



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 11 OF 2009

JOHN KIINE MUSHARU PLAINTIFF

VERSUS

OLE TASUR KOONTIDEFENDANT

CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE NO. 28 OF 2009

KOONTI OLE TASUR PLAINTIFF

VERSUS

JOHN KIINE MUSHARU DEFENDANT

JUDGMENT

1. What I have before me are two consolidated suits which in reality are a claim and a counter-claim as they concern the same parties and the same subject matter. The first of the two cases, **Kisii HCCC No. 11 of 2009, John Kiine Musharu –vs- Ole Tasur Koonti** was filed on 16th January 2009. In this suit, the plaintiff, John Kiine Musharu, averred that he is and was at all material times the registered proprietor of all that parcel of land known as **LR No. Trans-Mara/Shartuka/408** (hereinafter referred to as “**Plot No. 408**”) measuring approximately 20.64ha. which parcel of land was registered in his name on 14th August 1998. He averred that on or about the month of August, 2006, the defendant in the suit, Ole Tasur Koonti without any right or lawful cause entered Plot No. 408 and started putting up structures, carrying out cultivation and grazing of cattle on a substantial portion thereof. He averred further that as a result of the defendant’s said acts of trespass, he has been deprived of the use and enjoyment of a substantial portion of Plot No. 408 and has therefore suffered loss and damage. He sought judgment against the defendant for:-

(i) Declaration that the plaintiff is the registered and/or lawful owner of LR No. Trans-Mara/Shartuka/408.

(ii) An order of eviction and demolition of the structures erected on the suit land by the defendant.

(iii) Permanent injunction restraining the defendant by himself, agents, servants and/or anyone claiming under the defendant, from re-entering, trespassing onto, cultivating, grazing, interfering with and/or in any other manner, whatsoever, dealing with the suit land, that is

LR No. Trans-Mara/ Shartuka/408.

(iv) General damages for trespass.

(v) Costs of the suit to be borne by the defendant.

(vi) Such further and/or other relief as the honourable court may deem fit and expedient so to grant.

2. The defendant in the suit, Ole Tasur Koonti entered appearance and filed a statement of defence on 17th February 2009. In his statement of defence, the defendant denied the plaintiff's (John Kiine Musharu's) claim in its entirety and termed the same as bad in law and an abuse of the process of the court. The defendant denied that he has trespassed on Plot No. 408 and contended that he is a stranger to the said parcel of land.

3. Immediately after filing a statement of defence in Kisii HCCC No. 11 of 2009, Koonti Ole Tasur who is also known as Ole Tasur Koonti filed a separate suit against the plaintiff, John Kiine Musharu, namely, **Kisii HCCC No. 28 of 2009, Koonti Ole Tasur –vs- John Kiine Musharu**. In this suit, Koonti Ole Tasur, who is the plaintiff, averred that, he is and was at all material times the registered proprietor of all that parcel of land known as **LR No. Trans-Mara/Shartuka/1063** measuring 23.48ha (hereinafter referred to as "**Plot No. 1063**") which property was registered in his name on 14th September 1998. He averred that on or about the month of January, 2009, the defendant in this suit, John Kiine Musharu entered Plot No. 1063 without any right or lawful cause and laid a claim to a portion thereof measuring 5ha. which he cleared in preparation for putting up a house. He averred further that as a result of the said unlawful act on the part of the defendant, he has been deprived of his right to quiet enjoyment of the said portion of Plot No. 1063. He sought judgment against the defendant, John Kiine Musharu for:

(a) Permanent injunction restraining the defendant by himself or through his agents or servants from re-entering or trespassing onto Plot No. 1063.

(b) Costs of the suit.

4. The defendant in this suit, John Kiine Musharu filed his statement of defence on 23rd February 2009 in which he averred that Plot No. 1063 is non-existent and/or unknown in Shartuka. In the alternative, he averred that the plaintiff was not a member of Shartuka Group Ranch and as such could not have been allocated land and/or registered as the proprietor of Plot No. 1063. He denied that he has trespassed on Plot No. 1063 and contended that it is the plaintiff who has been trespassing on his parcel of land namely, Plot No. 408 in respect of which trespass he has filed a suit against the plaintiff, namely, Kisii HCCC No. 11 of 2009 referred to herein above. He averred further that this suit was filed contrary to the provisions of Order VII Rules (1) (e) of the Civil Procedure Rules, is mischievous, misconceived and legally untenable.

5. On 27th June 2012, the two suits, Kisii HCCC No. 11 of 2009 and Kisii HCCC No. 28 of 2009 were consolidated and a direction given that further proceedings would be undertaken in Kisii HCCC No. 11 of 2009. For the purposes of this judgment, I will treat Kisii HCCC No. 11 of 2009 that was first in time as the main suit and Kisii HCCC No. 28 of 2009 that was filed subsequently as a counter-claim. For ease of reference, I will throughout this judgment refer to John Kiine Musharu who is the plaintiff in the main suit and a defendant in the counter-claim as plaintiff and Ole Tasur Koonti who is the defendant in the main suit and the plaintiff in the counter-claim as defendant while considering both suits.

6. The hearing of the consolidated suits commenced before R. Lagat-Korir J. on 27th June 2012 when the plaintiff gave evidence and closed his case without calling a witness. The plaintiff told the court that the defendant is his neighbour and that in the month of August, 2006, the defendant encroached on his parcel of land known as Plot No. 408 which measures 20.64ha. destroyed trees and put up two houses thereon. He produced copies of the title deed and register for Plot No. 408 as exhibits in proof of his ownership of

the said parcel of land. He told the court that the defendant has remained in occupation of the said parcel of land to date and that he (the defendant) is also keeping cattle on the said property. He stated further that the defendant owns a parcel of land known as Plot No. 279. He produced a copy of a certificate of official search on the register for Plot No. 279 and a copy of the register for the said parcel of land in proof of this fact. He stated that the defendant has denied him the use of Plot No. 408. He stated further that Plot No. 408 and Plot No. 279 were allocated to him and the defendant respectively by Shartuka Group Ranch and that there were a number of court cases that were filed over the allocation of Shartuka Group Ranch's land. He produced as exhibits a number of rulings and/or orders that were made in the said cases.

7. The plaintiff told the court that some of the land titles that were issued to members of Shartuka Group Ranch were cancelled by the court. He produced a copy of a Gazette Notice published on 8th June 2011 through which he said some of the said titles were cancelled. He urged the court to give an order for the eviction of the defendant from Plot No. 408 and a permanent injunction to restrain him from re-entering the property. On his loss, he told the court that from one acre of land, he could harvest 25bags of maize per year. With regard to the defendant's counter-claim, the plaintiff stated that there is no record for Plot No. 1063 which the defendant claims to own. He denied that he has put up a house on the said parcel of land which he claimed not to be in existence. In cross-examination, the plaintiff stated that he acquired Plot No.408 on 14thAugust 1998. He stated further that the titles which were cancelled by the court referred to herein earlier were issued around the year 2003. He told the court that the land titles that were issued in the year 1998 were not cancelled. He maintained that Plot No. 1063 allegedly owned by the defendant does not exist and termed a copy of the register for that parcel of land that was produced by the defendant as not genuine. After the close of the plaintiff's case the matter was adjourned and given another date for the hearing of the defendant's case.

8. In the meantime, R. Lagat-Korir J. was transferred from the station. The matter was mentioned before me on 16th January 2013 when the advocates for the parties agreed that the same do proceed from where it had stopped before R. Lagat-Korir J. The proceedings were typed and the hearing resumed before me on 19thMay 2014 when the defendant gave evidence and called one witness. In his evidence, the defendant denied that he has trespassed on Plot No. 408. He stated that he is in occupation of Plot No. 1063 measuring 23.48ha. that was registered in his name in the year 1998. He denied that his title to Plot No. 1063 was cancelled contending that he was not involved in any of cases in which the alleged cancellation order was issued. He produced as exhibits; a copy of the title deed for Plot No. 1063 dated 19th September 2003, a copy of the register for Plot No. 1063 certified on 6th March 2009 and a copy of a survey map dated March, 2008. The defendant told the court that the plaintiff has trespassed on Plot No. 1063 and prayed for an order restraining the plaintiff from entering the said property. He urged the court to dismiss the plaintiff's claim against him and to allow his counter-claim.

9. In cross-examination, the defendant reiterated that he owns and occupies Plot No. 1063 and that he is a stranger to Plot No. 408. The defendant also denied any knowledge of Plot No. 279 and that he has any interest therein. The defendant's witness, Simeon Saningo Ole Leina (DW2) is the defendant's son. He corroborated the evidence of the defendant. He told the court that they reside on Plot No. 1063 on which he was born over 30 years ago. He denied any knowledge of Plot No. 408 which he claimed does not exist on the ground. He denied that the title for plot No. 1063 was cancelled through a court order. He also denied any knowledge of the court rulings/orders that the plaintiff had referred to. He wondered how the defendant's title that was registered on 14th September 1998 could have been cancelled while the plaintiff's title that was registered a month earlier on 14th August 1998 was spared. DW2 stated that Plot No. 408 and Plot No. 1063 are separate and distinct in that they are in separate sheet maps and have different sizes.

10. After the close of the defendant's case, the parties agreed to make closing submissions in writing. The plaintiff's advocates filed their submissions on 2nd February 2015 while the defendant's advocates did so on 30th December 2014. I have considered the pleadings and the evidence that was adduced by the parties in support of their respective cases. I have also considered the closing submissions by the parties' respective advocates and the authorities cited in support thereof. The parties did not agree on the issues

for determination by the court. From my analysis of the pleadings, the evidence on record and the parties respective submissions, the following in my view are the issues that arise for determination in this suit;-

- (i) Whether the defendant has trespassed on Plot No. 408?
- (ii) Whether Plot No. 1063 is in existence and if it is, whether the plaintiff has trespassed on the same?
- (iii) Whether the plaintiff is entitled to the reliefs sought in Kisii HCCC No. 11 of 2009?
- (iv) Whether the defendant is entitled to the reliefs sought in Kisii HCCC No. 28 of 2009?
- (v) Who is liable to pay the costs of the two (2) suits?

11. The first issue:

In the case of, **Plista Akumu Bayi –vs- Susan Ongaro Bayi & 2 Others, Kisii HC. E&LCC No. 61 of 2012(unreported)** that was cited by the plaintiff, this court citing the book, **Clerk and Lindsell on Torts, 18th Edition at paragraphs 18-01, 18-10 and 18-11** stated that, trespass is defined as any unjustifiable intrusion by one person upon the land in the possession of another and that trespass is actionable at the instance of the person in possession. The court stated further that proof of ownership is prima facie proof of possession. In the case of **M’Mukanya –vs- M’Mbijiwe [1984] KLR 761**, it was held that trespass is the infringement of the right to possession. In view of the foregoing, what the plaintiff was required to prove herein was that he was at all material times in possession of Plot No. 408 and that the defendant unjustifiably entered thereon.

12. I am satisfied from the evidence on record that the plaintiff is the owner of Plot No. 408 and as such entitled to immediate possession thereof. The plaintiff produced as exhibits; a copy of the title deed for Plot No. 408 (PEXh. 1), a copy of the register for Plot No. 408 (PEXh. 13) and a copy of a certificate of official search on the register for Plot No. 408 (PEXh. 16). These documents show beyond doubt that the plaintiff is the registered owner of Plot No. 408. The defendant did not contest the plaintiff’s title over Plot No. 408. What was contested was the location of the said parcel of land and whether or not the defendant has trespassed thereon. As I have stated above, ownership of land is prima facie proof of possession of such land. The plaintiff having proved that he is the owner of Plot No. 408, he has passed the first hurdle in proving his trespass claim against the defendant. The next issue to consider is whether the plaintiff has established that the defendant entered Plot No. 408 without any justifiable cause.

13. Again, the onus of proof rested upon the plaintiff. Section 107 (1) of the Evidence Act, Cap. 80 Laws of Kenya provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In his plaint, the plaintiff averred that on or about August, 2006, the defendant without any lawful cause entered Plot No. 408 and commenced construction of structures, cultivation and grazing of cattle on a substantial portion thereof. In his evidence in chief, the plaintiff stated that the defendant moved onto Plot No. 408 in August, 2006, destroyed trees which were standing thereon and put up two houses. The plaintiff stated that the defendant has remained in occupation of the property to date. The defendant in his statement of defence and in his testimony before court denied that he entered onto and occupied Plot No. 408 as claimed by the plaintiff.

14. The defendant contended that he is occupying Plot No. 1063 which is registered in his name. The defendant produced in evidence a copy of his title deed for Plot No. 1063 (DEXh. 1) and a copy of the register for Plot No. 1063 (DEXh. 2). The two documents show that Plot No. 1063 was registered in the name of the defendant on 14th September 1998 and that the defendant was issued with a title deed on 19th September 2003. What I need to determine is whether the defendant is occupying Plot No. 408 or Plot No. 1063. The plaintiff has contended that Plot No. 1063 does not exist and as such the defendant can only be in occupation of Plot No. 408. As I have stated above, the burden of proof rested with the plaintiff. This court cannot presume that because Plot No. 1063 which the defendant claims to be

occupying does not exist as claimed by the plaintiff, the defendant must be occupying Plot No. 408.

15. The plaintiff had a duty to demonstrate that the houses that he claims to have been put up by the defendant on Plot No. 408 are indeed on that parcel of land. The same applies to cultivation and cattle grazing activities which he claims are being carried out by the defendant on Plot No.408. Apart from the plaintiff's statement in court that was controverted by the defendant and DW2, there is no other evidence that points at the defendant's occupation of Plot No. 408. To bolster his contention that the defendant is in occupation of plot No.408, the plaintiff had contended that Plot No.1063 which the defendant claims to be occupying does not exist and that the defendant owns Plot No.279. On the material before me, I am not persuaded that Plot No. 1063 does not exist as claimed by the plaintiff. The plaintiff produced a number of court rulings/orders and a copy of a Gazette Notice through which he claimed that the title for Plot No. 1063 among others were cancelled. I have read the rulings/orders and the Gazette Notice dated 7th June 2011 (PEXh. 14) that were produced in evidence by the plaintiff. As correctly submitted by the defendant's advocates, I have noted that neither the plaintiff nor the defendant was a party to any of the cases in which the rulings/orders aforesaid were made. Again, neither Plot No. 408 nor Plot No. 1063 was in issue in any of the cases.

16. There is no reference to either Plot No. 1063 or Plot No.408 in the said rulings/orders and Gazette Notice. According to the evidence before me, Plot No. 1063 was registered in the name of the defendant under the Registered Land Act, Cap 300, Laws of Kenya (now repealed). The defendant's title to Plot No. 1063 could only be cancelled by the court under section 143 of the Registered Land Act. The land registrar had no power to cancel the said title through a Gazette Notice. This was the finding by Kariuki J. and Muchelule J. in the rulings that they made in **Kakamega HC. Misc. Application No. 103 of 2003, Moses L. Korinko & 5 Others –vs- Chief Land Registrar & Another** and **Kisii HC. JR Misc. Application No. 52 of 2009, Republic –vs- Director of Surveys & Others** respectively which were produced by the plaintiff as exhibits herein.

17. It follows from the foregoing that an express order by the court was necessary to cancel the title for Plot No. 1063. I have no such order before me. Even if a title such as that for Plot No. 1063 had been issued by the land registrar or chief land registrar wrongfully or contrary to a court order, it would still require an order of the court to cancel the same. The chief land registrar could not cancel such a title through a Gazette Notice without hearing the title holder. In the instant case, the title for Plot No.1063 was purportedly cancelled pursuant to decisions that were made in court cases in which, the title was not in issue and the title holder who is the defendant herein was not a party.

18. In cross-examination, the plaintiff stated that **“The titles which were cancelled are the ones which were given around 2003. The 1998 titles were not cancelled.”** From the evidence on record, both the titles for Plot No. 408 and Plot No. 1063 were issued in the year 1998 and to be specific, one month apart. No explanation has been given by the plaintiff as to why the title for Plot No. 1063 could have been cancelled and that for Plot No. 408 spared the axe despite the fact that they were issued at the same time. I am not persuaded that the title for Plot No. 1063 was cancelled and that the said parcel of land ceased to exist.

19. On the issue of Plot No. 279, the defendant denied that he owns this parcel of land. As I have stated above, the plaintiff had produced in evidence, a copy of a certificate of official search and a copy of the register for Plot No.279 showing that the property is registered in the name of one, Ole Tasur Koonti. Although the defendant did admit that he is also known as Ole Tasur Koonti, he denied any knowledge of Plot No.279. In cross examination, he stated that, **“I don't know that I own LR No. Trans-Mara/Shartuka/279. I only own Plot No.1063”**. DW2 who is the defendant's son also denied that the defendant owns Plot No.279. He stated as follows in cross-examination, **“The defendant only owns Plot No.1063. I am not aware that the defendant only owns Plot No.279. I only know of Plot No.1063.”**

20. I am of the view that the defendant having denied that he owns Plot No.279, it was necessary for the defendant to place before the court more evidence showing that Ole Tasur Koonti who is registered as the owner of Plot No. 279 is indeed the defendant and that the defendant actually owns the said parcel of

land. Evidence of the defendant's occupation or possession of the said parcel of land would have sufficed for that purpose. On the evidence before me, I am unable to say with certainty that the defendant owns Plot No. 279. Arising from the foregoing, I am of the view that the plaintiff has failed to prove that the defendant is in occupation of Plot No. 408. I am therefore not satisfied that the defendant entered Plot No. 408 in August, 2006, constructed houses thereon and has since then been occupying, cultivating and grazing his cattle thereon as claimed by the plaintiff.

21. The second issue;-

I have partly dealt with this issue earlier in this judgment. As I have stated above, the defendant has placed sufficient evidence before the court in proof of the fact that Plot No. 1063 is registered in his name. He has produced a copy of the title deed for Plot No. 1063 in his name. He has also produced a certified copy of the register for the said parcel of land which shows that he is the registered owner thereof. Although the plaintiff has contended that Plot No. 1063 does not exist, he has tendered no evidence to challenge the evidence that was placed before court by the defendant in proof of his ownership of Plot No. 1063. The only evidence that the plaintiff placed before the court are the ruling/orders and Gazette Notice which I have already considered above and dismissed as irrelevant. It is my finding therefore that Plot No. 1063 is in existence. The next issue to consider is whether the plaintiff has trespassed on this parcel of land as claimed by the defendant in his counter-claim. I defined earlier in this judgment what constitutes trespass. The defendant did not adduce any evidence in proof of the plaintiff's alleged acts of trespass. In his evidence in chief, the defendant told the court that **"The plaintiff resides at Olalui which is far away from my residence"**. In cross-examination, the defendant stated that, **"The plaintiff has not trespassed on my parcel of land."** DW2 on the other hand stated as follows in his evidence in chief, **"The plaintiff lives in another location. We are not neighbours."** I am not satisfied from the evidence on record that the plaintiff has trespassed on a portion of Plot No. 1063 measuring 5ha. as claimed by the defendant in his plaint dated 17th February 2009.

22. The third issue;

I have set out earlier in this judgment, the reliefs sought by the plaintiff. As I have stated above, the plaintiff has proved that he is the registered owner of Plot No. 408. The plaintiff has however failed to prove that the defendant has trespassed on the said parcel of land. In view of these findings, the plaintiff would only be entitled to the relief sought in prayer (i) of the plaint dated 16th January 2009. Prayers (ii), (iii) and (iv) which were premised on the alleged acts of trespass by the defendant which have not been proved are not available to the plaintiff.

23. The fourth issue;

The defendant has only sought one relief in his counter-claim against the plaintiff namely, an injunction. As I have stated above, the defendant has established that he is the registered owner of Plot No. 1063. Like the plaintiff, the defendant has failed to prove that the plaintiff has trespassed on the said parcel of land. In the circumstances, the injunction sought by the defendant in his plaint dated 17th February 2009 cannot be granted.

24. Conclusion;

In conclusion, I hereby enter judgment for the plaintiff against the defendant in terms of prayer (i) in the plaint dated 16th January 2009 filed in Kisii HCCC No. 11 of 2009, John Kiine Musharu –vs- Ole Tasur Koonti. The defendant's counter-claim that was brought in Kisii HCCC No. 28 of 2009, Koonti Ole Tasur –vs- John Kiine Musharu is dismissed. In view of the fact that the plaintiff's rights over Plot No.408 were not contested by the defendant and that the plaintiff has not succeeded in getting most of the reliefs that he had sought herein against the defendant, each party shall bear its own cost of the consolidated suits.

Delivered, Dated and Signed at Kisii this 31st day of July, 2015.

S.OKONG'O

JUDGE

In the presence of:

Mr. Ochwangi for the plaintiff

Mr. Okenye for the defendant

Milcent Maore Court Assistant

S.OKONG'O

JUDGE