he erected the said fence around Plot No. 936 seven (7) years ago and as such the plaintiff’s allegations that he did the fencing on 20th August 2014 is misleading. Lastly, the defendant contended that the pictures attached to the plaintiff’s supporting affidavit (as evidence of trespass) were not taken on Plot No. 936 and as such are only meant to mislead this court into granting the orders sought.

6. When the application came before me on 13th October 2014, it was agreed by the advocates for the parties that the same be argued by way of written submissions. The advocates representing both parties filed their respective submissions and the same are on record. I have considered the plaintiff’s application together with the affidavit filed in support thereof. I have also considered the defendant’s affidavit in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties in support of and in opposition to the application. This being an application for a temporary injunction, it has to be considered in light of the principles that were set out in the case of **Giella –vs- Cassman Brown Ltd [1973]** namely;

- a. **That the applicant must satisfy the court that he has a prima facie case with a probability of success.**

b. That the applicant will otherwise suffer irreparable injury which is uncompensable in damages and;

c. If in doubt, the court will determine the application on a balance of convenience.

7. In the case of **Mrao –vs- First American Bank of Kenya and 2 Others [2003] KLR 125**, a prima facie case was defined as follows:-

“A prima facie case in civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Turning to the present case, the question which this court needs to answer is whether the plaintiff has satisfied the conditions for granting a temporary injunction set out in the **Giella Case** (Supra). To begin with, I need to consider whether the plaintiff has established a prima facie case with a probability of success against the defendant. Looking at the facts of this case and the affidavit evidence placed before this court, I am satisfied that the plaintiff has demonstrated that he is indeed the registered proprietor of the suit land. This has been proved by copies of certificate of official search and title deed attached to the plaintiff’s affidavit. The plaintiff’s title to the suit land is therefore not in dispute. What is disputed is whether the defendant has trespassed on the suit land. The defendant has contended both in his statement of defence and in his affidavit filed in opposition to the present application that he is in occupation and use of Plot No. 936 that he was allocated to him by Shartuka Group Ranch and which he has occupied since 1987. I have seen on record a copy of the title deed that was issued to the defendant on 8th May 2009 with respect to Plot No. 936 which measures 37.81hectares. The defendant has also annexed to his affidavit in reply copies of photographs of his residence on what is said to be Plot No. 936. The photographs leave no doubt that the defendant has been in occupation of the land where his homestead is situated for several years going back beyond the year 2003 when the defendant is said to have trespassed on the suit land.

8. The defendant has contended that the activities being complained of by the plaintiff are being undertaken on Plot No. 936 and not on the suit land as contended by the plaintiff. The defendant has contended that he has been carrying out farming activities on Plot No. 936 over the years and that the contention by the plaintiff that he has cultivated a substantial portion of the suit land is not true. The defendant has also denied fencing off a portion of the suit land contending that the said fence has been around Plot No. 937 for over 7 years. It would not be possible to determine on the affidavit evidence before me whether the defendant is carrying out the activities complained of on the suit land or on Plot No. 936 which is said to be owned by the defendant. On the material before me, I am unable to say that the cultivation complained of by the plaintiff is being carried out on the suit property and not on Plot No. 936. The same applies to the fence complained of by the plaintiff. These are issues which can only be determined at the trial.

9. For the foregoing reasons, I am doubtful if the plaintiff has established a prima facie case with a probability of success against the defendant. Since it is not clear whether the defendant’s activities are on the suit land or on plot No. 936, it is also doubtful if the plaintiff stands to suffer irreparable harm if the orders sought are not granted. In view of these findings, the plaintiff’s application falls for consideration on a balance of convenience. In view of the nature of the dispute before the court, I am of the opinion that justice would be better served if the status quo is maintained. In conclusion, I hereby grant the order of status quo sought in prayer five (5) of the Notice of Motion application dated 21st August 2013 but on the following terms; pending the hearing and determination of this suit, the status prevailing as of the date hereof relating to occupation and use of the disputed parcel of land which the plaintiff has referred to as a portion of **LR No. Trans-Mara/Shartuka/45** and the defendant as a portion of **LR No. Trans-Mara/Shartuka/936** shall be maintained. For the avoidance of doubt, the defendant shall not carry out any further fencing or cultivation beyond the portion of that parcel of land that he has fenced or

cultivated as of the date hereof. The costs of the application shall be in the cause.

Delivered, signed and dated at KISII this 20th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

Mr. Bigogo for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE