



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 528 OF 2012**

**ORAMAT OLE SENTU..... PLAINTIFF**

**VERSUS**

**EMMANUEL LEKISHON KAYO ..... DEFENDANT**

**RULING**

1. The plaintiff brought this suit against the defendant on 20<sup>th</sup> November 2012 seeking; a declaration that the plaintiff is the registered and/or lawful owner of Plot No. 488, Olomismis Group Ranch (hereinafter referred to only as “Plot No. 488”), an order for the eviction of the defendant from the said Plot No. 488, a permanent injunction restraining the defendant from trespassing on, interfering and/or in any other manner dealing with Plot No. 488 and, general damages for trespass.
2. In his plaint dated 19<sup>th</sup> November 2012, the plaintiff averred that, at all material times the plaintiff was and still is the proprietor of Plot No. 488 which measures 62.78 acres and that the said property was allocated to the plaintiff by Olomismis Group Ranch (hereinafter referred to only as “the ranch”). The plaintiff averred further that on or about 23<sup>rd</sup> September 2012, the defendant without the plaintiff’s consent or any other lawful cause entered Plot No. 488 and took possession of a portion thereof measuring 8 acres on which the defendant commenced cultivation. The plaintiff claimed that as a result of the defendant’s said act of trespass, the plaintiff has been deprived of the right to occupy and use the said portion of Plot No. 488 thereby exposing the plaintiff to loss and damage.
3. The defendant entered appearance and filed his statement of defence on 31<sup>st</sup> January 2013. In his defence to the plaintiff’s claim, the defendant contended that Plot No. 488 is part of community land and that the same is not surveyed and has no fixed boundaries. The defendant contended that Plot No. 488 lies within the ranch and that he is a beneficiary of Plot No. 491 within the said ranch by virtue of being a successor in title to his late father one, Olekayeu Kiramba Chesirikan. The defendant contended that he has occupied the said parcel of land known as Plot No. 491 as it was during the lifetime of his late father aforesaid and that it is the plaintiff who has encroached on a portion thereof on which the plaintiff has been grazing cattle. The defendant denied the plaintiff’s claim in its entirety and challenged the plaintiff to prove the same.
4. The plaintiff amended the plaint on 1<sup>st</sup> October 2013 and averred that Plot No. 488 has since been registered as LR No. Transmara/ Olomismis/766 (hereinafter referred to as “**the suit property**”) with a measurement of 25.169ha. On his part, the defendant also amended his statement of defence on 28<sup>th</sup> January 2014 and reiterated that the suit property is community land. The defendant contended further that the adjudication, survey and registration of Plot No. 491 which is under his occupation is pending the

outcome of Kisii HCCC No. 249 of 2013 (E&LC).

5. What is now before me is the plaintiff's application brought by way of Notice of Motion dated 10<sup>th</sup> April 2014 in which the plaintiff has sought a temporary injunction to restrain the defendant from entering into, trespassing onto, cultivating, planting sugarcane, grazing, building structures, felling trees, 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. The plaintiff's application was brought on the ground that while this suit is pending the defendant has commenced cultivation on a portion of the suit property measuring about 8 acres on which he had trespassed earlier with a view to planting sugarcane thereon. The plaintiff has annexed to his affidavit sworn on 10<sup>th</sup> April 2014 in support of the application; a copy of a certificate of official search in respect of the suit property which shows that the suit property was registered in the name of the plaintiff on 24<sup>th</sup> May 2013, a copy of the title deed for the suit property in the name of the plaintiff and photographs showing the extent to which the defendant is said to have cultivated the disputed portion of the suit property in readiness for planting sugarcane.

6. The plaintiff's application was opposed by the defendant. The defendant filed a replying affidavit and further affidavit on 23<sup>rd</sup> April 2014 and 5<sup>th</sup> May 2014 respectively in opposition to the application. In his replying affidavit the defendant denied that he has trespassed on the suit property as claimed by the plaintiff. The defendant has contended that he is in occupation of his deceased mother's parcel of land known as LR No. Trans-Mara/Olomismis/769 (hereinafter referred to only as "**Plot No. 769**") which is registered in the name of one, Nawuoshi Ene Kayeu. The defendant has contended further that his said deceased mother was original member of the ranch and was assigned membership no. 126.

7. The defendant has contended further that Plot No. 769 has always been measuring 60 acres which measurement has at no time been reduced. The defendant has reiterated that he is in occupation of Plot No. 769 as a beneficiary of his late mother Nawuoshi Ene Kayeu and that he has not trespassed on the suit property. In the further affidavit, the defendant deposed that Plot No. 769 which he is occupying measures 38.632 acres and that the disputed parcel of land which measures 8 acres is part of Plot No. 769 and not part of the suit property as claimed by the plaintiff. The defendant reiterated that it is the plaintiff who is attempting to annex a portion of Plot No. 769 measuring 8 acres. The defendant annexed to his further affidavit a certificate of official search in respect of Plot No. 769 which shows that the plot is registered in the name of one, Nenkoko Nonkipa Ketere and that it measures 16.148ha.

8. In response to the defendant's further affidavit, the plaintiff filed a supplementary affidavit on 3<sup>rd</sup> June 2014 in which the plaintiff deposed that Plot No. 769 which the defendant claims to be occupying as a beneficiary of his late mother Nawuoshi Ene Kayeu is actually registered in the name of one, Nenkoko Nonkipa Kerere and that the defendant has in fact lodged a civil case before this court namely, Kisii E&LC No. 174 of 2014 in which the defendant has sued among others the said Nenkoko Nonkipa Ketere and the ranch seeking the cancellation of the title of the said property. The plaintiff has deposed further that in view of the fact that Plot No. 769 is registered in the name of a third party, the defendant has no legitimate interest in the same in respect of which he can seek protection. The plaintiff has deposed further that he has no dispute with the registered owner of Plot No. 769 who has in fact acknowledged his interest in the disputed portion of the suit property. It is the plaintiff's contention that the defendant who is a stranger to Plot No. 769 has no business challenging his title to the suit property.

9. On 6<sup>th</sup> May 2014, the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The plaintiff filed his submissions on 3<sup>rd</sup> June 2014 while the defendant did the same on 5<sup>th</sup> June 2014. I have considered the plaintiff's application together with the two (2) affidavits filed in support thereof. I have also considered the replying affidavit and further affidavit filed by the defendant in opposition to the application. Finally, I have considered the written submissions filed by both parties and the authorities cited. In the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the principles for granting an interlocutory injunction were set out as follows:

- i. **The applicant must show a prima facie case with a probability of success.**

- ii. **An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated.**
- iii. **If the court is in doubt, it will decide the application on a balance of convenience.**

10. In the same case, the court defined a prima facie case in a civil application as “**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**”. The plaintiff’s claim herein is that he is the registered owner of the suit property and that the defendant has entered onto the said property and taken possession of a portion thereof measuring 8 acres which he has now ploughed in readiness for planting sugarcane. The defendant has not denied that he is in occupation of the disputed property or that he has ploughed the same for the purposes of planting sugarcane. The defendant’s contention is that the disputed 8 acres piece of land is part of Plot No. 769 which he has occupied in his capacity as the successor of his deceased mother one, Nawuoshi Ene Kayeu. The defendant has contended that this suit is an attempt by the plaintiff to annex the said portion of Plot No. 769.

11. The plaintiff has placed before the court adequate material in proof of his ownership of the suit property. The plaintiff has also placed evidence before me that a portion of the suit property has been ploughed by the defendant for the purposes of planting sugarcane a fact which, the defendant has not denied. On the other hand, the defendant has not placed any material before this court in proof of his interest in Plot No. 769 which he claims to occupy and on which he also claims that the disputed piece of land falls. The documents placed before the court by both the defendant and the plaintiff show that Plot No. 769 is owned by one Nenkoko Nonkipa Ketere and not by the defendant’s deceased mother as contended by the defendant. The defendant concealed to this court the fact that he has filed a suit against the said Nenkoko Nonkipa Ketere over Plot No. 769 which suit was filed on the same day when the defendant filed his further affidavit herein on 6<sup>th</sup> May 2014.

12. Since the defendant is not the registered owner of Plot No. 769, I see no basis on which he can lay a claim to the disputed parcel of land even if it is assumed that that the same is part of Plot No. 769 as claimed by the defendant. Due to the foregoing, I am satisfied that the plaintiff has established a prima facie case against the defendant with a probability of success. I am also satisfied that the plaintiff stands to suffer irreparable injury unless the orders sought are granted. The plaintiff has contended that he has all along owned and occupied the suit property until 23<sup>rd</sup> September 2012 when the defendant without his permission entered into the suit property and took possession of a portion thereof measuring 8 acres.

13. In the Court of Appeal case of, **George Orango Orago –vs- George Liewa Jagalo & 3 Others, Kisumu Civil Appeal No. 62 of 2009** (Unreported), the Court stated that where a registered owner of land is in possession, prima facie he must be taken to be the owner of the land until his title is set aside and there is no proper basis for dispossessing him of the land. The court noted that to deny such owner an injunction has the effect of dispossessing of the land. Applying the same reasoning here, I am of the view that to deny the plaintiff the injunction sought would in effect dispossess him of the portion of the suit property in dispute and this will no doubt occasion him irreparable loss.

14. In conclusion, it is my finding that the plaintiff has satisfied the principles for granting interlocutory injunction. The plaintiff’s application dated 10<sup>th</sup> April 2014 is allowed in terms of prayer 3 thereof. The plaintiff shall have the costs of the application.

**Delivered, signed and dated at KISII this 31<sup>ST</sup> of October, 2014.**

**S. OKONG’O**

**JUDGE**

**In the presence of:-**

Mr. Oguttu-Mboya for the plaintiff

Mr. Soire h/b for Kasamani for the defendant

Mr. Mobisa Court Clerk