



NO.110

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ENVIRONMENT & LAND CASE NO. 7 OF 2012

KIPAE OLE KANUNKA.....PLAINTIFF

VERSUS

JOSEPH TIARIKAT..... DEFENDANT

RULING

1. The plaintiff herein is the registered proprietor of all that parcel of land known as **LR No. Trans-Mara/ Moita/ 376** which measures approximately 8.56 hectares situated in Trans-Mara West District, Narok County (hereinafter referred to as “**the suit property**”). The suit property was registered in the name of the Plaintiff on 15th December, 1997. The Plaintiff has brought this suit against the defendant claiming that on or about the 14th day of November, 2012, the defendant without the authority or permission from the plaintiff trespassed onto the suit property and cut down assorted mature trees valued at Ksh.189,483.20. The Plaintiff has claimed further that the defendant has also commenced the clearance of a portion of the suit property with a view to carrying out cultivation thereon an act that will deny the Plaintiff the enjoyment of his proprietary rights and interests over the suit property. The plaintiff claims that his absolute and exclusive right to occupy, possess and use the suit property has been interfered with by the defendant and that the defendant’s acts aforesaid are bound to deny and deprive the Plaintiff of the use of a substantial portion of the suit property. In his plaint dated 3rd December, 2012 which was filed in court on 3rd December, 2012, the Plaintiff has sought; a declaration that he is the registered and lawful owner of the suit property, a permanent injunction to restrain the defendant from entering onto, re-entering, trespassing onto, fencing, cultivating, grazing on, building structures, cutting down trees, interfering with and/or in any manner dealing with the suit property or any portion thereof, special damages and general damages.
2. The defendant filed his statement of defence to the Plaintiff’s claim on 4th February, 2013 denying the claim in its entirety. The defendant denied ever trespassing on or encroaching upon the suit property. The defendant also denied cutting down the Plaintiff’s assorted trees on the suit property and clearing a portion of the suit property for cultivation. The defendant contended that he has for the last 35 years been occupying, grazing on and cultivating a parcel of land situated at Mashurura Location which parcel is distinct and separate from the suit property if the suit property exists at all on the ground. The defendant contended that the orders sought by the Plaintiff if granted would cause him heavy losses and deprive him of the right to own property which is guaranteed under Article 40 of the Constitution of Kenya.

3. On 29th January, 2013, the plaintiff filed an application by way of Notice of motion dated 28th January, 2013 for an order of a temporary injunction to restrain the defendant from entering onto, re-entering, trespassing onto, fencing, cultivating, grazing on, building structures, cutting down trees, interfering with and/or in any manner dealing with the suit property or any portion thereof pending the hearing and determination of this suit. The plaintiff's application was based on the grounds set out in the body thereof and on the affidavit of the plaintiff sworn on 28th January, 2013, in support thereof. In his grounds in support of the application and the supporting affidavit, the plaintiff reiterated the contents of the plaint that I have already summarized hereinabove. The plaintiff deposed that he is the lawful, bona fide and exclusive proprietor of the suit property. The Plaintiff stated further that on or about 14th November, 2012, the defendant without any lawful cause or basis entered the suit property and cut down assorted trees thereon valued at Ksh. 189, 438.20 and at the same time started clearing a portion of the suit property for cultivation. The Plaintiff contended that the defendant had continued with the said acts complained of despite a written demand upon him to stop and even after being served with the summons to enter appearance in this suit. The Plaintiff contended that he has a prima facie case with a probability of success against the defendant and that he stands to suffer irreparable harm unless the orders sought are granted. The Plaintiff annexed to his affidavit in support of the application; a copy of the title deed for the suit property dated 15th December, 1997 in his name, a copy of certificate of official search on the title of the suit property dated 12th November, 2012, a copy of an assessment report by the Kenya Forest Service dated 15th November, 2012 on the damage that was allegedly done to the trees on the suit property by the defendant, a copy of the demand letter dated 20th November, 2012 addressed to the defendant and copies of photographs of the trees that were allegedly cut down by the defendant on the suit property. The Plaintiff's application came before me for hearing ex-parte on 29th January, 2013 when I certified the same as urgent, granted an interim temporary injunction and directed that the application be served for hearing inter partes on 11th February, 2013.
4. The application was served upon the defendant, who filed an affidavit in reply thereto on 6th February, 2013. In his response to the application, the defendant reiterated the contents of his defence to the Plaintiff's claim and termed the injunction application as ill-intentioned, frivolous, and vexatious and an abuse of the process of the court. The defendant stated in his said affidavit that the Plaintiff resides several kilometers from the area where the defendant resides and carries on his activities and that the Plaintiff has never resided on or planted any trees on the parcel of land in the occupation of the defendant which the defendant could be accused of cutting down. The defendant stated that he had no idea of where the suit property is on the ground if it exists at all and that as far as he is concerned, he is occupying and carrying out other gainful activities on his late father's parcel of land which he has occupied for the last 35 years and on which land neither he nor any member of his family has felled any tree. The defendant contended that the Plaintiff's allegation that he had trespassed into the suit property and cut down a number of assorted trees is nothing but "concoctions" of the Plaintiff's imagination aimed merely at misleading the court so as to obtain the injunction sought. The defendant denied; destroying any trees on the land under his occupation, trespassing on the suit property, clearing any bushes on the land under his occupation or cultivating any portion of the suit property. The defendant contended that the Plaintiff seems to be claiming his family land which he has occupied since his childhood and if the injunction sought is granted, it would subject him and his family to untold suffering as they depend solely on this land for their livelihood.
5. The application was heard on 24th April, 2013 when Mr. Oguttu appeared for the Plaintiff and Mr. Bigogo appeared for the defendant. The Plaintiff's advocate adopted the contents of the Plaintiff's affidavit in support of the application and submitted that there was no dispute over the ownership of the suit property. That being the case, counsel submitted that it was completely irrelevant that the Plaintiff was not residing on the suit property. Counsel submitted that as the registered owner of the suit property, the Plaintiff was entitled to exclusive possession thereof. The Plaintiff's advocate submitted further that the defendant did not come out clearly as to which parcel of land was under his occupation. Counsel submitted that all the land in the area where the suit property is

situated have been adjudicated and registered and as such it was not sufficient for the defendant merely to allege that he is in occupation of his deceased father's land without indicating the parcel number for such land. Counsel submitted that the position taken by the defendant in the circumstances left no doubt that the defendant was in occupation of land that does not belong to him. Finally, the Plaintiff's advocate submitted that the defendant's acts complained of amounts to a violation of the Plaintiff's proprietary rights in that the Plaintiff has been deprived of the enjoyment and use of the suit property. Counsel urged the court to allow the application. In support of his submissions, the Plaintiff's advocate cited and relied on the cases of, **Aikman-vs-Muchoki (1984) KLR 353, Mrao Limited-vs-First American Bank of Kenya Limited & 2 Others (2003) KLR 125 and George Orango Orago-vs-George Liewa Jagalo & 3 Others, Court of Appeal Civil Appeal, No. 62 of 2009(unreported).**

6. In his submission in reply, the defendant's advocate also adopted the contents of the defendant's affidavit in reply to the application and submitted that the Plaintiff's application did not meet the conditions for granting a temporary injunction that were set out in the case of **Giella-vs-Cassman Brown & Company Limited (1973) E.A 358**. Counsel submitted that the defendant is a stranger to the suit property since the defendant and the Plaintiff stay several kilometers apart. Counsel submitted that the land in the defendant's area of residence has not been adjudicated and that explains why the defendant was unable to mention the land reference number for the land under his occupation. Counsel submitted that if it happens that the land under the defendant's occupation is the suit property, the defendant would claim the land through adverse possession as he had been in occupation of the same for over 35 years. Counsel urged the court to dismiss the Plaintiff's application.
7. I have considered the plaintiff's application and the affidavit in support thereof. I have also considered the submission by the advocate for the plaintiff. Equally, I have considered the defendant's replying affidavit and the submission by the advocate for the defendant in opposition to the plaintiff's application. The following is my view on the matter. The principles for granting a temporary injunction are well settled. As it was stated in the case of **Giella -vs- Cassman Brown & Company Ltd. (supra)**, that was cited by the defendant and the case of, **Aikman-vs-Muchoki (supra)**, that was cited by the Plaintiff, an applicant for a temporary injunction must show that he has a prima facie case against the defendant with a probability of success and that unless the injunction is granted, he will suffer irreparable loss. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. In the case of **Mrao Ltd. -vs- First American Bank of Kenya ltd (2003) KLR. 125**, that was cited by the Plaintiff, it was held as follows;

“a prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which on the material presented to 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”.

8. It follows from the foregoing that the first question that I need to answer is whether the Plaintiff has on the material placed before this court shown on a prima facie basis that the defendant herein has infringed on any of his rights. The Plaintiff's case against the defendant is based on trespass which has been described as; consisting of unjustifiable intrusion by one person upon the land in the possession of another. See, **Clerk & Lindsell on Torts, 18th edition, paragraph 18-01**. The plaintiff has established that the suit property is registered in his name. 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 trespassed onto the suit property, cut down the Plaintiff's trees and cleared a portion thereof for cultivation. The defendant pleaded in his defence to the suit herein and in response to the Plaintiff's application that he is a stranger to the suit property. The defendant vehemently denied ever trespassing onto the suit property and carrying out the acts that have been attributed to him herein. The defendant denied cutting down trees not only on the suit property but on any other land. The onus was upon the Plaintiff to prove the acts of trespass

complained of. In addition to proving ownership of the suit property, the Plaintiff had a duty to prove that it is actually the defendant who entered the suit property and carried out the illegal acts of cutting down trees and clearing a portion thereof for cultivation. The Plaintiff has placed evidence before the court that assortment of trees were cut down from the suit property. This evidence came in the form of photographs and a report by the Kenya Forest Service. The Plaintiff has not placed any material before this court to show or prove that the said trees were cut down by the defendant. There is also no evidence of whatsoever nature that it is the defendant who cleared a portion of the suit property for cultivation. The report by the Kenya Forest Service indicated that the trees were in fact cut down from two different parcels of land bordering one another and during the inspection for the purposes of that report; the owners of the two parcels of land were present. There is no indication in the said report as to who had cut down the said trees. The Plaintiff in paragraph 4 of his affidavit in support of the application deposed that; on or about 14th November, 2012 the defendant entered the suit property and cut down 32 assorted trees. In the report by the Kenya Forest Service aforesaid which is dated 15th November, 2012, just a day after the defendant is alleged to have entered the suit property and cut down the said trees, it is indicated that the 32 trees were cut down on various dates. The Plaintiff did not depose that he saw the defendant cutting down the said trees or that anyone else saw him. It is the Plaintiff's word against the defendant's word on this issue. There is no survey report or any other report for that matter showing that the said trees were cut from the suit property. There is also no abstract of any report made to the Police of the defendant's alleged criminal acts. I don't agree with the Plaintiff's advocate's submission that the defendant's failure to state the reference number of the parcel of land in his occupation should be construed to mean that the defendant is in occupation of the suit property. This is because; the onus remained throughout with the Plaintiff to prove his claim of trespass against the defendant. In the absence of any decisive evidence on the issue, I am left only with parties' depositions, one alleging and the other denying. There is completely no basis on which I can believe the Plaintiff's affidavit as against that of the defendant. Due to the foregoing, I am not satisfied that the Plaintiff has established a prima facie case of trespass against the defendant.

9. The plaintiff having failed to satisfy the main condition for granting a temporary injunction, I am not obliged to consider the other conditions. The Plaintiff's Notice of Motion application dated 28th January, 2013 is therefore not forgranting. The same is dismissed with costs to the defendant.
10. This application will not end there though. Under section 13 (7) of The Environment and Land Court Act, 2011, this court has the power in exercise of its jurisdiction under the said Act to make any order and grant any relief as the court deems fit and just. Section 18 of the said Act provides that in exercise of its jurisdiction this court would be guided by among others, the principles of sustainable development. I have noted from the material placed before me that there is massive destruction of trees and the surrounding vegetation on the disputed property. As I have already stated herein above, it is not clear at this stage as to who is responsible for this destruction. The defendant has denied involvement and has stated on oath that he has not cut down any tree on the suit property or on the parcel of land under his occupation. I would not like the dismissal of the application herein to act as a license for further destruction of trees and vegetation on the disputed property pending the hearing and determination of this suit as such destruction would be irreparable and would cause harm not only to the parties herein but also to the environment that we all have an obligation to protect. In the circumstances, I make a further order that, pending the hearing and determination of this suit neither party shall cut down trees on the suit property or on the property occupied by the defendant herein. Orders to issue accordingly.

Dated, signed and delivered at Kisii this 30th day of August, 2013.

S. OKONG'O,

JUDGE.

In the presence of:

No appearance for plaintiff

Mr. Bigogo for defendant

Bibu Court Clerk.

S. OKONG'O,

JUDGE.