



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 89 OF 2012**

**JOSEPH KIPNGETICH BET.....PLAINTIFF**

**VERSUS**

**ANTONY LANGAT.....1<sup>ST</sup> DEFENDANT**

**SAMWEL SANG.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff brought this suit on 14<sup>th</sup> March, 2012. In his Plaint dated 13<sup>th</sup> March, 2012, the plaintiff sought two (2) main reliefs namely, a declaration that the Plaintiff is the sole and exclusive owner and/or proprietor of all that parcel of land known as LR No. Transmara/Kerinkani/106 (hereinafter referred to as “**the suit property**” where the context admits) and a permanent injunction to restrain the defendants from trespassing and/or interfering with the Plaintiff’s activities and rights over the suit property in any manner whatsoever and/or howsoever.
2. On the same date, namely, 14<sup>th</sup> March, 2012, the plaintiff filed

an application by way of Notice of motion dated 13<sup>th</sup> March, 2012 seeking a temporary injunction to restrain the defendants from moving into the suit property and/or in any other manner howsoever and whatsoever, interfering with the suit property pending the hearing and determination of this suit. In his affidavit sworn on 13<sup>th</sup> March, 2012 in support of the application, the Plaintiff stated that he is the registered proprietor of the suit property which he acquired on first registration after the adjudication process in the area. The Plaintiff stated further that on 6<sup>th</sup> March, 2012, the defendants entered the suit property with two employees with an oxen plough for the purpose of tilling the suit property in readiness for the year 2012 planting season and that the Plaintiff and his relatives chased away the defendants and their employees aforesaid from the suit property. The Plaintiff stated that the defendants and their agents or employees aforesaid are still threatening to proceed with cultivation on the suit property.

The Plaintiff stated further that the suit property does not share a boundary with any land owned by the defendants and as such the defendants have no interest whatsoever on the suit property. The Plaintiff contended that the defendants’ activities aforesaid are unlawful and amounts an infringement of the Plaintiff’s constitutional rights to own property and that this is a fit and property case to grant a temporary injunction. The Plaintiff annexed to his affidavit in support of the application a copy of the title deed for the suit property in his name and a copy of certificate of official search which shows that the Plaintiff is the registered proprietor of the suit property. The Plaintiff’s application was opposed by the defendants. The defendants filed a replying affidavit sworn by the 1<sup>st</sup> defendant in response to the application. In the said affidavit sworn on 25<sup>th</sup> June, 2012, the defendants denied ever encroaching and/or trespassing on the

suit property. The defendants claimed that they were occupying and cultivating

parcel of land known as LR. No. Transmara/ Kerinkani/ 191 (hereinafter referred to as “**Plot No.191**”) which is separate and distinct from the suit property. The defendants claimed further that Plot No. 191 and the suit property are separated by a road which acts as a boundary between the two plots and that their activities were restricted within the boundary of Plot No. 191 which they hold on a lease from the proprietor thereof one, Parsaria Ole Maita. The defendants contended that the Plaintiff’s suit is baseless and constitutes an abuse of the process of the court. The defendants annexed to the affidavit of the 1<sup>st</sup> defendant aforesaid a copy of the title deed for Plot No. 191 which shows that it is registered in the name of the said Parsaria Ole Maita and a copy of the registry index map for the area which shows that Plot No. 191 and the suit property are separated by a road.

3. The application came up for hearing before me on 5<sup>th</sup> March,

2013 when Mr. Otieno, advocate, appeared for the Plaintiff.

There was no appearance for the defendants. Since the date was taken by consent, I allowed Mr. Otieno to argue the application. Mr. Otieno reiterated the contents of the Plaintiff’s affidavit filed in support of the application. He submitted that it was common ground that the suit property does not share a boundary with Plot No. 191 which the defendants claimed to be occupying. He submitted that the registry index map exhibited by the defendants shows clearly that there is a road which forms the boundary between the suit property and Plot No. 191. He submitted that that road is on the ground just as it is indicated in the map aforesaid and there has never been a dispute between the Plaintiff and the owner of Plot No. 191 over the boundary of the two plots. Mr. Otieno submitted further that apart from a copy of the title deed for Plot No. 191 which the defendants exhibited, the defendants did not place any material before the court to show that they have a lease over Plot No.191. Counsel submitted that the defendants

neither own nor occupy and land in the area and are mere trespassers on the suit property.

4. As was stated in the case of **Giella –vs- Cassman Brown & Company Limited [1973] E.A. 358**, an applicant for a temporary injunction must satisfy the court that he has a prima facie case with a probability of success and that unless, the orders sought are granted, he will suffer irreparable loss that cannot be compensated in damages. If the court is in doubt as to the above, the court will determine the matter on a balance of convenience. The plaintiff has annexed to his affidavit in support of the application a copy of a title deed and a certificate of official search for the suit property to prove that the plaintiff is the registered proprietor of the suit property. The defendants have not denied the Plaintiffs title to the suit property. The ownership of the suit property is therefore not in dispute. What is in dispute is whether the defendants have trespassed on the suit property or not. The Plaintiff’s claim

against the defendants is based on the tort of trespass. In the book, **Clerk & Lindsell on Torts, 18<sup>th</sup> Edition at paragraph 18-01**, trespass to land is defined as consisting of “**any unjustifiable intrusion by one person upon land in the possession of another.**” In the same book, it is stated that trespass is actionable at the suit of the person in possession of the land (paragraph 18-10) and that proof of ownership is a prima facie proof of possession (paragraph 18-110). In this case therefore, the Plaintiff was under a duty to show on a prima facie basis that the defendants had unjustifiably entered the suit property which was in his possession. The Plaintiff did not place any material before the court to prove the alleged acts of trespass on the suit property by the defendants. In the face of the defendants’ denial, the Plaintiff ought to have gone beyond mere allegation and placed some evidence before the court to prove or show the trespass complained of. It is common ground that the suit property and Plot No. 191 which the

defendants claimed to occupy are separated by a road. The defendants have claimed that they have restricted their activities on their side of the road while the Plaintiff claimed otherwise. The onus was upon the Plaintiff to show that the defendants had actually crossed the said road. It is worth noting that it is actually the defendants who brought to the attention of the court the fact that the two properties are

separated by a road. Due to the foregoing the merit of the Plaintiff's trespass claim against the defendants is doubtful. As to whether the Plaintiff would suffer irreparable harm unless the orders sought are granted, there is no evidence that the defendants have trespassed into the suit property and even if they did, there is no evidence that the defendants intended to plough the whole of the suit property thereby leaving the Plaintiff with no land to cultivate. This claim in my view is also doubtful.

5. Due to the foregoing, the Plaintiff's application falls for

consideration on a balance of convenience. On the facts of this case, I am of the view that the balance of convenience tilts against the granting of the injunction sought. The most appropriate order to make in the circumstances would be to maintain the status quo. The parties have both agreed that the suit property and Plot No. 191 are separated by a road which is both on the registry index map and on the ground. I order therefore that neither party shall cross that agreed boundary between Plot No.191 and the suit property pending the hearing and determination of this suit. The costs of this application shall be in the cause.

**Signed, dated and delivered at Kisii this 24<sup>th</sup> day of May, 2013.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

**Miss Kusa for the plaintiff**

**Mr. Oguttu for the defendants**

**Mr. Mobisa Court Clerk.**

**S. OKONG'O,**

**JUDGE.**