

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 85 of 2005

OLECHESUSUA KIPUTIT PLAINTIFF

VERSUS

AMPANI LEKAKENY DEFENDANT.

JUDGMENT

By an amended plaint filed on 19th July 2005, the plaintiff stated that he was the registered owner of a parcel of land known as Transmara/Shartuka/166, hereinafter referred to as “the suit land”. He stated that the suit land was part of the Shartuka group ranch, which was shared and adjudicated among the group members and there upon he was registered as the owner of the suit land on 14th August 1998. He claimed that the defendant had trespassed upon the suit land and committed acts of waste thereon. The defendant had refused and/or failed to move to his rightful parcel of land No. Transmara/Shartuka/36. The plaintiff prayed for an eviction order against the defendant and a permanent injunction to restrain him from trespassing upon the suit land.

The defendant filed a statement of defence through A. H. Khamati Advocate. He stated that his family occupies a parcel of land known as Transmara/Shartuka/943, which was formerly part of the Shartuka Group Ranch. He averred that in or about 1991, the said Group Ranch was dissolved and the Ranch was adjudicated among its members. He was wrongfully and arbitrarily adjudicated as owner of a piece of land that was subsequently registered as Transmara/Shartuka/36, which is a long distance from his residence. The defendant further stated that in or about September 1998, the adjudication and registration exercise was declared null and void and invalidated by the Court of Appeal vide Civil Application No.195 of 1998. As a result, the registrations made in 1991 were cancelled. However, the defendant admitted that the plaintiff had been registered as the owner of the suit land prior to the aforesaid cancellation of the adjudication and registration exercise. The defendant denied the plaintiff’s claim and urged the court to dismiss the same.

On 7th November 2005, the plaintiff filed an application seeking an order to compel the defendant to file his list of documents in compliance with the provisions of Order X rule 11A(1) of the Civil Procedure Rules in default of which the defendant’s defence be struck out. On 27th March 2006, the court ordered the defendant to file his list of documents within 30 days failing which the defence would stand struck out. The defendant did not file the said list with the result that his defence was deemed as struck out in terms of the aforesaid order.

On 5th March 2007, the defendant filed a notice of change of advocates and M/S. J. Odongo & Co. Advocates came on record in place of Gibson Morara & Co. Advocates, who seemed to have been on the record for the defendant, though it is not clear how they took over from A. H. Khamati Advocates.

When the matter came up for hearing, the plaintiff testified and proved that the suit land had lawfully been registered in his name. He produced the title deed in respect of the suit land. He also produced a copy of official search in respect of the suit land. The title deed was issued on 14th August, 1998. The plaintiff also produced a ruling delivered in Misc. application No.103 of 2003, Moses L. Korinko and others versus The Chief Land Registrar and the District Land Registrar, Transmara.

In the said application, the applicants sought an order of certiorari to remove into the High Court for purposes of quashing the decision of the Chief Land Registrar dated 14th July 2003 contained in the Kenya gazette of the 25th July 2003 expunging from the Land Register the title deeds relating to numerous parcels of land which were subdivisions of Shartuka group ranch. In the said ruling, the court was referred to an order issued by the Court of Appeal on 15th September 1998 in Civil Application No.195 of 1998. The Court of Appeal ordered, inter alia, that the 1992 Register of members of Shartuka Group Ranch was the only legitimate register for determining the bona fide members of the said group ranch for purposes of issuance of title deeds. Pursuant thereto, a notice was issued to all non bona fide members of the group ranch to surrender any title deeds which may have been issued to them.

In Misc. application No.103 of 2003 aforesaid, the applicant's averred that they had been described by the District Land Registrar, Transmara, as non bona fide members of Shartuka Group Ranch. The applicants had, however, shown that they were bona fide members of the group ranch. The court therefore issued an order of certiorari as prayed.

When the plaintiff closed his case, this court on its own motion adjourned the hearing to enable the defendant procure attendance of his advocate who had failed to attend court, having been served with a hearing notice. The defendant was further advised by the court to consider engaging another advocate in the event that Mr. Odongo was not willing to represent him. When hearing resumed after a two-week adjournment, the defendant had still not managed to get either Mr. Odongo Advocate or any other advocate to appear for him. The defendant sought further adjournment and the court adjourned the hearing from 9 a.m. to 2.30 p.m. for the defence case. When the hearing resumed, the defendant was still unrepresented. He was given an opportunity to cross-examine the plaintiff, which he did.

Having considered the unchallenged evidence adduced by the plaintiff, I am satisfied that he has proved his case on a balance of probabilities. The plaintiff is the registered proprietor of the suit land and his rights are properly secured under the provisions of Sections 27 and 28 of the Registered Land Act. The defendant did not deny that the plaintiff is the registered owner of the suit land. The plaintiff proved that the defendant is the registered owner of land parcel No. Transmara/Shartuka/36. That being the case, the defendant should vacate the suit land and move to his own parcel of land, parcel No.36. I order the defendant to vacate the suit land within the next 30 days from the date thereof failing which the plaintiff would be at liberty to forcefully evict him in accordance with the provisions of the law. The defendant is further restrained from trespassing upon the suit land. The defendant shall bear the costs of this suit.

DATED, SIGNED and DELIVERED at Kisii this 30th Day of May, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Nyamurongi HB for Mrs. Asati for the plaintiff

N/A for the defendant.

D. MUSINGA

JUDGE.