



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 30 OF 2008

MICHAEL MAKI.....PLAINTIFF

VERSUS

PAUL KIMAKUT MASISAI.....1ST DEFENDANT

JOHN OGINGA SUNYAI.....2ND DEFENDANT

JUDGMENT

The plaintiff stated in his plaint that he is the first registered proprietor of L.R. No. Trans Mara/Olalui/246 situate within Kilgoris Division of Trans Mara District, hereinafter referred to as “**the suit land**”. He claimed that on or about the 5th day of May 2004, the defendants and their agents moved into the suit land and constructed temporary structures thereon and occupied a portion measuring about 30 acres. He prayed for a declaration that he is the sole and exclusive owner of the suit land, a permanent injunction to restrain the defendants, their agents and/or servants from trespassing and/or interfering with the suit land, eviction of the defendants there from and mesne profits.

The defendants denied that the plaintiff is the registered proprietor of the suit land. They stated that they have been residing on the suit land since 1995 and as such the plaintiff’s rights over the disputed land, if any, have been extinguished. The defendants further contended that the suit land forms part of L.R. Nos. Trans mara/Olalui/422 and 435 which are registered in their respective names. In the circumstances, the plaintiff has no legal claim over the suit land. They urged the court to dismiss the plaintiff’s suit with costs.

The plaintiff filed an amended plaint and stated that the area that had unlawfully been occupied by the defendants measures 3 acres and not 30 acres as earlier stated.

The plaintiff testified that the defendants moved into the suit land in May 2004. They came there when there were land skirmishes between some Maasai clans. They were together with many other people but others left and only the defendants remained. Since they had been displaced from their land he allowed them to remain on the suit land for some time. They are presently occupying about 3 acres out of the 4.05 hectares comprised in the suit land. He denied that the defendants had been living on the land since 1995 as alleged. He added that the suit land does not have a common boundary with the defendants’ parcels of land. The plaintiff produced a letter dated 28th April 2008, vide which he gave notice to the defendants to vacate the suit land. The same was produced as **P. Exhibit 1**. The plaintiff also produced a copy of his title deed, **P. Exhibit 2** and a certificate of official search, **P. Exhibit 3**. He also caused the area map, **P. Exhibit 4** to be produced by **Wilson Wahuga Kibiru, PW2**, the District Surveyor, Transmara. This was to demonstrate that the suit land did not have a common boundary with the defendants’ parcels of land. He added that the defendants had destroyed his beautiful forest. They had also caused his grade animals to be infected with diseases from their local animals.

In cross examination, the defendant stated that he got the title deed for the suit land after the defendants had moved into the land. He said that his neighbours were his brothers known as **Antony Maki** and **Bernard Maki**. He further stated that the defendants’ parcels of land Nos. 422 and 435 were about 10

kilometers away from the suit land.

The plaintiff's evidence was also corroborated by his brother, **Antony Ole Maki, PW3**.

The 1st defendant testified that his correct name was Kimakut Ole Masai and not Paul Kimakut. He is a police officer by profession. He said that he is the registered owner of land parcel Transmara/Olalui/435. He produced a copy of the title deed as **D. Exhibit 1** and a certificate of official search as **D. Exhibit 2**. He was registered as the proprietor thereof on 27th July, 2005. He further testified that he had lived in Olalui since 1995. At that time Land Adjudication had not been done and people used to migrate from place to place. He was a member of Olalui Group Ranch through his father, Kipkorir Ole Masai. By 1995 his father had died and so he was given his father's share of the group ranch. They were not shown the boundaries of the parcels of land that were given to them.

The 1st defendant stated that the plaintiff was his neighbor but they are not related. He said that there is a common boundary between the plaintiff's land and his land. There is also a fence along the boundary as well as a passage. The fence was erected by the plaintiff. He denied having trespassed onto the plaintiff's land and occupying 3 acres thereof. He added that he has no claim over the plaintiff's land.

In cross examination, the 1st defendant said that the plaintiff's family used to live in another parcel of land but not on the suit land. They settled on the suit land in the year 2008. He denied that they moved to the suit land in 2004 after they were chased from their original land due to land skirmishes.

Christopher Sunyai Oginka, DW2, testified that he was the registered owner of Transmara/Olalui/422. He was also a member of Olalui Group Ranch which was subdivided in the year 2005 when he got parcel No. 422. He further stated that his land does not have a common boundary with that of the plaintiff. He denied having trespassed onto the plaintiff's land as alleged.

In cross examination, he denied they were chased from their original land in 2004 and migrated to the suit land as alleged by the plaintiff.

The defendants called one witness, **Moses Pioni Lei, DW3**. He is the registered owner of Transmara/Olalui/273. He said that the plaintiff and the defendants are all his neighbours. He said that the plaintiff's land and his land are divided by a river. He said that the defendants came to the area in 1995 and not 2004 as alleged by the plaintiff.

From the evidence on record there is no dispute that the plaintiff is the registered owner of the suit land. The defendants are not claiming any part of the suit land. There is also no dispute that the defendants are the registered proprietors of land parcels Nos. Transmara/Olalui/422 and 435 respectively. The issue in dispute is whether a portion of the suit land is occupied by the defendants. The defendants' contention is that they are occupying their respective parcels of land and not the suit land. From the evidence of PW3 and the area maps which were produced as **P. Exhibit 4 & 5** the three parcels of land do not share any common boundary. This court is aware that in Olalui registration section there have been many complaints of title holders occupying the wrong parcels of land in false belief that they are rightly occupying their own parcels of land. It appears to me that this is a matter which ought to have been first remitted to the District Land Registrar, Transmara, to carry out his investigations and submit a report as to where each of the parties is living. It is important that this dispute be resolved conclusively and on merits. That is the spirit of the new **section 1A (1)** of the **Civil Procedure Act**. In that regard, I direct that the District Land Registrar, Transmara, do visit the suit land and the defendants' respective parcels of land and give a report to this court as to where each of the parties is residing on. The Land Registrar's costs shall be shared equally between the plaintiff and the defendants. The Land Registrar should file his report before 24th September, 2010 when this matter will be mentioned.

DATED, SIGNED AND DELIVERED AT KISII THIS 29th DAY OF JULY, 2010.

D. MUSINGA

JUDGE.

29/7/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Otieno for the Plaintiff

Mr. Oguttu for the Defendants

Court: Judgment delivered in open court on 29th July, 2010.

D. MUSINGA
JUDGE.