



No. 278

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 63 OF 2014

LEREIKAN OLE KONCHELLAH PLAINTIFF

VERSUS

JULIUS TABARAI TAMPUSHI 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, KILGORIS 2ND DEFENDANT

RULING

1. Background;

On 4th November, 2010, the 1st defendant herein filed a suit against the plaintiff herein and another in, **Kisii HCCC No. 315 of 2010, Julius Tabarai Ole MaitoTampushi –vs- William Lerikan Konchella & Another** (hereinafter referred to only as “**the High Court case**”). In the High Court case, the 1st defendant had contended among others that the plaintiff herein who is the registered proprietor of all that parcel of land known as **LR No. Transmara/Osinoni/213** (hereinafter referred to as “**Plot No. 213**”) had trespassed into the 1st defendant’s parcel of land known as **LR No. Trans-Mara/Osinoni/234**(hereinafter referred to only as “**Plot No. 234**”) by destroying the boundary between Plot No. 213 and Plot No. 234 and occupying a portion of Plot No. 234measuring 12 acres.

2. The 1st defendant sought as against the plaintiff herein a declaration that the plaintiff had encroached onto Plot No. 234 to the extent of 12 acres, an order for the eviction of the plaintiff from Plot No. 234, an order of a permanent injunction to restrain the plaintiff from encroaching on Plot No. 234 or any portion thereof, general damages for trespass and an order that the District Land Registrar, Trans-Mara District do fix the boundaries between Plot No. 234 and Plot No. 213. The plaintiff and his co-defendant in the High Court case filed a joint statement of defence on 15th November 2010 denying the 1st defendant’s claim against them in its entirety. The High Court case was heard by Sitati J. on 21st February 2013, judgment was entered for the 1st defendant against the plaintiff as prayed in the plaint.
3. The court found that the plaintiff had encroached onto Plot No. 234 to the extent of 12 acres and ordered the eviction of the plaintiff from the said portion of Plot No. 234 if the plaintiff failed to move out voluntarily within 90 days from the date of judgment. The court made further orders restraining the plaintiff from encroaching on Plot No. 234 and for the District Land Registrar, Trans-Mara District to fix the boundaries between Plot No. 234 and Plot No. 213. The plaintiff was not satisfied with the High Court decision and filed a notice of his intention to appeal against the same to the Court of Appeal. In the meantime, the plaintiff seems not to have complied with the

terms of the High Court judgment and the 1st defendant who had extracted the decree from the said judgment executed the same on 20th August 2013 through Ikimwanya Auctioneers with the assistance of the Officer Commanding Administration Police, Trans-Mara West Sub-County and had the plaintiff evicted from the said portion of Plot No. 234 measuring 12 acres. On the same day, namely, 20th August 2013, the plaintiff moved the High Court under certificate of urgency seeking a stay of execution of the said judgment of the High Court that was delivered on 21st February 2013 pending the hearing and determination of the appeal that the plaintiff had preferred to the Court of Appeal. The plaintiff's application for stay was heard again by Sitati J. who dismissed the same with costs in a ruling that was delivered on 18th November 2013.

4. In that ruling, the High Court found as a fact that the execution had already taken place and concluded that if the stay sought was granted, the same would be in vain. After the plaintiff lost the application for stay in the High Court, the plaintiff petitioned the National Land Commission on 22nd January 2014 to intervene and assist him to retain the 12 acres of land that had been decreed in favour of the 1st defendant by the High Court. The plaintiff's plea to the National Land Commission seems not to have borne any fruit. The plaintiff did not rest there though. The plaintiff lodged another application in the Court of Appeal at Kisumu on or about 5th February 2014 seeking a stay of execution and/or further execution of the High Court decree. In paragraph 10 of his affidavit in support of his application for stay in the Court of Appeal, the plaintiff deposed that in execution of the High Court decree the 1st defendant had already destroyed a fence that he had put up and that the District Land Surveyor would visit the site on 19th February 2014 to fix the boundary. The outcome of the plaintiff's application for stay of execution in the Court of Appeal is not clear. Nothing positive however seems to have come from that end.
5. **The suit before this court;**

Having failed both in the High Court and in the Court of Appeal to obtain a stay of execution of the High Court judgment in favour of the 1st defendant, the plaintiff filed this suit against the 1st defendant and the District Land Registrar, Kilgoris on 17th February 2014. In his eight (8) paragraph plaint, the plaintiff claimed that from the month of August 2013 the 1st defendant trespassed on Plot No. 213 and claimed a portion thereof without any colour of right. There is no plea in the plaint against the District Land Registrar, Kilgoris, who is the 2nd defendant herein. The plaintiff did not also disclose the existence of the High Court case in the plaint. The plaintiff sought only one principal relief namely, a permanent injunction to restrain the defendants from invading, alienating or in any other way whatsoever interfering with Plot No. 213. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 17th February 2014 under certificate of urgency seeking a temporary injunction to restrain the defendants herein from invading, trespassing on, fencing, developing, alienating or in any other way interfering with Plot No. 213 pending the hearing and determination of this suit. The plaintiff's application was brought on the grounds set out in the body thereof and on the supporting affidavit sworn by the plaintiff on 17th February 2014. In his affidavit in support of the application, the plaintiff gave the history of Plot No. 213 and Plot No. 234, the High Court case that had been brought against him by the 1st defendant and the judgment that was made therein.

6. The plaintiff contended that whereas he has no problem with the judgment that was made by the High Court, he is concerned with the manner in which the defendants have gone about in executing the same. The plaintiff claimed that the manner in which the said judgment was being executed was contrary to the terms of the judgment itself. The plaintiff contended that the 1st defendant had in purported execution of the said judgment destroyed the plaintiff's fence which stood at the common boundary between Plot No. 213 and Plot No. 234 and had threatened to annex a portion of Plot No. 213 measuring 12 acres to the left of the said common boundary. The plaintiff claimed that the 2nd defendant was in the process of proceeding to the site of the two parcels of land to fix their boundary. In his further affidavit sworn on 3rd March 2014, the plaintiff contended that instead of the 1st defendant seeking to recover 12 acres that was decreed in his favour which lies to the right hand side of the common boundary between Plot No. 213 and Plot No. 234 the execution has been directed at the 12 acres of land lying on the left hand side of

- the said common boundary. The plaintiff contended that the execution being carried out by the 1st defendant is “ultra vires” the judgment of the High Court and amounts to trespass which gives the plaintiff a new cause of action. The plaintiff contended further that the 1st defendant has skewed the High Court judgment to suit his whims and that the 1st defendant’s intention is to annex the plaintiff’s parcel of land so as to render the plaintiff’s family destitute.
7. In summary, the plaintiff contended that the 1st defendant is executing the High Court judgment on an area that was not decreed in his favour a process which the plaintiff termed “reangling the judgment”. The plaintiff urged the court to preserve Plot No. 213 from unjust and illegal annexation in the name of implementation of a lawful court decree. The plaintiff’s application was opposed by the 1st defendant. The 1st defendant filed a notice of preliminary objection dated 20th February 2014 and a replying affidavit sworn by the 1st defendant on the same date. In his preliminary objection, the 1st defendant contended that the plaintiff’s suit is res judicata, discloses no cause of action against the 1st defendant, is an abuse of the process of the court and as such should be struck out together the injunction application which is based thereon.
 8. In the replying affidavit, the 1st defendant reiterated the contents of his preliminary objection. The 1st defendant averred that; the 1st defendant had instituted the High Court case against the plaintiff and his brother which case was determined in favour of the 1st defendant. The plaintiff thereafter preferred an appeal to the Court of Appeal against the said decision. The plaintiff’s application for an order for stay of execution was dismissed by the High Court. In the meantime, the judgment that had been entered against the plaintiff was executed. The 1st defendant denied that the plaintiff’s parcel of land, namely Plot No. 213 was invaded by hooligans contending that what the plaintiff termed an invasion was actually an execution of a lawful court decree. The 1st defendant termed this suit an attempt by the plaintiff to shop for a court that can make a determination in his favour on a matter which has already been determined. The 1st defendant contended further that the orders sought herein are intended to reinstate the plaintiff on Plot No. 234 from where he was evicted through a lawful court decree. The 1st defendant contended that the issues raised in the present application should have been raised in the High Court case where the decree, the execution of which is being contested was issued and is being executed. The 1st defendant urged the court to dismiss the plaintiff’s application.
 9. On 21st February 2014, I directed that the plaintiff’s application be heard by way of written submissions. The plaintiff filed his written submissions on 28th March 2014 while the 1st defendant filed his submissions on 29th April 2014. I have considered the plaintiff’s application together with the two (2) affidavits filed in support thereof. I have also considered the 1st defendant’s notice of preliminary objection and replying affidavit filed in opposition to the application. Finally, I have considered the parties’ respective written submissions and the authorities cited. What I have before me is an application for interlocutory injunction. The principles which the court applies in applications of this nature are now well settled. As was held in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] E. A 358**, an applicant for an interlocutory injunction must satisfy the court that he has a prima facie case against the respondent with a probability of success and that unless the order is granted he will suffer harm that cannot be compensated by an award of damages. If the court is in doubt as to the above, the court would determine the application on a balance of convenience. The onus was upon the plaintiff to satisfy the said conditions for granting the interlocutory injunction sought. The plaintiff’s case as set out in the plaint is that the 1st defendant has trespassed on Plot No. 213 which is registered in the name of the plaintiff and as such the 1st defendant should be restrained by a permanent injunction from continuing with that act of trespass.
 10. The plaintiff has admitted that the plaintiff and the 1st defendant were parties to the High Court case in which a decree was issued in favour of the 1st defendant. The plaintiff has admitted further that under the said decree, the plaintiff was ordered to vacate or be evicted from a portion of the 1st defendant’s parcel of land known as Plot No. 234 measuring 12 acres which lies near the common boundary between Plot No. 213 and Plot No. 234. The plaintiff has contended however that in the course of executing the said court decree, the 1st defendant trespassed on Plot No. 213.

It is not in dispute from the material before me that the dispute between the parties in the High Court revolved around; the exact boundary between Plot No. 213 owned by the Plaintiff and Plot No. 234 owned by the 1st defendant, whether or not the plaintiff had trespassed into Plot No. 234 and if so, the extent of trespass or encroachment. It is also not in dispute that the High Court determined the dispute in favour of the 1st defendant. The High Court made a finding of fact that the plaintiff had encroached on the 1st defendant's parcel of land aforesaid to the extent of 12 acres from the common boundary between Plot No. 213 and Plot No.234. The court found that the plaintiff had extended the boundary of Plot No. 213 into Plot No. 234 by a margin of upto 12 acres and ordered the eviction of the plaintiff from the said portion of Plot No. 234. The plaintiff's eviction had the effect of restoring the boundary between Plot No. 213 and Plot No. 234 which the plaintiff had unlawfully placed inside Plot No. 234 into its rightful place. The restoration of the said boundary to its correct position meant that the plaintiff had to vacate or be evicted from a portion of land measuring 12 acres which he had previously considered to be part of Plot No. 213.

11. The plaintiff's contention in the application before me is that in an attempt to recover the said 12 acres of land through execution of the said decree of the High Court, the 1st defendant has ended up annexing a portion of Plot No. 213 that was not part of the 12 acres decreed in his favour. On his part, the 1st defendant has contended that he has already executed the said decree and recovered the 12 acres in dispute from the plaintiff. The 1st defendant has contended that the High Court decree has been executed strictly in accordance with the judgment of the High Court and that he has not recovered from the plaintiff more than was decreed by the High Court. It is clear from the foregoing rival arguments by the plaintiff and the 1st defendant that the issue in dispute is whether the 1st defendant has executed the High Court decree in accordance with the terms thereof. This unfortunately is not an issue which I can determine in these proceedings.
12. As rightly submitted by the 1st defendant's advocate, section 34 of the Civil Procedure Act provides that all questions arising between the parties to a suit in which a decree has been passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit. It is the High Court which is better placed to determine the issue as to whether the 12 acres of land from which the plaintiff was to be evicted was on the right hand side or left hand side of the common boundary between the plaintiff's Plot No. 213 and the 1st defendant's Plot No. 234. That being my finding, I am of the opinion that the plaintiff's claim herein is not maintainable. If the plaintiff main concern was that the 1st defendant had been awarded a portion of land measuring 12 acres to the right hand side of the common boundary between Plot No. 213 and Plot No. 234 and that instead of the 1st defendant executing for the recovery of the said 12 acres on the right hand side of the common boundary, the execution was being carried on the left hand side of the boundary, the plaintiff should have moved the High Court for appropriate relief. It was not necessary at all to bring this suit. I must say also that the plaintiff's claim that the 1st defendant is executing the decree on the portion of land on the left hand side of the boundary instead of the portion that lies on the right hand side seems not to add up.
13. I have looked at the decree of the High Court. There is nowhere in the said decree where it is stated that the plaintiff was to be evicted from 12 acres of land lying on the right hand side of the common boundary between Plot No. 213 and Plot No. 234. I have also looked at the land registrar's report that formed the basis of the High Court judgment. The location of the 12 acres of land that was in dispute in the High Court case was clearly marked in that report. There was no dispute at all as to the ground location of that portion of land. When approached from the hillside towards the river, the said portion of land lies on the left hand side of the court determined boundary between Plot No. 213 and Plot No. 234 and when approached from the river towards the hill, the same parcel of land lies on the righthand side of the said boundary. It follows from the foregoing that whether the said parcel of land lies on the righthand side of the boundary or on the lefthand side depends on the position from which you approach the same. Furthermore, whether that portion of land is on the right or left hand side of the boundary, it is one and the same portion of land. The plaintiff's argument concerning the ground location of the said portion of land is not convincing for another reason. The plaintiff's contention in these proceedings is that the High Court had awarded the 1st defendant a portion of land measuring 12 acres on the right hand side of

the boundary and that he would not mind the 1st defendant recovering the said 12 acres of land provided the land is on the right hand side of the common boundary. If the plaintiff's argument is being made in good faith then the question that begs for an answer is why the plaintiff appealed against the High Court decision and sought a stay of execution of that decision both in the High Court and in the Court of Appeal. Due to the foregoing, I am not satisfied that the plaintiff has established a prima facie case against the defendants with a probability of success.

14. Having reached the conclusion that the plaintiff has not established a prima facie case, I am not obliged to consider whether the plaintiff would suffer irreparable harm unless the orders sought are granted. If I was to determine the issue, I would hold against the plaintiff. The plaintiff has not shown the nature of loss that he will suffer if the injunction sought is not granted. The High Court had made a finding in the plaintiff's application for stay of execution that the execution of the High Court decree had already taken place and that the court would be acting in vain in allowing the application. It follows therefore that if the plaintiff was to suffer any loss, the loss has already been incurred. The plaintiff having failed to show a prima facie case and also to demonstrate that he stands to suffer irreparable harm, the plaintiff's application is not for granting. The 1st defendant had urged me not only to dismiss the plaintiff's application but also to strike out the plaintiff's suit for among other reasons that the same is *res judicata*.
15. As I have stated above, what is before me is an application for a temporary injunction and the findings that I have made above on the merit of the plaintiff's case are only preliminary and not conclusive. In the circumstances of this case, I am of the opinion that it would not be in order to strike out the plaintiff's suit on the basis of these findings. As I have stated above, the main issue that arises for determination in this suit is whether or not the High Court decree is being executed in accordance with its terms. This issue has not been determined. It is an issue which can only be determined by the High Court. The plaintiff's claim may be frivolous and vexatious. The claim may also be said not to be disclosing a reasonable cause of action the same having been brought by way of a fresh suit. It cannot however be said to be **res judicata** as claimed by the 1st defendant so as to justify the striking out of the same on a preliminary objection. For the court to strike out this suit on account of being frivolous, vexatious and for failing to disclose a reasonable cause of action, the 1st defendant will have to institute a formal application for that purpose in accordance with Order 2 Rule 15 of the Civil Procedure Rules. The court cannot strike out a suit on those grounds on a preliminary objection. For the foregoing reasons, I am not inclined to strike out this suit.
16. The upshot of the foregoing is that the plaintiff's application dated 17th February 2014 has no merit. The same is hereby dismissed with costs to the 1st defendant.

Delivered, signed and dated at KISII this 27th day of June, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i h/b for Kaikai for the plaintiff

N/A for the 1st defendant

N/A for the 2nd defendant

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE