



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE 110 OF 2007

LEKAKENY OLO SONGINAN Alias OLOOSOGNIAN DANIEL. ... PLAINTIFF

VERSUS

BENSON OLE SOIT TASUR DEFENDANT

RULING

By an application filed on 22nd October, 2007, the plaintiff prayed for an injunction to restrain the defendant, his agents, servants and/or employees from entering into, fencing, working, ploughing, constructing or in any manner whatsoever interfering with the plaintiff's quiet possession, occupation and enjoyment of a parcel of land known as TRANSMARA/SHARTUKA/38, hereinafter referred to as "***the suit property***" pending hearing and determination of a suit that he had filed against the defendant.

The plaintiff swore an affidavit in support of his application and deposed that he was the registered owner of the suit property measuring 20.64 hectares or thereabouts. He has constructed eight residential houses and carries on agricultural activities thereon. He stated that on or about the 11th day of September, 2007, the defendant unlawfully and forcefully entered onto the suit property and fenced off a portion measuring ten acres or thereabouts. When the plaintiff made attempts to inquire from the defendant why he had invaded the suit property, the latter threatened to demolish the plaintiff's houses.

In his replying affidavit, the defendant deposed that the title to the suit property was fraudulent since the same had been cancelled and Title No. TRANSMARA/SHARTUKA/921 issued. He added that Shartuka Group Ranch parcels of land had been the subject of many court cases and that Civil Appeal No.4 of 2004 was pending before the Court of Appeal. On 9th September 1998 the Court issued an Order restraining the plaintiff from continuing with the sub-division, adjudication and/or registration of the subdivision of the Group Ranch. Further, on 15th September, 1998 the court ordered that the 1992 register for Shartuka Group Ranch was the only one which contained the bona fide members and not any other subsequent register. The 1992 register contained 334 original members who were to be allocated 53 acres of land each. On 1st April, 2003 the District Land Registrar, Transmara, notified all parties that he had cancelled all the titles issued prior to 2003 as ordered by the Court of Appeal. In the defendant's view, the plaintiff ought to have surrendered the title deed to the suit property since it was among the cancelled ones. He urged the court to dismiss the plaintiff's application.

In a supplementary affidavit, the plaintiff explained that the order by the Chief land Registrar which had the effect of canceling various titles including the one for the suit premises had been quashed by an order of Certiorari issued by the High Court at Kakamega on 14th June, 2004. In any event, the said title was not in the list of titles that were to be cancelled, he added.

The defendant also swore a supplementary affidavit. He annexed thereto Gazette Notice No.501 published by the Chief Land Registrar on 1st February, 2008. In the said Gazette Notice, the Chief Land Registrar referred to the orders issued by the Court of Appeal on 15th September, 1998.

I have carefully considered all the affidavits that were filed by the parties. I have also considered the submissions made by counsel in support of the affidavits sworn by their respective clients. The plaintiff was issued with a Title Deed to the suit property on 14th July, 2000.

My understanding of the facts relating to Shartuka Group and which are relevant to the application before is as follows:

On 24th August, 1998, the Registrar of Group Representative wrote to the Registrar, Court of Appeal and enclosed two certified copies of the Shartuka Group Ranch members' register as at 1992 before dissolution of the group ranch. That was in compliance with an order that had been issued by the Court of Appeal in Civil Application No.NAI 195 of 1998, **ISSA LEHSAN KERES & 4 OTHERS VS KIPOKI OREU TASUR & 10 OTHERS.**

On 15th September, 1998 the Court of Appeal made the following Order:

*“The 1992 register is the only register for the
the purpose of determining the bona fide members
of Shartuka Group Ranch. The second register
of new members of the Group Ranch is fraudulent
and void and is not to be used. The Chief Land
Registrar to continue with reconciliation of
membership.”)*

In the list that was submitted on 24th August, 1998 the name of the plaintiff is listed under number 121. After reconciliation of the register, the District Land Registrar, Trans-mara, wrote to the Chief Land Registrar and forwarded a list of Titles, which had been registered and issued, to persons who were non-members of the Shartuka Group Ranch. The list included parcel No.38, the suit property. However, the list that was annexed to the said letter contained nothing that could indicate that it actually originated from the District Land Registrar. The same Land Registrar had earlier written to all the registered proprietors of the various parcels of land which were sub-divisions of the former Group Ranch. His letter dated 1st March, 2003 read in part as follows:

“RE: PERSONS WHO HAVE BEEN REGISTERED

WITH PARCELS OF LAND IN SHARTUKA

GROUP RANCH – MEMBERS SCHEDULE.

The persons who have been registered

with parcels of land listed hereunder

are said to have obtained those parcels

while they are not members of the

***Shartuka Group Ranch. Under the Court
Order of the Court of Appeal Civil Application
No.195 of 1998 Nairobi, it was ordered that
The 1992 Register of members of Shartuka
Group Ranch was the only Register of
of members to be followed on sharing parcels
of land of the Shartuka Group Ranch.
Anyone therefore, who may have been
registered with any parcels of land of the
Shartuka Group Ranch. Anyone therefore,
who may have been registered with any
parcels of land of the Shartuka Group Ranch
and whose name falls outside this list
approved by the Court of Appeal hold (sic)
the parcel illegally and may be prosecuted
for they hold the same contrary to the Court
Order.***

You are therefore notified that the registration and the titles issued to you are null and void and will therefore be cancelled.”

The parcels of land referred to in the first paragraph of the aforesaid letter do not include the suit property. That means the suit property was not among the ones that were registered in the names of people who were not members of the group Ranch. However, a close reading of the third sentence in said letter reveals a different meaning from the first sentence. It is not clear whether the Land Registrar intended to list down the parcels of land that were registered in the names of the genuine members of the Group Ranch or the parcels of land that were registered contrary to the original register of Group Ranch members.

It appears that the owners of the parcels of land that were listed down by the District Land Registrar in his letter of 1st March, 2003 are the same ones who filed Judicial Review Proceedings in Miscellaneous Civil Application No.103 of 2003 in the High Court of Kenya at Kakamega and obtained an Order of Certiorari to quash the decision of the Chief Land Registrar that purported to cancel some title deeds. Although the said order was issued on 22nd June, 2004, the Chief Land Registrar published another Gazette Notice on 24th January, 2008 which contained the same information as the earlier Gazette Notice of 14th July 2003 which had been quashed.

The decision by the Chief Land Registrar, having been quashed by an order of certiorari could not lawfully be re-published. Gazette Notice No.501 published on 1st February, 2003 was of no legal

consequences as long as the orders of certiorari remained in force.

From the foregoing, it is evident that the purported declaration by the Chief Land Registrar that the plaintiff's Title Deed to the suit premises had been cancelled was quashed. The plaintiff has thus established a prima facie case with a likelihood of success against the defendant. The plaintiff has also demonstrated that he is likely to suffer irreparable loss unless the defendant is restrained from trespassing into the suit premises and interfering with the plaintiff's use and enjoyment of the same.

I grant orders of injunction in terms of prayer (c) of the plaintiff's application dated 22nd October, 2007. The defendant shall bear the costs of the application.

DATED, SIGNED and DELIVERED at KISII this 14th day of October, 2008.

D. MUSINGA

JUDGE.

Delivered in the open court in the presence of:

Mrs. Asati for the Plaintiff

Mr. Katwa HB for Mr. Mutua for the Defendant

D. MUSINGA

JUDGE.