



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 200 OF 2012

FRED WAFULA WAMALWA PLAINTIFF

VERSUS

WILLIAM KALAYO NKEYUA DEFENDANT

RULING

1. This suit was filed on 11th June 2012. The same is ready for hearing as the parties have complied with all pre-trial procedures. The suit has been listed for hearing twice but for one reason or the other the hearing has not taken off. The plaintiff has now brought an application by way of Notice of Motion dated 13th August 2014 seeking a temporary injunction to restrain the defendant from entering onto, trespassing onto, cultivating, planting sugarcane, grazing, building structures, felling trees, interfering with and/or in any other manner whatsoever dealing with the property in dispute herein namely, LR No. **Transmara/ Shartuka/376** (hereinafter referred to as “**the suit property**”). The plaintiff has prayed in the alternative that the status quo in relation to the suit property be maintained more particularly pertaining to the occupation thereof so that there is no cutting of and/or felling of indigenous trees growing thereon pending the hearing and determination of this suit. The plaintiff has also sought an order that the O.C.S Kilgoris Police Station be directed to enforce compliance with the orders sought herein if granted. The plaintiff’s application that was supported by the affidavit of the plaintiff sworn on 13th August 2014 was brought on the grounds that; while this suit is pending hearing and determination, the defendant has forcefully entered the suit property and started ploughing a portion thereof. The defendant has also cut down several indigenous trees growing on the suit property. The plaintiff has contended that the defendant’s activities aforesaid have dispossessed and/or deprived the plaintiff of the use and/or benefit arising from the portion of the suit property which is occupied by the defendant and has also subjected the suit property to wastage and abuse. The plaintiff has contended that unless the orders sought are granted, the plaintiff will suffer irreparable loss. The plaintiff annexed to his affidavit; copies of a certificate of official search on the title of the suit property and the title deed for the suit property in his name to prove his ownership of the suit property and copies of photographs said to have been taken on the suit property to show the activities on the suit property which are attributed to the defendant.
2. The plaintiff’s application was opposed by the defendant through a replying affidavit sworn on 15th October, 2014. The defendant denied that he is engaged in the activities complained of by the plaintiff on the suit property. The defendant deposed that he is in occupation of the parcel of land known as LR No. **Transmara/Shartuka/1533** (hereinafter referred to only as “**Plot No. 1533**”) which is owned by his two (2) sisters with whom they have occupied and cultivated the said parcel of land since the year 1991. The defendant contended that the orders sought if granted would have the effect of evicting him from the said parcel of land owned by his sisters. The defendant contended that he has grazed his cattle, sheep and goats and has also cultivated and resided on Plot

- No. 1533 since the year 1991. The defendant denied entering onto or re-entering the suit property and cultivating and/or felling trees growing thereon as claimed by the plaintiff or at all.
3. On 23rd October 2014, I directed that the plaintiff's application be heard by way of written submissions. The plaintiff filed his submissions on 4th December 2014 while the defendant did so on 26th November 2014. I have considered the plaintiff's application and the affidavit filed by the defendant in opposition thereto. I have also considered the submissions by both parties and the authorities cited in support thereof. The dispute between the plaintiff and the defendant revolves around the ownership and ground location of **LR No. Transmara/Shartuka/376** ("the suit property") and **LR No. Transmara/Shartuka/1533** ("Plot No. 1533"). The plaintiff has claimed that he is the registered proprietor of the suit property having been so registered on 14th August 1998. The suit property measures 20.64ha. The plaintiff has claimed in his plaint dated 11th June 2012 that the defendant entered the suit property without his permission on or about November/December, 2011 and put up temporary structures thereon. He also started cultivating a substantial portion of the suit property.
 4. In his statement of defence dated 30th July 2012, the defendant denied the plaintiff's claim and contended that the parcel of land that he occupies and cultivates is Plot No. 1533 which is owned by his sisters. The defendant contended that the plaintiff was not a member of Shartuka Group Ranch and as such there is no way he could have been allocated land that was owned by the said ranch upon its dissolution. The defendant denied trespassing on the suit property and insisted that his activities are confined to Plot No. 1533. In his reply to the defendant's statement of defence, the plaintiff contended that Plot No. 1533 which the defendant claims to occupy is non-existent. The plaintiff contended that the title to Plot No. 1533 was nullified through a court order and as such the same does not exist and as such cannot be occupied by the defendant.
 5. Among the issues that arise for determination in this suit are; whether the defendant has trespassed on the suit property, whether Plot No. 1533 exists, whether the defendant is in occupation of Plot No. 1533 and whether the plaintiff is entitled to the reliefs sought against the defendant. I am of the opinion that these are issues which cannot be determined on affidavit evidence. I am unable to say on the basis of the affidavit of the plaintiff filed in support of the application herein that the activities complained of are being undertaken by the defendant on the suit property. I am also unable to say that Plot No. 1533 which the defendant claims to be occupying and using does not exist. These are issues which can only be determined at the trial. Due to the foregoing, I am doubtful if the plaintiff has established a prima facie case with probability of success against the defendant. It is also doubtful if the plaintiff stands to suffer irreparable harm if the orders sought are not granted. The plaintiff has placed before me copies of photographs said to have been taken on the suit property. The same were intended to show the activities being carried out thereon by the defendant that the plaintiff has sought to restrain. These copies of photographs have no evidential value. The plaintiff should have placed before the court the actual photographs instead of these photocopies which are completely dark and faint. I am unable to appreciate at all what the plaintiff had intended to convey through these photographs.
 6. In the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**, it was held that if the court is in doubt as to whether an applicant for a temporary injunction has established a prima facie case and has also demonstrated that he will suffer irreparable harm if the orders sought are not granted, the application shall be determined on a balance of convenience. The defendant is occupying the disputed parcel of land. According to the plaintiff, he has been in occupation of the same since December, 2011. According to the defendant however, he has been occupying and using the disputed parcel of land since the year 1991. It is not clear from the material on record what activity the plaintiff is carrying out on the suit property and how it is affected by the defendant's grazing and cultivation on the disputed parcel of land. There is no doubt however that if the defendant is indeed engaged in indiscriminate felling of trees on the disputed parcel of land, it will have a negative impact on the suit property. Since the defendant is in occupation and has been using the disputed parcel of land for several years, the orders of injunction sought if granted would be prejudicial to him. On the other hand, the defendant cannot be given a free hand to subject the disputed property to wastage while this suit is pending. In the circumstances, I am of the view that the balance of convenience would favour the granting of the alternative prayer sought by the plaintiff.

7. The upshot of the foregoing is that the plaintiff's application dated 13th August 2014 is allowed in terms of prayer 5 thereof. The costs of the application shall be in the cause.

Delivered, signed and dated at KISII this 13th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

Mr. Bigogo for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE