



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.289 OF 2013

SAMWEL NAIDUYA MEITOI PLAINTIFF

VERSUS

OLENKARIE SIMON DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 28th June, 2013 seeking; a declaration that the plaintiff is the registered and/or lawful owner of all that parcel of land known as **LR No. Trans-Mara/Shartuka/209** (“hereinafter referred to only as “**the suit property**”), an order for the eviction of the defendant from the suit property, a permanent injunction to restrain the defendant from entering upon, re-entering, trespassing onto, cultivating, building structures, interfering with and or in any other manner dealing with the suit property or any portion thereof and, general damages for trespass. In the plaint dated 26th June 2013, the plaintiff averred that he is the registered proprietor of the suit property and as such entitled to exclusive and/or absolute use thereof and that on or about 9th October 2012, the defendant entered the suit property without his permission and started erecting temporary structures thereon. The defendant also commenced cultivation on a substantial portion of the said property thereby denying him (the plaintiff) his rights to enter, occupy and use the suit property.
2. The defendant filed a statement of defence on 16th August 2013 denying the plaintiff’s claim in its entirety. The defendant denied that he has trespassed on the suit property. The defendant contended that he is the registered proprietor of all that parcel of land known as **LR No. Trans-Mara/Shartuka/1584** (hereinafter referred to as “**Plot No. 1584**”). The defendant contended that his activities are restricted to Plot No. 1584 and that he had at no time carried out the illegal acts complained of by the plaintiff.
3. On 16th December 2013 the plaintiff brought an application by way of Notice of Motion dated 9th December 2013 in which he sought; a mandatory injunction to compel the defendant to yield up, vacate, be evicted from and/or to grant vacant possession of the suit property to the plaintiff pending the hearing and determination of this suit and a temporary injunction restraining the defendant from re-entering, trespassing onto, cutting down trees, cultivating, building structures on, grazing on, interfering with and/or in any other manner dealing with the suit property pending the hearing and determination of this suit. The plaintiff’s application was brought on the grounds that the plaintiff is the registered proprietor of the suit property and that the defendant has encroached on and excised a portion of the suit property thereby denying and/or depriving the plaintiff of the use enjoyment and benefit of the said portion of the suit property. The plaintiff contended that the actions of the defendant complained of amounts to trespass.
4. The plaintiff contended further that Plot No. 1584 which the defendant claims to be occupying is non-existent and does not share a common boundary with the suit property. The plaintiff contended that the defendant has continued with the offensive activities complained of even after

the filing of this suit and that the said activities intensified in the month of November, 2013. The plaintiff annexed to his affidavit in support of the application among others; a copy of the title deed for the suit property in his name, a copy of a certificate of official search on the title of the suit property, a copy of a letter of demand dated 10th June, 2013, a copy of a letter dated 23rd September 2013 by the District Land Registrar Trans-Mara East/West Districts, a copy of a letter dated 30th April 2009 by the Chief Land Registrar, copies of various court rulings, a copy of a letter dated 8th October 2010 by the Chief Land Registrar and copies of photographs said to have been taken on the suit property.

5. The plaintiff's application was opposed by the defendant through a replying affidavit sworn on 3rd June 2014. The defendant deposed that he was a member of Shartuka Group Ranch and that upon the dissolution of the said Group Ranch, he was allocated Plot No. 1584 by virtue of his membership. The defendant deposed further that it is premature for the plaintiff and the District Land Registrar Trans-Mara District to declare Plot No. 1584 as non-existent. The defendant contended that the existence or otherwise of Plot No. 1584 can only be determined at the trial of this suit. The defendant deposed that Plot No. 1584 exists and denied that he has destroyed trees on the plaintiff's parcel of land ("the suit property"). The defendant contended that the rulings attached to the plaintiff's affidavit in support of the application herein did not cancel the defendant's title over Plot No. 1584 on which he resides and carries out cultivation.
6. On 16th July 2014, the advocates for the parties agreed to argue the plaintiff's injunction application by way of written submission. The plaintiff's advocates filed their submissions on 18th August 2014 while the defendant's advocates did so on 8th September, 2014. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavit in reply filed by the defendant in opposition to the application. Finally, I have considered the written submissions filed by the advocates for both parties and the statutory provisions and case law cited in support thereof. In the case of **Mrao Ltd –vs- First American Bank of Kenya & 2 Others [2003] KLR 125**, the principles for granting interlocutory injunction were set out as follows:-
 - a. **The applicant must show a prima facie case with a probability of success.**
 - b. **An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.**
 - c. **If the court is in doubt, it will decide the application on a balance of convenience.**
7. The plaintiff has sought both prohibitory and mandatory injunction at this interlocutory stage. In the court of appeal case of **Kenya Breweries Ltd & Another –vs- Washington O. Okeyo, Nairobi Civil Appeal No. 332 of 2000 (unreported)**, the court stated as follows regarding the test to be applied by the court while considering an application for a mandatory injunction at interlocutory stage;

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edition para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the plaintiffa mandatory injunction will be granted on an interlocutory application.”

Also in Locabail International Finance Ltd –vs- Agroexport and Another [1986] 1 All ER 901 at page. 901it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the injunction was

directed at a simple and a summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.”

8. The foregoing principles shall be the basis upon which I will consider the application before me. The plaintiff's case against the defendant is that, he is the registered proprietor of the suit property and that the defendant has entered onto the suit property without his permission, authority or consent and put up temporary structures on a portion thereof. The defendant is also said to have been cultivating a substantial portion of the suit property, cutting down trees, grazing cattle among other unauthorized activities on the suit property. The plaintiff has contended that he took possession and has been residing on the suit property since the same was registered in his name on 5th August 2011. The plaintiff has contended that the actions by the defendant complained of amounts to trespass which is an infringement of the plaintiff's proprietary rights over the suit property in that the plaintiff has now been unlawfully prevented from using the portion of the suit property in occupation by the defendant. The plaintiff has submitted that his rights under sections 24, 25 and 26 of the Land Registration Act 2012 have been infringed. The plaintiff has placed material before the court in proof of his ownership of the suit property. The plaintiff has exhibited a copy of the title deed of the suit property in his name and a certificate of official search on the title of the suit property which shows that he is the registered owner of the suit property.
9. On the material before me, I am satisfied on a prima facie basis that the plaintiff is the registered proprietor of the suit property. The defendant has denied knowledge of the suit property and the plaintiff's proprietary interest in the same. The defendant has contended that he is occupying and cultivating Plot No. 1584 which is registered in his name. The defendant has denied that he has trespassed on the suit property and that he is carrying out there on the activities complained of by the plaintiff. The defendant has contended that he was allocated Plot No. 1584 by Shartuka Group Ranch upon its dissolution and that he has been in occupation thereof with his family since the year 1992. The defendant referred the court to his list of documents filed in court on 3rd April 2014 to which he annexed among others a list containing the names of Shartuka Group Ranch members in which his name appears as member No. 28 and a copy of a title deed for Plot No. 1584 dated 27th September 2009 in his name. The defendant has contended that he has nothing to do with the suit property his interest being limited only to Plot No. 1584.
10. The plaintiff has contended that Plot No. 1584 which the defendant claims to be occupying is non-existent the title thereof having been cancelled by the Chief Land Registrar following a number of High Court decisions that were made concerning the validity of the said title and others. As I have stated above, the plaintiff exhibited a number of documents to back up his contention that Plot No. 1584 is non-existent. The defendant has contended that the documents that were produced by the plaintiff before the court are not conclusive on the issue of the existence of Plot No. 1584. The defendant has contended that the issue can only be determined at the trial and not on the basis of affidavit evidence before the court.
11. The plaintiff's claim against the defendant as I have stated above is based on the tort of trespass. Trespass is any entry by one person into the land in the possession of another without any lawful justification or cause. To be able to prove the tort of trespass, the plaintiff had to prove his ownership or possession of the suit property and the fact that the defendant has entered thereon without any justifiable cause. As I have stated above, I am satisfied that the plaintiff is the registered proprietor of the suit property. The ownership of the suit property is not contested. What seems to be in contest is whether the defendant has entered the suit property and if so, whether such entry is without any lawful cause. The plaintiff and the defendant have both claimed to have been members of Shartuka Group Ranch. It is not in dispute that Shartuka Group Ranch was dissolved and the land that it had hitherto held on behalf of the members was demarcated and allocated to the members. The plaintiff has claimed that the suit property was allocated to him by Shartuka Group Ranch upon its dissolution as aforesaid. The defendant has also contended that Plot No. 1584 was allocated to him by the same Shartuka Group Ranch upon its dissolution as aforesaid. The plaintiff and the defendant have both claimed that they each took possession of their respective parcels of land in contention herein upon the same being allocated to them. The

plaintiff has claimed to be residing on the suit property. The defendant has also claimed to be residing on Plot No. 1584.

12. I have noted from the High Court decisions and correspondence annexed to the plaintiff's affidavit in support of the present application that there were several disputes between the members of Shartuka Group Ranch regarding the process of demarcation and allocation of its land to members upon its dissolution. The said disputes generated a number of suits that were filed in the High Court at Kisii, High Court at Kisumu, High Court at Kakamega and High Court in Nairobi. One of the disputes went up to the Court of Appeal. The bone of contention was the legitimate members of Shartuka Group Ranch who were entitled to be allocated land upon dissolution of the said group ranch. According to the material on record, there seems to have been two (2) adjudication, demarcation and allocation processes conducted on Shartuka Group Ranch's land upon its dissolution. The first process included the original members of Shartuka Group Ranch and those who were labelled non-members or non-original members. This process was successfully completed and a number of titles issued to the said members and non-members. The members who were not happy with this first process challenged the same in court. The matter as I have stated above went up to the Court of Appeal where some orders were made on a temporary basis. The chief land registrar purporting to be acting on an order of the Court of Appeal that had been discharged, nullified the first process of demarcation and allocation Shartuka Group Ranch land that I have mentioned above and purported to revoke the titles that were issued pursuant thereto. This gave rise to the second round of demarcation and allocation of Shartuka Group Ranch's land based on a purported list of members that had been approved by the Court of Appeal.
13. Following this development, fresh registry index maps were published and new titles issued. The persons who were beneficiaries of the first exercise were not amused by the chief land registrar's action. They moved to court contending that their titles had been revoked without following the due process and the Court of Appeal order that informed the chief land registrar's decision was non-existent. The court agreed with them and quashed the cancellation of their titles. The court also quashed the second process of demarcation and allocation of Shartuka Group Ranch land that was ordered by the chief land registrar together with the new registry index maps that he had published. Following this order by the court, the chief land registrar reinstated the title deeds that were issued following the first process of demarcation and allocation of Shartuka Group Ranch land and revoked the titles that were issued under the second round of demarcation that was nullified by the court. The foregoing illustrates the confusion that marked the dissolution of Shartuka Group Ranch and the allocation of its land to members an exercise that has given rise to hundreds of cases majority of which are still pending hearing and determination before this court.
14. The confused exercise generated double titles over same parcels of land and boundary disputes which resulted from the different registry index maps that were used in the first round of the allocation process and the second round of the same process. It is not clear on the material on record whether the issue of the legitimate members of Shartuka Group Ranch was ever resolved. It is also not very clear as to the total number of the titles that had been issued in the first round of demarcation that were reinstated. It is also not clear as to how many titles that were issued following the second round of demarcation were cancelled.
15. In the case before me, the plaintiff has contended that his title to the suit property was issued pursuant to the lawful process that was sanctioned by the court while the defendant's title to Plot No. 1584 was issued pursuant to a process that was nullified by the court and that resulted in the defendant's title among others being cancelled by the chief land registrar. I have no evidence before me that the plaintiff's title was among those which were issued pursuant to the first demarcation and allocation of Shartuka Group Ranch's land and that the defendant's title was among those which were issued subsequently and which were cancelled by the chief land registrar following a court order. Due to the foregoing, I am in agreement with the defendant's advocates that the existence or otherwise of the defendant's title over Plot No. 1584 can only be determined at the trial. I am in agreement with the defendant's advocates that the court decisions referred to in the District land registrar's letter dated 23rd September 2013 in which he has claimed that Plot No. 1584 does not exist do not refer to the suit property or Plot No. 1584. It is not even clear whether the plaintiff and the defendant herein were parties to those suits. The question therefore still remains whether the defendant is occupying the suit property as claimed by the plaintiff or he

is in occupation of Plot No. 1584. As I have stated above the onus was upon the plaintiff to prove that the defendant is in occupation of the suit property and that the occupation is without any lawful cause. From what I have stated above, I am not satisfied that the plaintiff has discharged this burden.

16. The plaintiff also had a duty to prove the claims made against the defendant as relates to the activities that the defendant is said to be carrying out on the suit property. The plaintiff has claimed that the defendant entered the suit property on or about 9th October 2012 and put up temporary structures thereon. The defendant is also said to have started cultivating a substantial portion of the property. The defendant has denied that he is in occupation of the suit property and that he is engaged in cultivation, cattle grazing and cutting of trees thereon. There is no evidence that the defendant is carrying out these activities and that he is doing so on the suit property. The defendant has contended that the report by the Kenya Forest Service dated 12th November 2013 regarding the cutting of trees does not relate to the parcel of land under his occupation and that the photographs annexed to the plaintiff's affidavit were taken elsewhere. Whether the trees the subject of the said report were cut by the defendant and whether they were cut on the suit property can only be determined at the trial. I have noted that the Kenya Forest Service report aforesaid was addressed to Kilgoris Police Station. I wonder why the police never took action and why a police abstract concerning the report that was made to them by the plaintiff was not produced for the court's perusal. Due to the foregoing, I am not satisfied that the plaintiff has established a prima facie case with a probability of success against the defendant.
17. Having reached the conclusion that the plaintiff has failed to establish a prima facie case with a probability of success against the defendant, it is not necessary for me to consider whether the plaintiff is likely to suffer irreparable harm which cannot be compensated for in damages if the orders sought are not granted. I would say however that if I was to determine this issue, I would have ruled against the plaintiff. As I have stated above, there is no evidence of the activities that the defendant is said to be carrying out on the suit property. I am unable therefore to make an assessment of the impact that the same may have on the suit property. I cannot say therefore that the plaintiff would suffer irreparable injury that cannot be compensated for in damages if the orders sought are not granted. I would wish also to add that, whereas, the plaintiff has claimed that the defendant encroached on and occupied a portion of the suit property on or about 9th October 2012, the application before me was not brought until 16th December 2013 more than a year after the defendant's alleged entry into the suit property. I am of the view that if at all the defendant's alleged occupation of the suit property was subjecting the plaintiff to irreparable injury, the plaintiff would have moved the court for the orders sought herein earlier.
18. The upshot of the foregoing is that the plaintiff has failed to satisfy the conditions for granting interlocutory injunction. The plaintiff's Notice of Motion application dated 9th December 2013 is hereby dismissed. The cost 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:-

Mr. Nyamweya h/b for Mr. Oguttu for the plaintiff

Mr. Bigogo for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE

