



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 18 OF 2015

KINYAMAL OLE TARE PLAINTIFF

VERSUS

SOTUA SAKANA MUYIA DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 21st January, 2015 seeking the following reliefs:-
 - a. **Eviction of the defendant from Plot No. 873 Nkararo Adjudication Section.**
 - b. **Costs.**

In his plaint dated 20th January, 2015, the plaintiff averred that he is an allottee of all that parcel of land known as Plot No. 873, Nkararo Adjudication Section (hereinafter referred to as “the suit property”) and that sometimes in December, 2014 the defendant entered the suit property without any lawful excuse and started cutting down trees and tilling the same. The plaintiff averred that as a result of the defendant’s said offensive acts he has been subjected to loss and damage. The defendant entered appearance and filed a statement of defence and a counter-claim against the plaintiff on 6th February. In his statement of defence the defendant denied that the plaintiff is the allottee of the suit property or that he has any interest of any nature therein. The defendant averred that as a result of his long and continuous occupation and use of the suit property, the same was adjudicated and demarcated in his favour during the adjudication exercise within Nkararo Adjudication Section which was carried out under the provisions of the Land Adjudication Act, Cap. 284, Laws of Kenya.

2. The defendant averred that the plaintiff did not lodge any objection to the adjudication, demarcation and recording of the suit property in the defendant’s name as provided for under the provisions of the Land Adjudication Act aforesaid. The defendant has termed the plaintiff’s suit as misconceived, premature, incompetent, frivolous, vexations and an abuse of the process of the court. In his counter-claim the defendant stated that upon the filing of this suit, the plaintiff entered the suit property and started grazing his cattle thereon. The defendant has averred that the plaintiff has also threatened to cut down the trees grown by the defendant on the suit property and has prevented the defendant from developing the said property. The defendant has averred that as a result of the said illegal activities by the plaintiff, the defendant has been subjected to extreme hardship and loss and his proprietary and constitutional rights have been violated.
3. The defendant has counter-claimed against the plaintiff for; a declaration that the defendant is the lawful owner of the suit property and a permanent injunction restraining the plaintiff from encroaching onto, leasing out, grazing on, cutting down trees on, alienating, cultivating,

interfering with the defendant's peaceful use, occupation and title of the suit property or in any other manner interfering with the said property. Together with the defence and counter-claim, the defendant filed an application by way of Notice of Motion dated 6th February 2015 brought under Order 40 rules 1, 2, 3 and 10 of the Civil Procedure Rules 2010 and Article 159 and 232 of the Constitution of Kenya 2010 seeking the following orders:-

- a. **Spent**
 - b. **Spent**
 - c. **Pending the hearing and determination of the instant application the honourable court be pleased to grant an order of temporary injunction, restraining the defendant/respondent by himself or through his agents, servants and/or anyone claiming under them from interfering, harassing, evicting, intimidating the plaintiff and other members of his family from the suit land and/or in any manner howsoever and/or whatsoever, interfering, alienating, parcels of land number land parcel No. 873 Nkararo Adjudication Section.**
 - d. **Costs of this application to be borne by the defendant/respondent.**
 - e. **Such further and/or other orders be made as the court may deem fit and expedient.**
4. The application was supported by the affidavit of the defendant/applicant sworn on 6th February 2015 in which he stated that he is the absolute registered proprietor by way of first registration of all that parcel of land known as LR No. 873 Nkararo Adjudication Section ("the suit property") which ownership was acquired pursuant to a full adjudication and demarcation process within Nkararo Adjudication Section which is still in progress. The defendant stated further that the allocation, adjudication and demarcation of the suit property in favour of the defendant has not been challenged by the plaintiff through the mechanism provided under the Land Adjudication Act, Cap 284 Laws of Kenya.
 5. The defendant stated that the plaintiff has encroached on the suit property by grazing his cattle thereon. The plaintiff has also been sourcing for persons interested in leasing the suit property for sugarcane growing. The defendant stated that the plaintiff has never occupied or utilized the suit property and that he has no interest of whatsoever nature in the suit property that would justify the activities that he is engaged on in the suit property. The defendant has contended that he is the one who has been in actual use and occupation of the suit property for several years and this explains why the same was adjudicated and demarcated in his favour.
 6. The defendant stated that on the 2nd day of February 2015 soon after serving him with the summons to enter appearance herein, the plaintiff started grazing his cattle on the suit property. He also threatened to cut down trees that the defendant has grown on the said property. The defendant has contended that these activities by the plaintiff are hindering development on the suit property. The defendant stated that he relies on the suit property for his livelihood and that the activities of the plaintiff on the suit property have the effect of denying him his livelihood. The defendant contended that if the orders sought are not granted, he is likely to suffer injury that cannot be compensated in damages. The defendant annexed to his affidavit as exhibits, a copy of a letter dated 29th May, 2014 from the District Land Adjudication and Settlement Officer, Trans-Mara East/West Districts confirming that according to her records, the suit property was demarcated and recorded in the name of the defendant during the land adjudication at Nkararo Adjudication Section which is at the Objection stage, and photographs said to have been taken on the suit property of the defendant's house on the property and the trees planted thereon.
 7. The defendant's application was opposed by the plaintiff through a replying affidavit sworn on 15th April 2015. In his affidavit, the plaintiff contended that he has resided on the suit property for several years. He contended that he has over the years built a homestead, farmed and reared livestock on the suit property. He stated that the defendant used to reside on a portion of the suit property but relocated to a place known as Shangoi where he now resides. The plaintiff contended that the photographs annexed to the defendant's affidavit were taken at the defendant's current residence at Shangoi and not on the suit property. The plaintiff stated that the defendant does not have a homestead within Nkararo Adjudication Section. The plaintiff denied that he has harassed or intimidated the defendant or that he intends to evict the defendant from the suit property on which the defendant does not reside in any event but is only an absentee land lord.
 8. The plaintiff contended that if the injunctive reliefs sought are granted, the same will amount to

restraining him from using his own parcel of land parcel as the trees planted on the suit land belong to him and he has every right to cut down the same for his own use. The defendant filed a supplementary affidavit sworn on 7th March 2015 in response to the plaintiff's replying affidavit. In the said affidavit, the defendant reiterated that the plaintiff is not residing on the suit property. The defendant has contended that the photograph that the plaintiff has annexed to his affidavit was taken next to the defendant's own house with a view to mislead the court. The defendant stated that the plaintiff has his parcel of land elsewhere. He reiterated that he is in actual occupation of the suit property and that all the trees on the suit property belong to him.

9. When the defendant's application came up for hearing on 15th June 2015 Mr. O. M Otieno, advocate appeared for the defendant while Mr. Abobo, advocate appeared for the plaintiff. The two advocates told the court that they wished to rely entirely on the parties' respective affidavits filed herein in support of and in opposition to the defendant's application dated 6th February, 2015. They therefore did not make any submissions save for urging the court to make a finding in favour of their respective clients.
10. I have considered the defendant's application together with the affidavit and supplementary affidavit filed in support thereof. I have also considered the defendant's replying affidavit 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 laid down in the case of **Giella –vs- Cassman Brown Ltd [1973]** namely:-
 - a. **The applicant must satisfy the court that he has a prima facie case against the respondent 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.**
11. 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.”

Applying the said principles to the present case, the first question which I need to answer is whether the defendant has established a prima facie case with a probability of success against the plaintiff. On the material before me, I am satisfied that the defendant has demonstrated that he is indeed the lawful proprietor of the suit property. This fact has been proved by the copy of a letter from the Land Adjudication Officer in charge of Nkararo Adjudication Section dated 29th May, 2014 that was annexed to the defendant's affidavit in support of the application herein as annexure “SM1(a)”. In that letter the said officer confirmed that the suit property was demarcated and recorded in the name of the defendant. The defendant's title to the suit property seems not to be disputed by the plaintiff. In paragraph 9 of his replying affidavit, the plaintiff referred to the defendant as “an absentee landlord”. The plaintiff appears to be claiming the suit property on account of alleged occupation. The plaintiff has however not placed any evidence before the court in proof of his claim over the suit property.

12. I am in agreement with the contention by the defendant that if indeed the plaintiff was in occupation of the suit property, the same should have been demarcated and recorded in his name during the land adjudication process at Nkararo Adjudication Section. If for any reason, the land adjudication officer and the committee that was assisting him adjudicated and recorded the suit property in the name of the defendant in error, the plaintiff had recourse. He had a right given by the Land Adjudication Act to object to such demarcation to the Land Adjudication Officer whose decision on the matter he could also appeal to the Minister in charge of land. There is no evidence that the plaintiff has objected to the demarcation and recording of the suit property in favour of the defendant. In the absence of such objection, the defendant remains the bona fide and lawful owner

- of the suit property.
13. This court has no jurisdiction in these proceedings to interfere with or impeach the defendant's title to the suit property on account of any error that was committed during the land adjudication process. A party with such grievance has to follow the dispute resolution mechanism set out in the Land Adjudication Act that I have outlined above. The defendant has contended that he is occupying and using the suit property. The defendant has annexed to his affidavit copies of photographs showing his residence on the suit property. Although the plaintiff has contended that the photographs were taken elsewhere, I am not convinced that, that is the case. The photographs which that were presented to court by the plaintiff which he claimed to have been taken on the property interestingly shows the house that the defendant has claimed to be his.
 14. The plaintiff has not denied that he is grazing his cattle on the suit property. He has in fact admitted that fact. He has annexed a photograph to his affidavit showing his cattle grazing on the suit property. The plaintiff has also not denied that he has not obtained the permission of the defendant to graze his cattle on the suit property. I am satisfied on a prima facie basis that the defendant is the owner of the suit property and that the defendant has entered thereon without the defendant's consent. The defendant has therefore established that the plaintiff is a trespasser on the suit property.
 15. On whether the defendant would suffer irreparable harm if the orders sought are not granted, I am equally satisfied that that would be the case. As I have stated above the plaintiff has not denied that he is grazing his cattle on the suit property. If this activity is allowed to continue I am in agreement with the defendant that the nature and character of the suit property is likely change permanently for the worse. The plaintiff has also not denied that his activities on the suit property are hindering development thereon. I am persuaded that if the orders sought herein by the defendant are not granted the injury that would be suffered by the defendant would be irreparable.
 16. The upshot of the foregoing is that the defendant has met the conditions for granting a temporary injunction and his Notice of Motion application dated 6th February, 2015 is for granting. The application is allowed in terms of prayer 3 thereof save that reference to the defendant in the order shall be changed to plaintiff and reference to the plaintiff shall be changed to the defendant. For the avoidance of doubt the orders are granted in favour of the defendant against the plaintiff and not vice versa. The defendant shall have the costs of the application.

Delivered, Dated and Signed at Kisii this 27th day of August, 2015.

S.OKONG'O

JUDGE

In the presence of:

Mr. Abobo	for the plaintiff
Mr. O. M. Otieno	for the defendant
Mr. Omwoyo	court clerk

S.OKONG'O

JUDGE