



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**(CORAM: A.K. NDUNG'U)**

**CIVIL APPEAL NO. 129 OF 2019**

**DANIEL NYABARO OMWEGA ..... APPELLANT**

**VERSUS**

**KENNEDY OMWEGA MAGACHI ..... RESPONDENT**

**(Being an appeal from the Ruling and Order of Hon. Maloba RM dated and delivered on 17<sup>th</sup> August 2017 in Chief Magistrates Court Civil Suit No. 353 of 2017)**

**JUDGEMENT**

1. The matter before the trial court was instituted by the appellant by way of a plaint dated 16<sup>th</sup> August 2017 to restrain the respondent from burying the remains of Hores Ochieng' Onkundi on land parcel No. Majonge/ Kanyimbo/385 ("parcel no. 385"). Contemporaneously with his plaint, the appellant filed an application for a temporary injunction to halt the burial which was scheduled to take place the following day on 17<sup>th</sup> August 2017.

2. In his suit before the trial court, the appellant accused the respondent of illegally settling on his land notwithstanding the dismissal of a suit he had filed against him vide Civil Case No. 88 of 1993. The appellant averred that he had himself filed Civil Suit No. 534 of 2012 for the respondent's eviction in the High Court at Kisii which had not been finalized and he was apprehensive that the respondent would bury the remains of his son on parcel No. 385 if the orders sought were not granted.

3. On 16<sup>th</sup> August 2017, the trial court issued a temporary injunction restraining the respondent from burying the remains of his deceased son on parcel no. 385.

4. The next day, the respondent filed an application dated 17<sup>th</sup> August 2017 beseeching the court to allow him to bury the remains of his son on plot number L. Majoge/Kanyimbo/2180 ("plot 2180") and for costs. He informed the trial court that the land dispute between him and the appellant had been determined vide Ogembo PMCC No. 26 of 2011 and that parcel no. 385 had been subdivided by an order of the court. He averred that he intended to bury his son on plot no. 2180 which he owned and annexed a copy of title to support his claim.

5. Trial court's decision to allow the aforementioned application of the respondent and other subsequent decisions of the court are what impelled the appellant to institute this appeal.

6. After the trial court had allowed his application dated 17<sup>th</sup> August 2017, the respondent made an application for costs. His bill of costs was assessed on 25<sup>th</sup> May 2018 by Hon. Obina at a total of Kshs. 161,950/= inclusive of a sum of Kshs. 146,000/= for costs incurred in funeral arrangements. The appellant moved the court to set aside its orders for costs but the court dismissed his application in a ruling delivered on 26<sup>th</sup> October 2018.

**ANALYSIS AND DETERMINATION**

7. The appellant has enumerated 20 grounds of appeal in his memorandum of appeal dated 26<sup>th</sup> November 2019. The appellant's counsel filed written submissions in support of the appeal but the respondent did not participate in the appeal.

8. From his memorandum of appeal and counsel's written submissions it is clear that the appellant has not only appealed against the ruling delivered on 17<sup>th</sup> August 2017 but also purports to challenge the decisions of the court delivered on 25<sup>th</sup> May 2018 and 26<sup>th</sup> October 2018 in the instant appeal.

9. The appeal is not only abjectly muddled up but has also been filed way out of time. The last decision the appellant seeks to challenge was made more than a year before this appeal was filed. No leave was sought to appeal the matter out of time. Having also examined the appeal on its merit, I find it to be a non-starter and an abuse of the court process for reasons which I shall give shortly.

10. Regarding the ruling dated 17<sup>th</sup> August 2017, the appellant contends that the respondent did not have any right to inter the remains of his son on parcel no. 385 as he had not adduced evidence to show that he was the legally registered proprietor of the land. He argued that the trial court's orders were based on misrepresentation and non-disclosure of facts by the respondent as the decision of the court in Misc. Application No. 26 of 2011, which was the basis for the impugned order, had been appealed against vide High Court Civil Appeal No. 534 of 2012 and stay orders issued.

11. The appellant also contends that the trial court made final orders on the respondent's interim application without hearing the merits of the suit which prejudiced his right to fair hearing and right to prove and defend his claim. That if he had been given an opportunity to prosecute his claim, it would have come out that the Parcel No. 385 had not been subdivided as claimed by the respondent and was still registered in the name of the appellant.

12. The principles to be considered by an appellate court in determining whether to interfere with the trial court's discretion to grant or dismiss an application for an injunction are if the trial court misdirected itself on law, or; misapprehended the facts, or; took account of considerations of which it should not have taken account or failed to take account of consideration of which it should have taken account; or if its decision albeit a discretionary one, was plainly wrong. (See *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others CA MSA Civil Appeal No 39 of 2002 [2003] eKLR*)

13. In the ruling dated 17<sup>th</sup> August 2017, the trial court allowed the respondent's application to bury the remains of his son on plot no. 2108 for the reason that when the appellant had applied for an injunction to restrain the respondent from burying his son on parcel no. 385 the previous day, he did not disclose that by virtue of the determination of the court in Miscellaneous Application No. 26 of 2011, land Parcel No. 385 had been subdivided into plot number Majoge/ Kanyimbo/ 2108 and plot number Majoge/ Kanyimbo/ 2012. The court allowed the respondent to bury the body of his son on plot no. 2108 of which he was the registered owner, jointly with the deceased.

14. It is trite that an interlocutory injunction will be set aside if it has been obtained by means of misrepresentation or concealment of the material facts. In the case of *R v Kensington Income Tax Commissioners, ex p. Princess Edmond de Polignac [1917] 1 KB 486* which was cited with approval by the Court of Appeal in *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others CIVIL APPEAL NO. 126 OF 1995 [1995] eKLR* the court held:

*"it is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage may have already obtained by him. That is perfectly plain and requires no authority to justify it."*

15. A perusal of the appellant's application which had been granted the previous day, shows that he had attached a copy of an order of the High Court in Civil Suit No. 534 of 2012 staying the proceedings in Miscellaneous Application No. 26 of 2011. He however appeared to have deliberately left out the trial court's orders in Miscellaneous Application No. 26 of 2011 which revealed that the respondent was his brother and had an interest in parcel no. 385 by virtue of being the son of Omwega Obuya. The court in Miscellaneous Application No. 26 of 2011 had ordered the subdivision of parcel no. 385 into two equal portions with one portion being registered in the name of the respondent.

16. These facts were significant in the determination of the appellant's application to restrain the respondent from interring the body of his son on parcel no. 385. They demonstrated that the respondent was not a stranger as claimed by the appellant and that he had a legitimate interest in parcel no. 385. The trial court rightly observed that being a party to the suit in Miscellaneous Application No. 26 of 2011, the appellant ought to have disclosed the decision of the court in that matter. The court was therefore on firm ground in setting aside the temporary injunction it had granted to the appellant the previous day as he had obtained the injunction by disclosure of material facts.

17. The trial court cannot also be faulted for granting the respondent's application to bury the remains of his son on parcel no. 2108. The respondent had shown that the parcel no. 2108 was lawfully excised from parcel no. 385 by a court order and that he had a title to that portion of land. At the time he made his application to bar the respondent from burying the remains of his son on parcel no. 385, the appellant was legally required to make full disclosure of all facts including the subdivision of parcel no. 385 by the court in Miscellaneous Application No. 26 of 2011 which he failed to do. The court was therefore right in depriving the appellant the advantage he had obtained by concealing these material facts.

18. As to the appeal against the trial court's decision delivered on 25<sup>th</sup> May 2018 awarding the respondent costs and the ruling delivered on 26<sup>th</sup> October 2018 dismissing the appellant's application to set aside the orders for costs, I find that those orders have been overtaken by events. The respondent proceeded to execute the orders for costs as soon as they were awarded by the court. The proceedings before the trial court shows that the appellant has engaged in negotiations on how to settle that debt. He has been committed to civil jail on two occasions for failing to pay the agreed instalments. The appeal against the decisions of the court delivered on 25<sup>th</sup> May 2018 and on 26<sup>th</sup> October 2018 has been brought very late in the day.

19. It is instructive that the appellant was represented by counsel at the time of the assessment of the respondent's application for costs and when he filed the application to set aside the award of costs. The appellant did not exercise his right to appeal against the decisions of the court in the time prescribed by the law. He has come belatedly after steps have been taken to execute the orders of the court. With respect, the appeal appears to be a last ditch attempt by the appellant to avoid paying costs to the respondent after his committal to civil jail. This court declines the invitation to interfere with the decisions of the trial court made on 25<sup>th</sup> May 2018 and 26<sup>th</sup> October 2018.

20. The inevitable conclusion is that the appeal is found to be lacking in merit and is hereby dismissed with no orders as to costs.

**Dated, signed and delivered at Kisii this 24<sup>th</sup> day of February, 2021.**

**A. K. NDUNG'U**

**JUDGE**