



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIROMENT & LAND COURT CASE NO. 20 OF 2012**

**KILETIA OLE DIKIRR..... PLAINTIFF**

**VERSUS**

**CHARLES MPASIO KINAMPU..... DEFENDANT**

**RULING**

1. The plaintiff is the registered proprietor of all those parcels of land known as Plot No. 125, Oldanyati Adjudication Section and LR. No. Trans-Mara/Moita/495 (hereinafter referred to only as “**the suit properties**”). The plaintiff brought this suit against the defendant on 21<sup>st</sup> January, 2013(I don’t know why the case was assigned a 2012 number at the registry) seeking among others a declaration that the plaintiff is the registered and/or lawful owner of the suit properties, a permanent injunction restraining the defendants from entering into, re-entering,trespassing onto, cutting down trees, cultivating, grazing, interfering with and/or in any other manner dealing with the suit properties or any portion thereof. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 28<sup>th</sup> January, 2013 under certificate of urgency seeking interlocutory injunction to restrain the defendant from entering into, re-entering, trespassing onto, cutting down trees, cultivating, grazing, building structures, interfering with and/or in any other manner dealing with the suit properties or any portion thereof pending the hearing and determination of this suit. The plaintiff’s application was supported by the affidavit of the plaintiff sworn on 28<sup>th</sup> January, 2013 in which the plaintiff stated that he is the registered proprietor of the suit properties. He annexed a letter from the Land Adjudication officer, Transmara East/West Districts dated 7<sup>th</sup> November, 2012 in proof of his ownership of Plot No. 125 Oldanyati Adjudication Section and a certificate of official search dated 7<sup>th</sup> November, 2012 in proof of his ownership of LR. No. Transmara/Moita/495. He stated further that in violation of his proprietary rights over the suit properties, the defendant without any lawful cause or basis entered the suit properties in the month of November, 2012 and laid a claim to the same contending that he is the owner thereof. The plaintiff reported the defendant’s said act of trespass to the provincial administration to prohibit the defendant from further acts of trespass but the defendant refused and/or declined to heed counsel from the said officers and continued with his claim and trespass over the suit properties. The plaintiff was left with no alternative but to institute these proceedings.
2. The plaintiff’s application was opposed by the defendant who filed a replying affidavit sworn on 8<sup>th</sup> February, 2013 in response to the said application. In the said affidavit, the defendant contended that he owns Plot No. 128 Oldanyati Adjudication (Plot No. 128) which does not share a common boundary with the Plaintiff’s Plot No. 125 Oldanyati Adjudication section. The defendant annexed to his affidavit a copy of a letter from the Adjudication Officer, Transmara East/West Districts dated 2<sup>nd</sup> October, 2012 in proof of his ownership of the said parcel of land. The defendant also annexed a sketch map showing the ground location of Plot No. 128. The said map shows that Plot No. 128 owned by the defendant does not share a boundary with Plot No. 125 owned by the Plaintiff within the same adjudication area. The defendant contended that he has never trespassed upon the plaintiffs parcels of land namely, Plot No. 125 and LR. No. Transmara/Moita/495(the suit properties). The defendant contended that it is the plaintiff and his son who had trespassed into his Plot No. 128 and ploughed approximately 5 acres thereof which act of trespass was reported to the police and the area land adjudication officer and resolved amicable. The defendant contended that the plaintiff has failed completely to show any evidence

of trespass on the part of the defendant on the suit properties.

3. On 12<sup>th</sup> February, 2013 the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The defendant filed his submissions on 25<sup>th</sup> February, 2013 while the Plaintiff filed his written submissions on 13<sup>th</sup> May, 2013. I have considered the plaintiff's application, the affidavit in support thereof and the submissions filed by the Plaintiff's advocates. I have also considered the affidavit in reply by the defendant and the defendant's advocates written submissions. The principles applicable to applications for interlocutory injunction are settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1975] E.A. 358**, an applicant for interlocutory injunction must show that he has a prima facie case against the respondent with a probability of success and that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt, the court will determine the application on a balance of convenience. The plaintiff has placed sufficient material before the court in proof of the fact that the plaintiff is the registered proprietor of the suit properties. The plaintiff's ownership or title to the suit properties is not denied by the defendant. The plaintiff's title to the suit properties is therefore not in dispute. What is in dispute is whether or not the defendant trespassed on the suit properties. This is the issue that the plaintiff was supposed to demonstrate or establish before the court on a prima facie basis. I am not satisfied that the plaintiff has demonstrated on a prima facie basis that the defendant trespassed on the suit properties in November, 2012. The plaintiff claimed that he reported the alleged trespass to the chief, the District Officer and the District Commissioner of the area. No evidence of whatsoever nature was placed before the court to prove the alleged reports. Although the plaintiff claimed in paragraph 13 of his affidavit that the defendant's alleged acts of trespass were criminal in nature, no report of the same was made by the plaintiff to the Police. The defendant has denied ever trespassing onto the suit properties. There is no evidence before me to the contrary. What I have is the plaintiff's claim and the defendant's denial. I have no reason to believe the plaintiff's word as against that of the defendant. The issue will have to be resolved at the trial. As for now, the plaintiff has not persuaded me that he has a prima facie case against the defendant with a probability of success. Having reached this conclusion, I am not obliged to consider whether the plaintiff would suffer irreparable harm unless the orders sought are granted.
4. Due to the foregoing, the plaintiff's application dated 28<sup>th</sup> January, 2013 is not for granting. The same is hereby dismissed with costs to the defendant.

**Dated, signed and delivered at KISII this 7th day of October, 2013.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

..... for plaintiff

..... for defendant

.....Court Clerk

**S. OKONG'O,**

**JUDGE.**

