



NO. 2754

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII

CIVIL SUIT NO. 298 OF 2010

JACOB OMONDI OOKO
(Suing as legal representative of the Estate of **RUSALIA ANYANGO ORWA –**
Deceased).....**PLAINTIFF**

-VERSUS-

MAURICE PAUL OGALO
OTIENO.....**DEFENDANT**

RULING

The facts of this dispute are fairly simple and straightforward. The disputed land parcel Kamagambo/Kongudi/983 was a subdivision of land parcel number Kamagambo/Kongudi/150 whose original proprietor was **Orwa Ralimu**. **Orwa Ralimu** had two wives **Susana A. Orwa** and **Rusalina Anyango Orwa**. The 1st wife, **Susana** was the mother of **Maurice Ooko Orwa** who died earlier than **Orwa Ralimu**. When **Orwa Ralimu** passed on his only then surviving second wife **Rusalina Anyango Orwa**, sold a portion of the deceased parcel of land aforesaid to **Mr. Charles Okeyo Dede**. Following the process of transmission the said parcel land, Kamagambo/Kongudi/150 was subdivided into Kamagambo/Kongudi/983 and Kamagambo/Kongudi/984, the later going to **Charles Okeyo Dede** and the former being retained by **Rusalina Anyango Orwa**. **Rusalina** passed on sometimes in October, 2002 and was survived by two step daughters-in-law **Rachel Achieng Onyango** (deceased) and the mother of **Jacob Omondi Ooko**, the plaintiff herein and **Lorna Atieno Ogweno** and her four children **Ken Odhiambo Ooko**, **Maurice Otieno Ooko**, **Lorine Achieng Ooko**, and **Christine Ajwang Ooko**. In the year 2004 **Rachel Achieng** sold a portion of Kamagambo/Kangunid/983 to **Danile Ochola Odoyo**. The boundary was demarcated using sisal plants. The said boundaries remain in place to date. In may 2006 **Danile Ochola Odoyo** sold his interest aforesaid to **Maurice Paul Ogalo Otieno** the defendant who took possession and planted trees all round as a manifestation of the boundary. Thereafter, he immediately started his economic activities on the same piece of land between 2006-2008 May without any complaint and or objection from anybody including **Jacob Omondi Ooko** or **Charles Okeyo Dede** who is the immediate neighbour.

The defendant then moved to court and cited **Jacob Omondi Ooko** and **Lorna Atieno Ogweno**, would be administrators of estate of **Rusalina** vide succession cause number 357/2010 . In the meantime and in a separate succession Cause, **Jacob Omondi Ooko** obtained a grant of letters of Administration Ad-Litem and filed this suit.

In this suit the plaintiff prays for a declaration that land parcel Kamagambo/Kondundi/983 “**the suit premises**” belongs to and forms part of the estate of **Rusalina Anyango Orwa** deceased, permanent injunction against the defendant as well as costs of the suit . Essentially what the plaintiff is saying, is that, at all material times relevant to this suit, the plaintiff’s grandmother, **Rusalina Anyango Orwa** had been and still is the registered proprietor of the suit premises. However on or about September, 2010 the defendant without any lawful cause, basis and without any colour of right whatsoever trespassed into a portion of the suit premises and dispossessed the estate of the deceased, a substantial portion of the same. He had therefore brought the suit as the legal representative of the estate of the deceased.

Contemporaneously with the filing of the suit, the plaintiff took out a chamber summons application for temporary injunction pending the hearing and determination of the application and secondly, temporary injunction pending the hearing and final determination of the suit. He anchored the application on the grounds that the defendant had forcefully taken possession of a portion of the suit premises without the authority or permission of the plaintiff, the actions of the defendant were calculated to injure or alter the character of the suit premises and deny or deprive the plaintiff of use of the same. The acts of the defendant were bound to occasion irreparable loss to the plaintiff and in any event constitutes a violation of his indefeasible rights. In the premises the plaintiff had a prima facie case against the defendant.

When the application came first before me ex-parte, I certified it urgent but declined to grant interim injunction pending the hearing of the application interpartes. For now therefore prayers 1 and 2 on the face of the application are spent. This ruling is therefore limited to prayers 3 and 4 of the same application.

When served with the application, the defendant responded by filing a replying affidavit in which he deponed that on 11th may, 2006 he purchased a portion of the suit premises measuring 0.4 Ha from **Danile Ochola Odoyo** .The family of the deceased had all along been aware of the fact. Accordingly he was not a trespasser for he is a lawful purchaser of a portion of the suit premises he currently occupies. In the premises he will suffer irreparable damage if the injunction is granted. He was only waiting for succession proceedings to be concluded so that he may get his share of the suit premises as the original owner died before transferring the portion to him.

When the application came up for interpartes hearing before me on 17th November, 2010, parties agreed to canvass the same by way of written submissions. The same were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

The issues that emerge from this application and which call for determination are

- a) Whether the plaintiff has a prima facie case against the defendant?
- b) Whether the plaintiff would suffer irreparable loss? and
- c) Whether all said and done the balance of convenience tilts in favour of the plaintiff.

These are the basic principles upon which a court granting or refusing an interlocutory injunction has to grapple with. See **Mrao Ltd .v. First American Bank of Kenya Ltd (2003) KLR 125, Alkman .v. Muchoki (1984) KLR 353 and George Orango Orayo .v. George Liewa Jagalo C.A.No. 62 of 2009(UR).**

It cannot be gainsaid that the plaintiff is a legal administrator of the estate of **Rusalina Anyango Orwa**-deceased, having been so appointed vide letters of Administration Ad Litem issued to him on the 30th September, 2010. It is also common ground that the suit premises is still registered in the name of the deceased. Consequently, same forms part and parcel of the Estate of the deceased. It matters not therefore that the defendant may have an interest in the same as a purchaser. The defendant can only hope and pray that he will be able to pursue his claim through the succession proceedings if at all. However for now, his entry into the suit premises constitutes trespass and is infact intermeddling with the estate of a deceased in terms of section 45 of the **Law of Succession Act**. On this ground alone, I think that the plaintiff has established a prima facie case, with overwhelming chances of success against the defendant. The plaintiff's rights over the suit premises are statutorily vindicated by virtue of sections 27 & 28 of the **Registered Land Act**. If the court was to decline to issue the order of injunction it may be seen as sanctioning and protecting the defendant's unlawful acts and thus render valueless, the sanctity of title to the suit premises as well as violating the provisions of the **Law of Succession Act**.

Secondly, though the defendant contends to have purchased a portion of the suit premises, however, the person with whom he transacted, it would appear was not seized of the legal capacity to do so. Besides, as at the time of the alleged purchase, the grant to the estate of the deceased had neither been issued nor confirmed. Consequently, any dealing with the suit premises, in the absence of a confirmed grant amounts again to intermeddling in the estate of the deceased, which is illegal and infact a criminal offence.

Finally, the suit premises is an agricultural land and hence any dealing or transactions, touching or concerning the same, requires consent from the relevant Land Control Board within six months following the agreement. In the instant case, the defendant, admits that he neither sought for nor obtained the relevant land Control Board Consent following the agreement of sale. In the circumstances, the alleged Sale Agreement may well be null and void, for all intents and purposes. Consequently, it is possible that the defendant cannot enforce it by taking possession of the portion of the suit premises.

In this regard and on those two grounds, I am satisfied that the plaintiff has established a prima facie case against the defendant with the overwhelming chances of success.

Consequently, the application dated 22nd October, 2010 is allowed. An injunction shall forthwith issue pending the hearing and final determination of the suit. The plaintiff shall have the costs of this application.

Ruling dated, signed and delivered at Kisii this 31st March, 2011.

ASIKE-MAKHANDIA

JUDGE