



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 123 OF 2011

LEBOI OLE NAIRENKE.....1ST PLAINTIFF

MOSES NAIRENKE.....2ND PLAINTIFF

VERSUS

SAMWEL SHESHOROI..... DEFENDANT

RULING

1. The 1st Plaintiff is the registered proprietor of all that parcel of land known as LR. No. Transmara/ Enaenyien/ 393 (herein referred to as “**the suit property**”) while the 2nd Plaintiff is the 1st Plaintiff’s brother and is the one residing on the suit property. The plaintiffs brought this suit against the defendants on 20th June, 2011 claiming that in the year 2010, the defendant entered the suit property without the Plaintiffs permission and commenced cultivation thereon. The Plaintiff claimed that the defendant’s said act of trespass had denied the 2nd Plaintiff the

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use and enjoyment of the suit property thereby occasioning the Plaintiffs loss and damage. The Plaintiffs claimed further that in the same year, the defendant falsely and without any justifiable cause laid a claim to the suit property. The Plaintiffs sought a declaration that the Plaintiffs are the proprietors of the suit property and that the defendant has no right to interfere with the Plaintiffs’ quiet and peaceful occupation of the same, an order of eviction against the defendant and general damages.

2. The defendant filed a defence to the Plaintiffs’ claim on 28th June, 2011. The defendant denied the Plaintiffs’ claim in its entirety. In his defence, the defendant admitted that the 1st Plaintiff is the registered proprietor of the suit property which property is separated from the defendant’s parcel of land known as LR. No. Transmara/ Enaenyien/ 304 (hereinafter referred to only as “**Plot No. 304**”) by a stream which forms the boundary between the two properties. The defendant denied ever trespassing into the suit property and claimed that the

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disputed parcel of land which is the subject of the Plaintiffs' claim falls across the stream on the side of Plot No. 304 and as such is part and parcel of the said plot. The defendant contended that as a result of the Plaintiffs' claim over this parcel of land, the defendant made a complaint to the district land registrar, Transmara district and asked him to visit the suit property and Plot No. 304 for the purposes of identifying and fixing the boundary of the two parcels of land. The defendant contended that the said land registrar visited the site of the two parcels of land on 7th April, 2011 and determined, demarcated and ascertained the boundary position of the same and neither party appealed against the exercise. The defendant prayed that the Plaintiffs' suit be dismissed and/or struck out. No reply was filed by the Plaintiffs in response to this statement of defence.

3. On 29th November, 2012, about 5 months after the filing of the said defence the defendant brought an application by way of Notice of Motion dated 28th November, 2012 under certificate

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of urgency seeking interlocutory injunction to restrain the Plaintiffs either by themselves or through their agents, servants and/or anyone claiming under them from entering upon, re-entering, trespassing or laying a claim to, building on, cultivating, grazing on, burning bricks on, felling trees, interfering with and/or in any other manner whatsoever dealing with Plot No. 304 which is registered in the name of the defendant pending the hearing and determination of this suit. The defendant's application was brought on the grounds set out on the face thereof and on the affidavit sworn by the defendant on 28th November, 2012. The defendant's case for interlocutory injunction as set out in the said grounds on the body of the application and the affidavit filed in support thereof ("**supporting affidavit**") was that, the defendant is the registered proprietor of Plot No. 304 which was registered in his name on 11th January, 2010. The defendant took possession of the said plot soon after the same was registered in his name and has

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remained in occupation peacefully without any interference from the Plaintiffs or anybody else. The defendant has annexed to the supporting affidavit copies of certificate of official search and a title deed for Plot No. 304 which shows that the same is registered in the name of the defendant. Plot No. 304 neighbours the suit property and the two plots are separated by a stream which forms a boundary between them. The defendant claims that on or about 10th November, 2012 while this suit was pending, the Plaintiffs entered upon Plot No. 304 without the defendant's permission and commenced cultivation and cattle grazing thereon under the guise that Plot No. 304 was part of the suit property. The defendant claims that he reported the Plaintiffs' activities to the local administration to rein in on the Plaintiffs' to stop the said acts of trespass but the Plaintiffs disregarded the intervention of the said administrators and have continued with the said acts of trespass unabated. The defendant has annexed copies of

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photographs showing brick making, cattle grazing and cultivation complained of. The defendant has also annexed to the supporting affidavit a copy of a letter from the Assistant Chief Enaenyeny Sub-location dated 13th November, 2012 confirming acts of trespass complained of by the defendant. The defendant claims that the said acts of the Plaintiffs are intended to deprive the defendant of his right to possess, use and enjoy the benefits attendant to his ownership of the said Plot No.304. The defendant claims that the said activities of the Plaintiffs have denied and/or deprived him of the use and occupation and or cultivation of the said plot which he uses solely for cultivation. The defendant claims that the acts aforesaid amounts to the Plaintiffs taking the law into their own hands and are criminal in nature. The defendant claims that as the registered proprietor of the suit property, he has absolute and/or exclusive rights over Plot No. 304. The defendant contended that he has established a prima facie case against the

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Plaintiffs and that unless the orders sought are granted he stands to suffer irreparable loss. On 9th January, 2013, the defendant filed a further affidavit. The purpose of the said affidavit was to produce a copy of the proceedings and decision of the district land registrar dated 7th April, 2011 on the boundary dispute between the Plaintiffs and the defendant that I had referred to herein earlier. The defendant annexed to the said affidavit a copy of the said proceedings and decision of the district land registrar. In his decision on the said dispute, the district land registrar held that the river (stream) remained the main boundary between Plot No. 304 and the suit property. It is on the basis of the foregoing that the defendant sought the injunction prayed for in the application herein.

4. The Plaintiffs' advocates were served with the defendant's application. They neither filed a response to it nor appeared in court for the hearing when the application came up on 20th March, 2013. The application was therefore heard in their

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5. absence. In his submission in support of the application, Mr.Oguttu Mboya the advocate for the defendant adopted the contents of the two affidavits filed by the defendant in support of the application. Counsel submitted that the defendant has proved that the Plaintiffs have trespassed into the defendant's parcel of land. This he submitted, is well demonstrated by the photographs, the letter from the chief and a report by the district land registrar, Transmara district on the boundary of the suit property and Plot No. 304 annexed to the affidavit and further affidavit filed by the defendant in support of the application. Counsel asked the court in conclusion to consider the defendant's bundle of authorities and allow the application as prayed. Among the authorities contained in the defendant's list of authorities were the Court of Appeal Case of, **Aikman-vs-Muchoki(1984)KLR 353** whose *ratio decidendi* is that, a wrong doer cannot keep what he has unlawfully taken just because he

can pay for it and the High Court case of, **Njoroge Kironyo &**

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others-vs-Kironyo Njoroge(1976) KLR 109, whose *ratio decidendi* is that, interlocutory injunction can issue at the instance of a defendant.

6. I have considered the defendant's application, the affidavit in support thereof and the submission of the advocate for the defendant. The view I take of the matter is as follows. The defendant has proved on a prima facie basis that he is the registered proprietor of Plot No. 304. As such proprietor, the law accords the defendant certain rights and privileges which cannot be taken away save as provided by law. One such right is a right to have exclusive possession of the said property which possession can only be taken away with the consent or authority of the defendant or by an order of the court. The Plaintiffs brought this suit against the defendant claiming that the defendant has trespassed on the suit property. The Plaintiffs sought among other orders an order of eviction of the defendant from the suit property, damages and loss of use of

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the suit property. The Plaintiff claimed that the defendant trespassed on the suit property some times in the year 2010 and started cultivating the same. The defendant placed sufficient evidence before the court to show that the suit property and the defendant's plot are separate and distinct and that the boundary of the two parcels of land is marked by a stream. This is deposed in the defendant's affidavit and is confirmed by a report from the district land registrar Transmara district. I have also had sight of a sketch survey map dated 21st July, 2010 drawn by the district surveyor depicting the positions of the suit property and Plot No. 304 on the ground. This map is included among the Plaintiffs bundle of documents submitted to court. This map also confirms that the boundary of the suit property and Plot No. 304 is marked by a stream. The defendant claims that the Plaintiffs have crossed the said stream and entered Plot No. 304 on which they are now carrying out the illegal activities complained of on the

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pretext that that portion of Plot No. 304 forms part of the suit property. The Plaintiffs did not respond to the application. The averments contained in the defendant's two affidavits are therefore not controverted. Due to the foregoing, I am satisfied that the defendant has established a prima facie case for trespass against the Plaintiffs. I am of the view that once the Plaintiffs filed this suit, they ought to have waited for the court's determination of their claim against the defendant before taking any other action. The Plaintiffs cannot come to court and at the same time employ self-help remedies. It is for the court to determine whether the defendant has trespassed on the suit property or not. As was held in the case of **Aikman-vs-Muchoki(supra)**, the Plaintiffs cannot be allowed to keep what they have unlawfully taken. The parties must revert to the status quo that was prevailing before the plaintiffs' forceful entry into Plot No. 304.

7. The defendant has no doubt also satisfied the other limb of the

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conditions for granting interlocutory injunction that was pronounced in the case of, **Giella-vs-Cassman Brown & Co. Ltd. (1973) E.A 358**. The acts of the Plaintiffs complained of have denied the defendant the use of his property. The defendant is likely therefore to suffer irreparable harm. In addition, the photographs exhibited by the defendant show brick making activities taking place on Plot No. 304. Such activities will leave permanent impact on Plot No. 304. I think that I have said enough to show that the defendant's application is for granting. The Notice of Motion application

dated 28th November, 2012 is allowed in terms of prayer 3 thereof. The defendant shall have the costs of the application.

Dated, signed and delivered at KISII this 3rd day of July, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

No appearance for plaintiffs

Mr. Oguttu for the defendant

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

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