



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 367 OF 2015**

**DANIEL LEURU KALASINGA ..... PLAINTIFF**

**VERSUS**

**JAMES KAYIONI KAIKAI ..... DEFENDANT**

**RULING**

1. The plaintiff by a plaint dated 28<sup>th</sup> July 2015 instituted the instant suit where he claims to be the registered owner of LR. Transmara/Olomismis/ 1329 measuring 8.256hectrars (approximately). The plaintiff claims to have purchased 2 portions of land from two members of Olomismis Group Ranch and that it is these two portions of land which after demarcation resulted in the parcel of land now registered in the plaintiff's name. The plaintiff claims that the defendant on or about 26<sup>th</sup> January 2015 caused a caution to be registered against the suit property claiming beneficiary interest. The plaintiff avers that the defendant during the month of July 2015 trespassed onto the plaintiff's land whereby he cut trees and built a cattle shed. The plaintiff in the plaint seeks a declaration that he is the lawful owner of the suit property, an order of eviction, injunction and damages for trespass against the defendant.
2. Simultaneously with the plaint the plaintiff filed a notice of motion application dated 28<sup>th</sup> July 2015 under a certificate of urgency seeking an interim order of injunction pending the hearing of the Notice of Motion interpartes and the suit. The application was predicated on the grounds set out on the body of the application and the affidavit sworn in support by Daniel Leuru Kalasinga, the plaintiff herein together with the supplementary affidavit sworn by the plaintiff on 9<sup>th</sup> November 2015.
3. The court at the ex parte stage on 29<sup>th</sup> July 2015 directed that the plaintiff's application dated 28<sup>th</sup> July 2015 be served on the defendant for interpartes hearing on 31<sup>st</sup> July 2015. The defendant attended court on 31<sup>st</sup> July 2015 and sought leave to respond to the application and was granted leave of 30 days and the application fixed for interpartes hearing on 21<sup>st</sup> October 2015. In the meantime the court granted an interim order of injunction pending the interpartes hearing. On 10<sup>th</sup> August 2015 the defendant made an ex parte application under the vacation rules seeking a variation and/or stay of the order of interim injunction granted on 31<sup>st</sup> July 2015 which the defendant submitted literally meant that the defendant would have to be evicted since he was in possession and occupation of the disputed portion of 10 acres that he claims. **Munyao, J.** before whom the application was placed declined to interfere with the orders granted by **Okong'o, J.** and directed that the defendant responds to the plaintiff's application for the hearing to be taken on 21<sup>st</sup> October 2015 as scheduled.
4. The defendant as at 21<sup>st</sup> October 2015 had not filed his response to the plaintiff's application dated

28<sup>th</sup> July 2015 and was granted leave to respond to the plaintiff's application. The defendant filed his replying affidavit sworn on 28<sup>th</sup> October 2015 on 30<sup>th</sup> October 2015. The defendant states that his father Oloolkerra Ole Kaikai was a committee member of Olomismis Group Ranch and was included in the adjudication register of the Group Ranch at No. 91 which entitled the respondent to be a member of the Group Ranch and therefore entitled to a portion of land in the group ranch. The respondent deposes that as a member of the Ilka Bongi Age group he was entitled to be allocated 10 acres of land in the group ranch. The respondent states he has been in occupation of his 10 acres which he has developed as from March 2011. The defendant further states that the 10 acres that he has been in occupation of and he has developed forms part of what the plaintiff claims to be part of his land parcel number **Transmara/Olomismis/1329**.

5. The defendant avers that he came to learn for the first time that his land was allocated to the plaintiff on 23<sup>rd</sup> January 2015 when he carried out a search which revealed the plaintiff had been registered and issued title. The defendant stated that the plaintiff stated that he purchased the two parcels of land from Robert Memusi Kipunde and David Chemurot Cheporion before land was surveyed and/or delineated which explains why the sale agreement did not specify the distinct parcels of land which were the subject of the sale. The defendant avers that he has developed the portion he occupies where he has put up two houses and a cattle shed and further states that the demarcation and allocation process of the Olomismis Group Ranch has generated a lot of issues and is the subject of Kisii ELC No. 249 of 2013 out of which the appeal in Kisumu Court of Appeal No. 134 of 2014 arose.
6. The plaintiff in a supplementary affidavit sworn on 9<sup>th</sup> November 2015 in response to the defendant's replying affidavit denies the defendant has been in occupation of the portion in dispute as from 2011 maintaining that the defendant commenced his offensive activities on or about 14<sup>th</sup> July 2015. The plaintiff restated that he is the registered owner of the suit property and consequently is entitled to exclusive possession and use of the same. The plaintiff further averred that though he is aware of the dispute involving Olomismis Group Ranch and of the pending Kisii ELC No. 249 of 2013 the pendency of the suit cannot affect or defeat his rights and/or interest as the registered proprietor of the suit property. As relates to the court of appeal decision in the appeal arising out of Kisii ELC No. 249 of 2013 the plaintiff stated that the Court of Appeal directed that there shall be no encroachment or interference with the current occupation of the resultant titles that arose from the subdivision of Olomismis Group Ranch. The plaintiff argues the Court of Appeal in fact restrained and/or prohibited actions such as the defendant's and urged the court to grant the injunction.
7. The parties filed written submission as per the court's directions. The plaintiff's submissions dated 12<sup>th</sup> February 2016 were filed on 15<sup>th</sup> February 2016 while the defendant's submissions dated 8<sup>th</sup> February 2016 were filed on the same date.
8. I have reviewed the pleadings and the Notice of Motion application by the plaintiff dated 28<sup>th</sup> July 2015 together with the supporting affidavits and the defendant's replying affidavit in opposition together with the annexures thereto. Although the application by the plaintiff is for injunction in terms of prayer (3) of the Notice of Motion the issue for determination as a preliminary issue in the light of the Court of Appeal decision referred to earlier is whether the defendant had in fact been in occupation and possession of any portion and possession of any portion of the suit land as at the time the plaintiff instituted the suit as he claims. The orders that were issued by the Court of Appeal in Civil Appeal No. 29 of 2014 which effectively apply to all the parcel of land owned by Olomismis Group Ranch namely former land parcel Transmara/Olomismis/1 and or any resultant titles arising from its subdivision were inter alia in the following terms:
  1. **Pending the hearing and determination of Kisii Environment and Land Case No. 249 of 2013, the status quo obtaining as at the date hereof in respect of parcel of land formerly known as Transmara/Olomismis/1 and or any resultant titles arising from its subdivision shall be maintained.**
  2. **The status quo referred to in No. 1 above means and includes:**
    - a. **No further sales, leases or transfers of the said resultant title or issue of any further titles shall be undertaken by the members or officials of the Group Ranch.**

- b. **No encroachment or interference with the current occupation of the resultant titles shall be done.**
- c. **All occupants of the land and/or the resultant titles shall remain where they are as of today and there will be no admission of any new members on to the land.**

Kisii HC ELC No. 249 of 2013 has not been heard and determined. It is not in doubt that the parcel LR No. Transmara/Olomismis/1329, the subject of the instant suit is a resultant subdivision of Transmara/Olomimisi/1 and therefore subject to the order issued in the Court of Appeal in the appeal referred to above.

9. The plaintiff states that the defendant on 26<sup>th</sup> January 2015 lodged a caution against the suit property but after due process the caution was removed by the land registrar and that it was after the removal of the caution that the defendant on or about 14<sup>th</sup> July 2015 forcibly entered onto the suit land and built a house and a cattle shed and took possession of a portion of the land and started cutting down assorted trees growing on the land. Arising from the defendant's actions the plaintiff lodged a complaint with the police and the defendant was arrested and charged with the offence of forcible detainer and illegal grazing vide Kilgoris PMCRC No. 933 of 2015 which is still pending hearing and determination.
10. The defendant for his part asserts that he has been in occupation of the portion that he claims out of the suit land since 2011 and avers that he was entitled to be allocated 10 acres thereat by the group ranch. He avers that as a member of the group ranch he was entitled to the allocation. While the plaintiff under paragraph 10 of the plaint and paragraph 11 of the supporting affidavit concedes that the defendant forcibly occupied a portion of the suit land the defendant maintains he has since 2011 been in occupation of the portion and his position is that the plaintiff is using the fact of having been issued with a title to the parcel of land to harass him with objective of procuring his eviction from his portion of land.
11. Kisii HC ELC No. 249 of 2013 raises issues of irregular allocation and subdivision of the group ranch and it is in recognition of these pertinent issues that the appellate court made the orders that it did in the appeal. In the present case there is serious contestation whether or not the defendant was in possession and occupation of the portion he claims to be entitled to since 2011. The plaintiff insists the defendant forcibly entered the land on or about 14<sup>th</sup> July 2015 and built a cattle boma. The defendant asserts he has been in occupation since 2011 and has constructed two houses and a cattle shed and has been cultivating thereon.
12. I have scrutinized the photographs "DLK7" annexed by the plaintiff as evidence that the defendant has cut down trees on the land. While the photographs are evidence that trees have been cut, they are not evidence of freshly cut trees. The photographs portray the picture of not some new invasion but of some **"old occupation"** and ground that may have even been cultivated. I do not suppose that would be the appearance if as the plaintiff claims the defendant entered into possession on 14<sup>th</sup> July 2015 and commenced cutting trees. This suit was filed on 29<sup>th</sup> July 2015 and the photographs therefore must have been taken a little earlier. In the premises I am not persuaded that the defendant indeed invaded the suit land on or about 14<sup>th</sup> July 2015 as claimed by the plaintiff. I accept the defendant's assertion that he was in occupation of the portion of the suit land before the institution of the instant suit. Whether or not he is lawfully in possession of the suit land in my view is a matter for determination at the trial.
13. In the present application the plaintiff under prayer (3) seeks an order of:-

**"...Temporary injunction restraining the defendant/respondent either by himself, agents, servants and/or anyone claiming under the defendant/respondent from re-entering, trespassing onto, cutting down trees, cultivating, building structures, grazing on, interfering with and/or in any other manner, whatsoever, dealing with the suit property, that is LR No. Transmara/Olomismis/1329 and/or any other portions thereof pending the hearing and determination of this suit."**

14. The purpose of an injunction the courts have repeatedly held is to conserve or preserve the subject property pending the determination of a suit concerning the property. An injunction can be

granted to prevent disposal or alienation and/or to prevent wastage and/or damage of the suit property. The court will not grant an injunction whose implementation is not practical as courts will not grant orders in vain. Where a party is or has been in possession of a parcel of land the court cannot properly grant an injunction restraining entry or possession of the land as you cannot restrain that which has already occurred.

15. In the instant matter as I have made a finding that the defendant was in possession and occupation of a portion of the suit land, to grant an injunction in the terms sought by the plaintiff would effectively amount to ordering the eviction of the defendant. The net result is that the plaintiff has not made out a case for grant of an injunction against the defendant in the circumstances. As the court of appeal held in Kisumu Civil Appeal No. 29 of 2014 the order that commends itself in the circumstances of this case is one that requires the parties to maintain and observe the status quo pending the hearing and determination of the suit.

16. The court in the premises orders and directs the parties to maintain and observe the prevailing status quo on the following terms:-

- i. **The defendant shall continue to occupy the portion that he is in occupation of but shall not open any fresh land for cultivation and will strictly not cut any trees either on the portion he is occupying or any other portion of the suit property until the suit is heard and determined;**
- ii. **No party will sell, dispose or transfer the suit property until the suit is heard and determined;**
- iii. **The parties shall within the next 45 days from the date hereof comply with Order II of the Civil Procedure Rules and have the matter fixed for pretrial directions at the registry;**
- iv. **The interim order granted herein on 31<sup>st</sup> July 2015 is accordingly vacated and varied in terms of (i) and (ii) above;**
- v. **The costs of the application shall be in the cause.**

**Ruling dated, signed and delivered at Kisii this 6<sup>th</sup> day of May, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the defendant

..... Court assistant

**J. M. MUTUNGI**

**JUDGE**