



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 21 OF 2013

OLE KORIO JAMES LESHAN PLAINTIFF

VERSUS

LEKAKENY PARSIRIA 1ST DEFENDANT

JOSEPH LEURU KORIO 2ND DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendants on 24th January 2013 seeking the following prayers:

- 1. Declaration that the plaintiff is registered and/or lawful owner of LR No. Transmara/Shartuka/165 measuring 20.64ha.**
- 2. An order of eviction directed against the defendants, their agents and/or servants from LR No. Transmara/Shartuka/165.**
- 3. Permanent injunction restraining the defendants from entering upon, re-entering, trespassing onto, fencing, cultivating, grazing on, building structures, cutting down trees, interfering with and/or in any other manner dealing with the suit land namely LR No. Transmara/Shartuka/165 and/or any portion thereof.**
- 4. General damage for trespass.**
- 5. Interest on (4) hereof at court rates.**
- 6. Costs of the suit together with interest thereon.**
- 7. Such further or other relief that the court may deem fit and expedient to grant.**

In his plaint dated 17th December 2012, the plaintiff averred that at all material times he was and still is the registered proprietor of all that parcel of land known as **LR No. Transmara/Shartuka/165** measuring approximately 20.64ha (hereinafter referred to as the “**suit property**”). The plaintiff averred further that the 1st defendant is the registered owner and/or proprietor of parcel of land known as **LR No. Transmara/Shartuka/164** (herein after referred to as “**Plot No. 164**”) which land borders and/or adjoins the suit property. The plaintiff has averred further that the suit property and Plot No. 164 were previously part of a larger parcel of land which was owned by Shartuka Group Ranch and that the suit property and Plot No. 164 were created after Shartuka Group Ranch demarcated, adjudicated and registered the same in the names of the plaintiff and the 1st defendant respectively after the dissolution of the said group ranch

and the sub-division of its land to the members who among them were the plaintiff and the 1st defendant.

2. The plaintiff has averred further that upon the demarcation, adjudication and registration of the suit property in his name, he took possession thereof and has remained in occupation of the same to date and as such, he is entitled to exclusive and absolute rights over the same to the exclusion of all, the defendants not exempted. The plaintiff has averred that on or about the year 2010, the defendants trespassed into the suit property and exercised a portion thereof measuring 5acres which they subsequently fenced off in the pretense that the said portion formed part and parcel of Plot No. 164. The plaintiff has claimed that upon entry into the said portion of the suit property, the defendants commenced the cutting down of indigenous trees and also cattle grazing on the said portion thereby depriving and/or denying the plaintiff of his rights to enter, occupy and use the said portion of the suit property.
3. The plaintiff has claimed that following the entry by the defendants into the said portion of the suit property, the plaintiff sought the assistance of the District Land Registrar, Trans-Mara District to come to the site and ascertain the exact boundary between the suit property and Plot No. 164 but due to the hostility on the part of the defendants the said Land Registrar was unable to execute that task. The plaintiff has claimed that despite demand and notice of intention to sue, the defendants have failed, refused and/or neglected to desist from trespassing and/or interfering with the suit property as a result of which the plaintiff was left with no alternative but to bring these proceedings. The defendants filed separate statements of defence to the plaintiff's claim, which defences were both filed on 20th February 2013. In their said defences, the defendants denied the plaintiff's claim in its entirety. The defendants denied the alleged acts of trespass and put the plaintiff to strict proof. The defendants contended that the plaintiff is not entitled to the reliefs sought in this suit, which they termed as an abuse of the process of court.
4. When this suit came up for hearing on 16th December 2013 only the plaintiff and his advocate appeared in court. The defendants and their advocate did not appear. After satisfying myself that the defendants' advocates on record were duly served with a hearing notice, I allowed the plaintiff's advocate to proceed with the hearing. The plaintiff gave evidence and called no witness. In his evidence, the plaintiff testified that he is the owner of the suit property which is situated in Shartuka Location, Pirar Division within Narok County. The plaintiff stated that he acquired the suit property from Shartuka Group Ranch to which he was a member and that other members of the said group ranch also got portions of the ranch land from which the suit property came from. The plaintiff testified that each member of the Shartuka Group Ranch was supposed to get 20.64ha from the original parcel of land which was owned by Shartuka Group Ranch, and that the suit property measures 20.64ha which is approximately 51.6acres. He obtained a title deed for the suit property on 14th July 2000. He testified further that the suit property shares a boundary with Plot No. 164 which is owned by the 1st defendant and that like the suit property, Plot No. 164 also measures 20.64ha. The plaintiff testified further that there is no visible boundary between the suit property and Plot No. 164 on the ground. In view of this fact, the plaintiff and the 1st defendant brought a private surveyor to mark out the boundary of the two (2) parcels of land which surveyor was brought by the 1st defendant although he was known to the plaintiff also. The name of the surveyor was Mr. Kigen. The plaintiff stated that when the said surveyor took the measurements on the ground, he found that Plot No. 164 measured 57acres while the suit property measured 47acres. The plaintiff testified that the said surveyor did not show them the actual boundary of the two parcels of land on the ground, but from the measurements that were taken by the said surveyor the suit property was found to be less by 5acres which on the ground was part of Plot No. 164. The plaintiff stated that plot No. 164 has encroached on to the suit property by a margin of upto 5acres, which encroachment is visible on the ground.
5. The plaintiff stated further that when he discovered this anomaly, he complained to the District Land Registrar and District Surveyor, Trans-Mara District and asked them to come to the ground to determine the exact boundary of the two parcels of land. The plaintiff stated further that the said officers did not undertake the task because the defendants denied them the opportunity to do so. The boundary dispute between the two plots was therefore left unresolved. The plaintiff stated that the 5acres which is part of the suit property is now being used by the 1st defendant and that

- the 2nd defendant grazes his cattle thereon and also resides on the same. The plaintiff stated that the 1st defendant put up a structure on the disputed portion of the suit property in the year 2010, while the 2nd defendant put up a structure on the said portion of the suit property in the year 2000. The plaintiff stated that the defendants have no right to enter and occupy the said portion of the suit property and he urged the court to issue an order of eviction of the defendants from the said portion of the suit property. The plaintiff also urged the court to issue an injunction to restrain the defendants from entering the suit property and to award him general damages because he has not been able to put the said portion of the suit property into any economic use.
6. The plaintiff produced as exhibits among others, a copy of the title deed dated 14th July 2000 in respect of the suit property in the name of the plaintiff, a copy of a certificate of official search dated 18th December 2012 in respect of the suit property, a copy of the registry index map for Transmara/Shartuka adjudication section, copies of sketch maps depicting the measurements that were carried out by a private surveyor on the suit property and Plot No. 164. After the close of the plaintiff's case, the plaintiff's advocate made brief oral submissions. In his submission, the plaintiff's advocate submitted that the plaintiff is the registered proprietor of the suit property which measures 20.64ha and which is equivalent to 51.6acres. Counsel submitted that the suit property shares a common boundary with Plot No. 164 which is owned by the 1st defendant which Plot also measures 20.64ha. The plaintiff's advocate submitted that although the two parcels of land are equal in size the 1st defendant's parcel of land, namely Plot No. 164 is now measuring 57acres on the ground which represents an increase of 5.4acres while on the other hand the suit property measures 47acres on the ground which represents a decrease of 5.4acres.
 7. Counsel submitted that the measurements of the 2 parcels of land was carried out by a surveyor who was called by the 1st defendant for that purpose and that although this anomaly in the acreages of the 2 parcels of land was pointed out to the 1st defendant, the 1st and 2nd defendants have declined to vacate and hand over possession of the 5 acres which is a portion of the suit property to the plaintiff. Counsel submitted that the 2nd defendant who is not even the owner of Plot No. 164 or the suit property has entered and remained on the disputed 5acres portion of the suit property.
 8. The plaintiff's advocate submitted that the defendants have no rights to interfere with the portion of the suit property in dispute. In support of this submission, counsel referred to section 24, 25 and 26 of the Land Registration Act 2012. On the issue of general damages, counsel submitted that the land owner is entitled to damages when he is deprived of his land and that general damages is always conventional and does not require proof like special damages. Counsel submitted that an award of a sum of Kshs. 100,000/= would be a reasonable compensation to the plaintiff for the non-user of the said portion of the suit property.
 9. I have considered the pleadings on record, the evidence tendered by the plaintiff and the submissions by the plaintiff's advocate. The plaintiff's claim against the defendants is based on the tort of trespass. Trespass has been defined to consist on any unjustifiable intrusion by one person upon land in the possession of another and that any slightest crossing of the boundary is sufficient to constitute trespass. Refer to, **Clerk and Lindsell on torts, 18th Edition, Paragraph 18-01**. In the case before me the onus was upon the plaintiff to prove that the defendants have trespassed on the suit property. There is no dispute that the suit property measures 20.64ha and that the same is owned by the plaintiff. It is also not in dispute that 20.64ha translates to approximately 51.6acres. It is also not in dispute that Plot No. 164 which is owned by the 1st defendant also measures 20.64 ha according to the register of the said parcel of land which is equivalent to 51.6acres. The plaintiff claims that although both parcels of land are supposed to be 51.6acres on the ground, Plot No. 164 measures 57acres while suit property measures only 47acres on the ground. The plaintiff's contention therefore is that Plot No. 164 is larger on the ground by upto 5.4acres and that the suit property is lesser on the ground with the same margin. The plaintiff's contention therefore is that the owner of Plot No. 164, namely the 1st defendant has encroached onto the suit property to the extent of the said 5.4acres.
 10. The Onus again was upon the plaintiff to prove that Plot No. 164 measures 57acres on the ground while the suit property measures 47acres on the ground. What has the plaintiff placed before this court in proof of these facts? The plaintiff has placed before the court, what he referred to as

sketch maps drawn by a surveyor known as Mr. Kigen which he claimed to contain the measurements that the said surveyor carried out on the two parcels of land. In the said sketches, it is indicated that Plot No. 164 measures 57 acres while the suit property measures 47 acres. The said sketch maps have not been signed and do not bear the name or the signature of the alleged surveyor who prepared the same. To me they are at best mere pieces of paper with no evidential value. I am not satisfied that these are acceptable evidence in proof of the ground measurements of the two parcels of land.

11. In my view, the dispute between the plaintiff and the defendants seems to be a boundary dispute which should have been resolved by the land registrar and the local district surveyor. The plaintiff pleaded and led evidence that he had sought the assistance of the district land registrar and surveyor Trans-Mara District to demarcate and mark the boundary of the two parcels of the land but the exercise did not take off due to the hostility on the part of the defendants. There is no evidence before me of such an attempt. The plaintiff did not place before the court any evidence of a complaint made to the said district land registrar and surveyor and any notice or summons from the district land registrar to the plaintiff and the defendants to either appear before him or at the site for the purposes of determining the boundary of the two parcels of land. In the circumstances, there is no acceptable evidence before me to the effect that the defendants have encroached onto the suit property by a margin of up to 5.4 acres. The plaintiff has therefore failed to prove the act of trespass on the part of the defendants.
12. The plaintiff has sought among others, an order of eviction of the defendants from the suit property and a permanent injunction restraining the defendants from re-entering or trespassing into the suit property. These orders or reliefs cannot be issued. I have no evidence before me to show the extent of the defendants' occupation of the suit property. It is alleged that the defendants have encroached onto the suit property to the extent of up to 5.4 acres. As I have stated above, the suit property is a large parcel of land measuring over 51.6 acres while Plot No. 164 owned by the 1st defendant is also said to measure up to 51.6 acres. It is not clear and it has not come out in evidence where these 5.4 acres which is disputed lies on the ground and from which the defendants should be evicted. A court of law cannot issue an order in vain. From the totality of the evidence on record, I am not satisfied that the plaintiff has proved his case against the defendants on a balance of probabilities. In conclusion therefore, the plaintiff's suit is dismissed with costs to the defendants.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i for the Plaintiff

Mr. Minda h/b for Jumba for the Defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE