REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.88 OF 2014

ANDREW O.C. LUMASIA.....APPELLANT

VERSUS

TOKESI MAKUNGU KAHUGANE..... RESPONDENT

(From the ruling of Hon Susan N. Mwangi, Ag.SRM in Vihiga PM's Court Suc.C.No.49 of 2010 dated 23rd April 2014 delivered on 10th July, 2014)

RULING

1. The appellant herein had filed an application dated 23rd April 2014 seeking for orders that:

> *a) Pending hearing of this succession cause an order of temporary injunction do issue restraining the petitioner, her agents, servants and/or employees or any other person acting on her behalf from tiling, cultivating the applicant's portion of land and/or interfering with boundaries/demarcations that are on property known as North Maragoli/Chavakali/416 making the applicant's and the deceased's portion.*
>
> *b) Pending the hearing and determination of this succession cause, the status quo pertaining at the filing of this succession cause on Land Parcel No. North Maragoli/Chavakali/416 be maintained.*

2. The application was dismissed by the trial magistrate on the grounds that the applicant, now appellant, had not established a prima facie case with a probability of success. It was also dismissed on the grounds that the appellant had not shown that he would suffer irreparable loss if the order of injunction was not granted. The other ground in dismissing the application was that the appellant had not gone to court with unclean hands as he appeared to have hidden a lot of information from the court in his pleadings. The appellant was dissatisfied with the decision of the honourable magistrate and has thereby filed this appeal.

Background to application:

3. The succession cause from which this appeal arises was filed at Vihiga Law Courts by one Tokesi Makungu Kahugane (*herein referred to as the petitioner/respondent)* in relation to the estate of her late husband Samuel Kahugane Mugaro. Later the appellant's father one Julius Lumasia Ondego filed an objection to the making of grant to the said petitioner. In the year 2012, the appellant's father died. The appellant herein, then obtained a limited grant ***ad litem*** in relation to his father's estate for the purpose of substituting him in the objection proceedings. An application for substitution was made and granted by the court. It is after the substitution that the appellant filed the application dated 23rd April 2014 seeking for orders stated above.

The petitioner was served with the said application but did not respond to it. The application was heard ***ex-parte***.

Grounds to the application:

4. The grounds in support of the application were that:-

> *a) The petitioner has forcefully entered into the portion of land Parcel No. North Maragoli/Chavakali/416 which belonged to the applicant's father Julius Ondego Lumasia.*
>
> *b) The petitioner is cultivating and interfering with the original demarcations/boundaries of the suit land thereby changing the status quo as at the time of filing this succession cause.*

5. The application was supported by the affidavit of the petitioner in which he deponed that the portion of land that the petitioner was

interfering with belonged to his late father. That his family has been in occupation of the contested parcel of land since 1995. That the petitioner was cultivating, tilling and interfering with the boundaries to the parcel of land. He was seeking that the prevailing status quo be maintained pending the hearing of the succession cause.

DETERMINATION:

6. The trial magistrate considered the principles applicable in granting of injunctions as set out in the case of ***Giella vs Cassman Brown & Co. Ltd*** (1973) E.A 358 and came to the conclusion that the prayers sought were not merited. It is my duty to consider the said principles in relation to the evidence presented before the lower court and determine whether the trial magistrate was right or not.

7. The first principle is whether the appellant had established a prima facie case with a probability of success.

8. The appellant did not in his supporting affidavit endeavour to show the basis under which his family was claiming he land in issue. He only contended himself with saying that his family had been in occupation of the land for close to 20 years. On the other hand the application was not opposed. It was not contested that the applicant's family was in occupation of the land close to 20 years. In those circumstances it cannot be known which of the parties has a stronger case than the other one. The court could not say categorically that there was no basis of issuing an injunction when the application was not opposed.

9. The second principle is whether the appellant had established that he would suffer irreparable loss that could not be adequately compensated by an award of damages unless an order of injunction was issued. The appellant did not address the issue in his supporting affidavit. Neither did his advocate address it in his submissions. Even if the issue was addressed who would compensate the appellant for any loss suffered when the respondent did not respond to the application?

10. The third principle for granting of injunctions is that, if the court is in doubt of the above two, to decide the application on a balance of convenience. I will revert to this issue later.

11. The fourth issue is that the conduct of a person seeking for a relief of injunction must meet the approval of the court of equity as an injunction is an equitable relief. The trial magistrate stated that the applicant was not entitled to the relief as he had hidden some material facts to the court. The magistrate however did not state what material facts were not disclosed to the court. The respondent did not oppose the application and therefore the court had no basis of saying that there were material facts that were not disclosed to the court. This was therefore not a basis for declining to grant the orders sought.

12. The applicant/appellant was seeking for maintenance of the status quo pending the hearing of the succession proceedings. He was also seeking that the respondent be restrained from interfering with the subject portion of land and from removing the boundary marks. Since the application was not opposed, the trial magistrate should have proceeded on the basis of balance of convenience in deciding whether or not to grant the application. If the respondent went ahead to remove the boundary marks, the applicant would suffer injustice in thereafter presenting his evidence in court as the evidence would have been destroyed. If the appellant's family had been cultivating the land for the last 20 years without any interference from the respondent, they would suffer inconvenience by the said interference. In my view, I think it was imperative for the magistrate to order the maintenance of the status quo and to injunct the respondent pending the hearing and determination of the succession proceedings.

13. In the foregoing and for the above said reasons, the ruling of the trial court dated 10th July 2014 is hereby set aside and replaced with orders of injunction and maintenance of the status quo as prayed in prayers 3 and 4 of the notice of motion dated 23rd April 2014, save that the status quo ordered is as from the date of service of this ruling upon the respondent.

Costs of this appeal to be in the cause.

Delivered, dated and signed at Kakamega this 3rd day of August, 2017.

J. NJAGI

JUDGE

In the presence of:

N/A……. for appellant

Appellant …… absent

Respondent ……....… absent

Okoit …….. court assistant