

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA ATA KAKAMEGA

CIVIL APPEAL NO. 1 OF 2012

PATRICK ONYANGO MANYENI APPELLANT

V E R S U S

JACKSON WALTER OWUOR DEFENDANT

(Appeal arising from the Ruling of the Senior Resident Magistrate Court in Kakamega Misc. Civil Award No. 214 of 1999)

J U D G M E N T

This is an appeal from the ruling of the Senior Resident Magistrate in Kakamega Misc. Civil Award No. 214 of 1999 delivered on the 30.12.2011. The grounds of appeal are that the dispute involved a boundary yet the court issued an order of injunction, the appellant was not afforded an opportunity to be heard contrary to rules of natural justices, the injunction was issued against the appellant yet the land is registered against a deceased person and that the trial magistrate did not understand the evidence before him.

Parties agreed to file written submissions. The appellant contends that the suit land is registered in the names of **MANYENI OWUOR** and it is about 36 acres. The respondent is seeking five acres and filed an application for injunction restraining the appellant from interfering with those five acres. The matter went before the land Disputes Tribunal and the appellant was not a party to those proceedings. The parties are step brothers and their late father was the defendant before the land disputes tribunal. After the award was made the appellant's late father filed for judicial review this being Kakamega High Court Misc. No. 18 of 2001 against the adoption of the award and an order of stay of proceedings was granted. The appellant's father died on the 8.5.2002. It is the position of the appellant that no further orders can be given until that claim filed by his father is revived.

Mr. Mukavale, counsel for the respondent, submitted that the award by the tribunal was adopted by the court. No appeal was filed. The respondent was awarded a portion of land measuring five acres which he is occupying. The appellant started claiming the respondent's portion and that is why the respondent filed the application for injunction dated 8.11.2011 and restraining orders were granted. The appeal is against those orders. There is no dispute as to the award as adopted by the court.

The court record shows that the respondent herein sued his late father before the Matungu Land Disputes Tribunal vide case No.1 of 1999. The respondent's claim was that his father had two wives and had promised to divide his land to his children from both houses. Despite seeking to be given their respective portions the respondent's father reneged on his promise. Sometimes later the deceased brought in another son born out of wedlock and the respondent together with his brothers from the first house agreed to create room for him. The deceased agreed before the tribunal and testified that he wanted to divide his land to his seven children whereby the first born was to get 7 acres, the second born 5 ½ acres, the third to sixth born 5 acres each and the seventh born 3 acres. He asked the tribunal to assist him subdivide his land so as to avoid future problems after his death. The tribunal ordered that the land be subdivided and the deceased was to obtain the consent of the Land Control Board to subdivide the land.

The court record further shows that Misc. Civil Award No. 214 of 1999 was filed at the Kakamega Chief Magistrate's Court and the same was adopted on the 3.10.2000 by F. Mwashu, DMI. There was High Court Misc. Civil Application No. 18 of 2001 which granted the parties' father to apply for leave for orders of certiorari against the adoption of the award order made on 3.10.2000. The leave was to operate

as a stay. There is no indication that a substantive application was filed once the leave was granted. The respondent herein filed an application dated 8.11.2011 seeking to restrain the appellant from interfering with his 5 acres of land. The application was fully heard and a ruling delivered on the 25.11.2011 whereby the application was granted. The trial court also issued an order directing the Land Registrar to subdivide the land to seven portions in line with the decision of the Matungu Land Disputes Tribunal.

It is clear from the background that each of the parties herein is entitled to five (5) acres of land out of the main plot number **N/WANGA/LUNG'ANYIRO/827** which is about 35 ½ acres. The respondent had the right to restrain the appellant from encroaching on his portion of the land despite the fact that the land is still registered in the names of their late father. The parties are advised to file succession cause and have the property subdivided for their own benefit. The parties' father indicated the way he intended to distribute the land and all what is remaining is for the beneficiaries to carry that wish forward. I do not see any problem with the ruling of the trial court that restrained the appellant from interfering with the respondent's portion of the land. I do find that the appeal lacks merit and the same is hereby dismissed. Each party to meet his own costs.

Delivered, dated and signed at Kakamega this 14th day of November 2013

SAID J. CHITEMBWE

J U D G E