



No. 286

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 374 OF 2012**

MARGARET SAMATO KIYIAPI .....PLAINTIFF

**VERSUS**

SIMION OLENGARIE .....DEFENDANT

**RULING**

1. The plaintiff brought this suit against the defendant on 11<sup>th</sup> October, 2012 seeking; a declaration that the plaintiff is the registered owner of all that parcel of land known as **LR No. Transmara/Shartuka/265** (hereinafter referred to as “**the suit property**”), an order for the eviction of the defendant from the suit property, a permanent injunction to restrain the defendant from trespassing, interfering or in any other manner dealing with the suit property or any portion thereof and general damages for trespass. In her plaint, the plaintiff claimed that the defendant who is the registered proprietor of LR No. Trans-Mara/Shartuka/364 (“Plot No. 364”) had on or about the year 2010 trespassed on the suit property and curved out a portion thereof measuring about 32 acres which he proceeded to fence off with barbed wire on the pretext that the same formed part and parcel of Plot No. 364.
2. The plaintiff claimed further that soon after the annexation of the said portion of the suit property, the defendant started to cut down trees, burn charcoal and graze cattle on the same. The plaintiff claimed that the defendant’s activities aforesaid have deprived and/or denied the plaintiff the use and enjoyment of the said portion of the suit property. On 10<sup>th</sup> July 2013 the plaintiff filed an application by way of Notice of Motion dated 6<sup>th</sup> July 2013 seeking a temporary injunction to restrain the defendant from re-entering, trespassing onto, cutting down trees, cultivating, building structures, grazing, interfering with and/or in any other manner whatsoever dealing with the suit property or any portion thereof pending the hearing and determination of this suit and a mandatory injunction to compel the defendant to vacate or be evicted from the suit property and/or any portion thereof pending the hearing and determination of this suit.
3. The plaintiff’s application was supported by the affidavit of the plaintiff sworn on 6<sup>th</sup> July 2013. In the said affidavit, the plaintiff stated that; the plaintiff is the registered proprietor of the suit property. The suit property was transferred and registered in the name of the plaintiff through transmission on 28<sup>th</sup> October 2002 from the name of her deceased husband one, Ole Kiyiapi Samson. Ole Kiyiapi Samson, deceased was allocated the suit property in the year 1997 upon the dissolution of Shartuka Group Ranch and the division of its land among the members of whom Ole Kiyiapi Samson (deceased) was one. The plaintiff and her deceased husband took possession and occupied the suit property peacefully until the year 2010 when the defendant entered the suit

- property and fenced off a portion thereof measuring 32 acres claiming that the same formed part of the defendant's land the particulars of which the defendant did not provide.
4. The plaintiff stated further that; the defendant has since the date of the said invasion engaged in acts of waste on that portion of suit property which includes, cutting down trees, cultivation and cattle grazing despite demand having been made upon the defendant to cease the said activities. The plaintiff stated further that, the defendant had claimed in his defence filed herein that the activities complained of by the plaintiff are being carried out on the defendant's own parcel of land known as LR No. Transmara/Shartuka/1582 ("Plot No. 1582"). However, a search on Plot No. 1582 at the Land Registry disclosed that Plot No. 1582 is non-existent the title thereof having been cancelled through a court order. Further inquiries made at the survey's office disclosed that Plot No. 1582 does not share a boundary with the suit property. Despite these revelations, the defendant has continued to cut down of trees on the disputed portion of the suit property and to interference with the plaintiff's use of the same. The plaintiff stated further that, the defendant has since the filing of this suit extended his activities outside the initial 32 acres that he had annexed in the year 2010 and seems to be intent in acquiring the entire land comprised in the suit property. It is on account of the foregoing that the plaintiff has been forced to seek the injunctive reliefs prayed for herein.
  5. The plaintiff's application was opposed by the defendant through a replying affidavit sworn on 22<sup>nd</sup> July 2013. In his replying affidavit, the defendant maintained that he occupies and carries out his activities which does not include cutting down of tress on plot No. 1582 which is registered in his name. The defendant contended that Plot No. 1582 shares a boundary with the suit property which boundary was established in the year 1991 when Plot No. 1582 was allocated to him by Shartuka Group Ranch. The defendant denied that the title of Plot No. 1582 is nonexistent and contended that the issue as to whether or not the said property is in existence can only be determined at the plenary hearing of this suit. The defendant denied further that he has excised a portion of the suit property measuring 32 acres as claimed. The defendant also denied that he has cut down trees on the suit property as claimed by the plaintiff. The defendant contended that contrary to the plaintiff's claim that he has trespassed on the suit property, the common boundary between the suit property and Plot No. 1582 owned by the defendant is intact. The defendant contended further that he depends on Plot No. 1582 for his livelihood and as such if the orders sought are granted the same would subject him and his family to irreparable loss. The defendant took issue with the photographs annexed to the plaintiff's affidavit terming them unreliable the same having been taken by persons who are not professional photographers.
  6. On 24<sup>th</sup> July 2013 the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The plaintiff filed her submissions on 6<sup>th</sup> November 2013 while the defendant's submissions were filed on 19<sup>th</sup> November 2013. I have considered the plaintiff's application and the affidavit filed in support thereof. I have also considered the defendant's affidavit in reply. Finally, I have considered the written submissions filed by advocates for the parties and the authorities cited. The law on interlocutory injunctions is now well settled be it prohibitory injunction or mandatory injunction. An applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that unless the injunction is granted, he will suffer irreparable loss. If the court is in doubt, it will determine the application on a balance of convenience.
  7. See the case of, **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**. For a temporary mandatory injunction, the same can only be granted in clear and obvious cases and again, only in exceptional circumstances. The onus was on the plaintiff to satisfy the said conditions for granting prohibitory and mandatory injunction. The plaintiff's case as pleaded in the plaint is that the defendant who is the proprietor of Plot No. 364 which shares a common boundary with the suit property had trespassed on and excised a portion of the suit property measuring 32 acres on which the defendant commenced acts of cutting down of trees, charcoal burning and cattle grazing. In the application before me, the plaintiff has accused the defendant of the same ills save that the defendant is said to have since the filing of the suit extended his activities beyond the 32 acres that he had annexed and fenced off earlier. The plaintiff has accused the defendant of trespass. Trespass is any unjustifiable intrusion by a person upon the land that is in the possession of another. The plaintiff has demonstrated that the suit property is registered in her name and this fact is not disputed by the defendant. The plaintiff's title to the suit property is therefore not in

- dispute. What is disputed is whether or not the defendant has trespassed on the suit property. The defendant has denied the plaintiff's claim that he has trespassed on the suit property.
8. As I have stated above, the defendant's contention is that the activities complained of by the plaintiff save for the cutting down of trees are being undertaken by the defendant on the defendant's own parcel of land namely, Plot No. 1582 which shares a boundary with the suit property. The defendant has exhibited a copy of the title deed for Plot No. 1582 in his name in proof of the fact that the said parcel of land is registered in his name. The plaintiff has on the other hand placed material before the court which casts serious doubt on the existence of Plot No. 1582 which the defendant claims to belong to him and from where he claims to be carrying out the activities complained of by the plaintiff. There is no doubt that the defendant is in occupation of a parcel of land which shares a boundary with the suit property. Whether the said parcel of land is Plot No. 340 as claimed by the plaintiff or Plot No. 1582 as claimed by the defendant may not be determined at this stage.
  9. The plaintiff has placed evidence before this court in the form of photographs which show that trees are being cut down and cattle are being grazed on a portion of land which the plaintiff claims to be part of the suit property and the defendant claims to be part of his parcel of land namely, Plot No. 1582. Apart from the plaintiff's claims or allegations, I have no other evidence before me that the activities complained of by the plaintiff are being undertaken on the suit property. I am in agreement with the plaintiff that the existence of the defendant's alleged title over Plot No. 1582 is in doubt. In my view however, whether the defendant's parcel of land is Plot No. 340 or Plot No. 1582 does not matter.
  10. What is in issue is whether the defendant has crossed the boundary of his parcel of land wherever situated and entered the suit property. I have no evidence before me of this fact. What I have is the plaintiff's claim and the defendant's denial. I have no reason to believe the plaintiff's word as opposed to that of the defendant. Due to the foregoing, I am doubtful whether the plaintiff has a prima facie case against the defendant. I have no evidence before me on the extent of the defendant's alleged trespass on the suit property. It has been alleged that the defendant has excised a portion of the suit property measuring 32 acres. I have no evidence before me in proof of this allegation. I am unable therefore to assess the plaintiff's possible loss in the event that the injunction sought is not granted. In the circumstances, I am equally doubtful whether the plaintiff would suffer irreparable loss unless the injunction sought is granted.
  11. In view of the conclusion that I have arrived at above, the plaintiff's application falls for consideration on a balance of convenience. There is clear evidence that trees are being cut down in the disputed parcel of land. There is also evidence of cattle grazing. Both activities are detrimental to the environment and have an impact on land quality more particularly if the land is normally used for cultivation. It follows therefore that if these activities are not restrained and the plaintiff proves at the trial that indeed the defendant who is accused of these activities has trespassed on the suit property, the plaintiff would have suffered great loss and damage arising from the wanton destruction of trees and other vegetation on the suit property.
  12. On the other hand, if the defendant is restrained from carrying out the activities complained of and the defendant proves at the trial that the activities being complained of are being carried out on the defendant's own parcel of land, the defendant will have his land back intact. He would have suffered no loss save for the inconvenience of looking for another grazing field and may be another tree endowed area from which to continue cutting down trees if at all he is engaged in the activity. In the circumstances, the balance of convenience tilts in favour of the plaintiff. Apart from the temporary prohibitory injunction, the plaintiff had also sought a temporary mandatory injunction. As I have stated above, the plaintiff's case against the defendant is not clear and obvious. The plaintiff has therefore failed to satisfy the condition for granting a temporary mandatory injunction. The upshot of the foregoing is that the plaintiff's application dated 6<sup>th</sup> July 2013 succeeds only in part. The same is hereby allowed in terms of prayer 4 thereof. The costs of the application shall be in the cause.

**Delivered, signed and dated at KISII this 18<sup>th</sup> day of July, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Miss Nekesa h/b for Mr. Oguttu for the plaintiff

Mr. Bigogo for the defendant

Mr. Mobisa Court Clerk.

**S. OKONG'O**

**JUDGE**