



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 286 OF 2013**

**STEPHEN OLE BARTA .....1<sup>ST</sup> PLAINTIFF**

**MORETET OLE BARTA (Suing as the legal representative of the  
estate of the late OLOISHURO OLE BARTA KURA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FARAH AWARD.....1<sup>ST</sup> DEFENDANT**

**SONKOI OLE MUNKASIA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs are the legal representatives of the estate of one, Oloishuro Ole Barta Kura, deceased (hereinafter referred to only as “**the deceased**”). The plaintiffs brought this suit against the defendants on 26<sup>th</sup> June 2013 seeking; a declaration that the plaintiffs are the legal representatives of the deceased hence the legal or rightful owners of all that parcel of land known as LR No. Trans-Mara/Kerrinkani/530 (hereinafter referred to as “**the suit property**”), a temporary injunction to restrain the defendants from taking possession, alienating, selling, transferring, developing or in any way dealing or interfering with the plaintiffs ownership and possession of the suit property, a permanent injunction for the same purpose, vacant possession and costs of the suit.

2. In the plaint dated 24<sup>th</sup> June 2013, the plaintiffs averred that at all material times the deceased was registered as the proprietor of all that parcel of land known as LR No. Trans-Mara/Kerrinkani/9 (“Plot No. 9”) which parcel of land was allocated and registered in the name of the deceased by Kerrinkani Group Ranch in which the deceased was a member. The deceased thereafter caused Plot No. 9 to be subdivided into five (5) portions namely LR No. Trans-Mara/Kerrinkani/398, 399, 400, 530 (“the suit property”) and 531. Whereas the deceased sold LR Nos. Trans-Mara/Kerrinkani/398, 400 and 531 during his life time, he retained LR Nos. Trans-Mara/Kerrinkani/399 and 530 (“the suit property”) in his name. The plaintiffs averred that the defendants have trespassed on the suit property and interfered with the plaintiff’s possession thereof and the plaintiffs are apprehensive that the defendants may proceed to sell or alienate the suit property to third parties unless stopped by the court.

3. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 26<sup>th</sup> June 2013 that was brought under Order 40 rules 1 and 2 of the Civil Procedure Rules and section 63 (c) and (e)

of the Civil Procedure Act, Cap 21 Laws of Kenya seeking a temporary injunction to restrain the defendants by themselves or through their agents or servants from further entering, occupying, cultivating, leasing, selling, transferring or in any way dealing with the suit property pending the hearing and determination of this suit. The plaintiffs' application was supported by the affidavit of the 1<sup>st</sup> plaintiff Stephen Ole Barta, sworn on 24<sup>th</sup> June 2013. In the said affidavit, the plaintiffs reiterated the contents of the plaint that I have highlighted herein above at the beginning of this ruling. The plaintiffs contended that the defendants have unlawfully entered into the suit property and started cultivation thereon thereby interfering with the plaintiff's possession and use of the property.

4. The plaintiffs contended further that the 1<sup>st</sup> defendant was not a member of Kerrinkani Group Ranch and as such could not have been allocated a portion of the said Group Ranch's land during the process of land adjudication. For the 2<sup>nd</sup> defendant, the plaintiffs contended that he was a member of Kerrinkani Group Ranch and was allocated two (2) parcels of land namely, LR Nos. Trans-Mara/Kerrinkani/230 and 248. The 2<sup>nd</sup> defendant therefore has no valid reason for interfering with the suit property. The plaintiff's contended that the parcel of land namely, LR No. Trans-Mara/Kerrinkani/8 ("**Plot No. 8**") which the 1<sup>st</sup> defendant claims to be owning in the area does not exist on the ground and as such the plaintiffs are apprehensive that the suit property on which the defendants have trespassed may be sold by the defendants to third parties as part of the said Plot No. 8. The plaintiffs annexed several documents to their affidavit as exhibits to demonstrate that the deceased owned Plot No.9 and that he caused the same to be sub-divided into several parcels one of which is the suit property. The plaintiffs' application was opposed by the defendants. The plaintiffs also annexed to their affidavit a list said to contain the names of the members of Kerrinkani Group Ranch and an extract of the registry index map for Trans-Mara/Kerrinkani registration area (Sheet No.4) to demonstrate that the 1<sup>st</sup> defendant was not a member of Kerrinkani Group Ranch and that Plot No. 8 does not exist. The defendants filed a replying affidavit sworn by the 1<sup>st</sup> defendant on 8<sup>th</sup> July 2013 in opposition to the application.

5. In his affidavit, the 1<sup>st</sup> defendant contended that he has at all material times resided on and cultivated portions of Plot No. 8 which was adjudicated, demarcated and registered in his name. the 1<sup>st</sup> defendant annexed to his affidavit as exhibits copies of the title deed for the suit property, the registry index map (RIM) for Kerrinkani adjudication section, adjudication record and certificate of official search to demonstrate that Plot No. 8 exists and that it is registered in his name as the owner thereof. The 1<sup>st</sup> defendant contended that whereas the deceased was registered as the owner of Plot No. 9 before it was sub-divided to give rise to among others the suit property, the 1<sup>st</sup> defendant was registered as the owner of Plot No. 8 and that the two (2) parcels of land shared a common boundary which was not fixed.

6. The 1<sup>st</sup> defendant contended that a dispute arose over the boundary of the two parcels of land which dispute was determined by the land registrar, Trans-Mara District in the year 2002. The 1<sup>st</sup> defendant annexed to his affidavit a copy of a report dated 17<sup>th</sup> May 2002 prepared by the District Land Registrar, Trans-Mara District on the determination of a boundary dispute that involved Plot No. 8 and Plot No. 9. The 1<sup>st</sup> defendant contended that the 1<sup>st</sup> defendant and the deceased lived in peace after the said boundary dispute was resolved until sometimes in the year 2011 when the deceased decided to sub-divide plot No. 9 into seven (7) portions which sub-division gave rise to the suit property.

7. The 1<sup>st</sup> defendant contended that during the said subdivision, the deceased interfered with the original boundary that had been fixed by the land registrar as aforesaid and this is what has led to the current claim by the plaintiffs over a portion of Plot No. 8 which is occupied by the 2<sup>nd</sup> defendant with the permission of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant contended that the portion of Plot No. 8 which is being claimed by the plaintiffs does not form part of the suit property and that the 1<sup>st</sup> defendant has occupied the same for a period of over 30 years. The 1<sup>st</sup> defendant contended that there is no basis upon which the injunction sought can issue. The 1<sup>st</sup> defendant contended that the plaintiffs' complaint concerns a boundary dispute which this court has no jurisdiction to determine in the first instance.

8. On 17<sup>th</sup> July 2013 the advocates for the parties agreed to argue the plaintiffs' application by way of written submissions. The plaintiffs filed their written submissions on 12<sup>th</sup> June 2014 while the defendants filed their submissions in reply on 11<sup>th</sup> March 2014. I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the 1<sup>st</sup> defendant's affidavit in opposition to the application. Finally, I have considered the written submissions by the advocates for both parties and the case law and statutes cited therein. In the cases of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358** and **Aikman -vs- Muchoki [1984] KLR 353**, the conditions for granting interlocutory injunction were set out as follows;

**a. The probability of success of the applicant's claim;**

**b. The likelihood of irreparable harm which would not be compensated for by damages.**

**c. If in doubt, the court should decide the matter on balance of convenience.**

9. The plaintiffs' claim against the defendants is based on the tort of trespass. In Clerk and Lindsell on Torts, 18<sup>th</sup> Edition at page 923 trespass is defined as "*any unjustifiable intrusion by one person upon the land in the possession of another*". The plaintiffs were under a duty to demonstrate to the court that the defendants have entered and occupied their parcel of land without any justifiable cause. The plaintiffs have placed sufficient evidence before court in proof of the fact that the plaintiffs are the administrators of the estate of the deceased and that the deceased is the registered proprietor of the suit property. The title of the deceased over the suit property is therefore not in dispute. What is disputed is whether the defendants have trespassed on the suit property. The defendants have denied that they have trespassed on the suit property. The defendants have contended that the portion of land on which they are said to have trespassed is part of Plot No. 8 which is registered in the name of the 1<sup>st</sup> defendant.

10. The 1<sup>st</sup> defendant has placed before court a copy of a title deed and a certificate of official search in respect of the title of the suit property in proof of his ownership of the said parcel of land. The plaintiffs have contended that Plot No. 8 does not exist on the ground. No evidence has however been placed before the court by the plaintiffs in support of this contention. On the material before me, I am satisfied that Plot No. 8 is in existence and that it is registered in the name of the 1<sup>st</sup> defendant. With the defendants' claim that the disputed portion of land is part of Plot No. 8 and the plaintiff's claim that the same is part of the suit property, the contest becomes a boundary dispute. I have no evidence before me that the portion of land in dispute is part of the suit property and not part of Plot No. 8 as claimed by the defendants. This is an issue that this court cannot determine at this stage.

11. The much I can say is that the plaintiffs have failed to prove on a prima facie basis that the defendants have trespassed on the suit property. The plaintiffs have therefore failed to satisfy the first condition for granting a temporary injunction. The plaintiff having failed to establish a prima facie case with a probability of success, against the defendants, I am not obliged to consider whether the plaintiffs would suffer irreparable injury unless the injunction sought is granted. The upshot of the foregoing is that the plaintiffs' application dated 26<sup>th</sup> June 2013 is not for granting. The same is dismissed with costs to the defendants.

**Delivered, signed and dated at KISII this 7<sup>th</sup> day of August, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for the plaintiffs

Mr. Ombachi h/b for Oguttu for the defendants

Mr. Mobisa Court Clerk.

**S. OKONG'O**

**JUDGE**