



No. 2927

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 19 OF 2008

GEORGE ORANGO ORAGO ..... PLAINTIFF

**-VERSUS-**

GEORGE LIEWA JAGALO ..... 1<sup>ST</sup> DEFENDANT  
AMBROSE LIEWA..... 2<sup>ND</sup> DEFENDANT  
DAVID OCHIENG LIEWA..... 3<sup>RD</sup> DEFENDANT  
SAMWEL OKELLO OREGA ..... 4<sup>TH</sup> DEFENDANT

RULING

The plaintiff filed this suit against the defendants jointly and severally praying for a declaration that he is the registered proprietor of land parcel **Kanyamkago/Kawere1/3212** hereinafter "**the suit premises**". He also sought orders to restrain the defendants from trespassing onto the suit premises, general damages for trespass and costs of the suit. Apparently, the plaintiff is the registered proprietor of the suit premises which he purchased in 2006 from one, **Rose Achieng Aketch**, who was the daughter of the deceased original owner of the suit premises, one **Aketch Jagalo**. He thereafter proceeded to plant sugar cane thereon. However, before he could harvest the same, the defendants on or about 11<sup>th</sup> February, 2008 jointly and severally descended on the suit premises and set on fire the plaintiff's sugar claiming that the suit premises was their ancestral land. The defendants went on to graze their cattle on the sprouting sugar cane ratoon. Besides, on 10<sup>th</sup> April, 2008, the defendant jointly and severally chased the plaintiff from the suit premises, vowing never to allow him and or his employees, servants and or agents to enter the same.

Upon the defendants being served with the suit papers, they filed a joint statement of defence and counterclaim. Essentially they pleaded that the suit premises were a sub-division of land parcel **Kanyamkago 1/Kawere/1219** which was registered in the name of **Akech Jagalo**, deceased and was ancestral land. The deceased held the original parcel of land in trust for the entire **Jagalo** family. However, one married daughter of the deceased, **Rose Achieng Akech**, sold a portion of the original parcel of land to the plaintiff and this is the suit premises. The said sale was without consent of the **Jagalo** family members. **Rose Achieng Akech** is said to have obtained, albeit fraudulently, a grant of letters of administration in respect of the estate of her deceased father, **Akech Jagalo** vide **Migori SRM Succession Cause No. 242 of 2002** which she used to have the suit premises transferred to the plaintiff. They averred further that by their continued occupation of the suit premises, they had in any event acquired both prescriptive and overriding interest in the suit premises. By way of counterclaim, they prayed for a declaration that **Rose Achieng Akech** had no interest in the suit premises capable of being transferred to the plaintiff or any other person, the same being land held in trust for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants by **Akech Jagalo** and they were entitled to have the title of the suit premises rectified by deregistering the name of the plaintiff from the register and substituting the same with their names.

Alongside the suit, the plaintiff filed as well an application for temporary injunction against the defendants. The same was heard interpartes and in a reserved ruling delivered on 5<sup>th</sup> February, 2009, **Musinga J.** dismissed the same. Subsequently, the plaintiff mounted an appeal against the said ruling vide Court of Appeal Civil Appeal No. 62 of 2009 which appeal was heard and allowed on 30<sup>th</sup> April, 2010. The effect of the Court of Appeal's decision was that the plaintiff's application for temporary injunction which had hitherto been dismissed was granted. The defendants were thus restrained and or prohibited from entering upon, trespassing onto and or otherwise interfering with the plaintiff's right over the suit premises pending the hearing and final determination of the suit. Notwithstanding the order aforesaid, the defendants had continued with their acts of trespass as aforesaid unabated.

As a result, the plaintiff was constrained to mount the instant application dated 16<sup>th</sup> May, 2011 in which he seeks in the main that this court be pleased to cite in particular the 1<sup>st</sup> and 3<sup>rd</sup> defendants for contempt and to commit them to jail for a duration not exceeding six (6) months or such period as the court may deem fit and expedient. Alternatively, he prayed that the court do grant an order of sequestration to attach their properties, which properties should be sold to defray the damages occasioned by the breach and or disobedience of the lawful court orders of Temporary injunction dated 30<sup>th</sup> April, 2010.

The grounds in support of the application were that upon the delivery of the judgment of the Court of Appeal, the order was duly extracted and personally served upon the defendants. The order had the effect of barring and or restraining them from entering upon and trespassing on the suit premises. The order served was endorsed with a penal notice. Notwithstanding service of the order, the 1<sup>st</sup> and 3<sup>rd</sup> defendants had ignored, breached and or disobeyed the same. They had continued to enter into the suit premises. They had even destroyed the ratoon sugarcane growing thereon and had infact turned a portion of the suit premises into a football field, thereby allowing persons to encroach on the suit premises. On 10<sup>th</sup> May, 2011, the 1<sup>st</sup> and 3<sup>rd</sup> defendants violently and forcibly evicted and chased away the plaintiff from the suit premises and has since been denied or deprived of the opportunity to plough the suit premises. These acts of the defendants amounted to or constituted disobedience of lawful court orders, smacked of impunity and militated against the administration of justice and the rule of law in general. They had the effect of bringing into disrepute the integrity and dignity of the court, hence the need for them to be punished.

The application as expected was opposed. The 1<sup>st</sup> defendant swore the replying affidavit on his own behalf and that of the 3<sup>rd</sup> defendant. He deponed that the allegation by the plaintiff that they had turned the suit premises into a football field and that they also graze their cattle thereon were false and solely intended to mislead the court into sending them to jail with a view to intimidating them to abandoning the proceedings before court. They never attacked and or evicted the plaintiff on 10<sup>th</sup> May, 2011 from the suit premises. On the alleged date, the 3<sup>rd</sup> defendant who is the son of the 1<sup>st</sup> defendant was infact away in Naivasha where he works and resides. They could not have committed the alleged acts without the area chief and or his assistant receiving information of the same. They annexed copies of letters from the 3<sup>rd</sup> defendant's employer an assistant chief to confirm their depositions aforesaid. They confirmed that, they were aware of the Court of Appeal order and had all along complied with the same and had no intention whatsoever of disregarding or disobeying it. Thus the application had not been brought in good faith. The 1<sup>st</sup> defendant had no cattle capable of grazing on the plaintiff's sugarcane. He was also an extremely old man with no strength to visit violence on the plaintiff or play football. Thus they prayed for the dismissal of the application. With leave of court, the plaintiff swore a further supporting affidavit to counter the contents of the replying affidavit aforesaid.

When the application came up for interpartes hearing before me on 15<sup>th</sup> July, 2011, **Mr. Oguttu** and **Mr. Otieno**, learned counsel for the plaintiff and defendants respectively consented to canvassing the application by way of written submissions. Subsequently, they filed and exchanged written submissions which I have carefully read and considered.

It is common ground that there exists a lawful court order of temporary injunction directed at the defendants whose purport is to restrain them from entering into and trespassing upon the suit premises or interfering with the plaintiff's occupation, possession and use of the same. It is also common ground that

the said order was extracted and was duly endorsed with a penal notice at the foot thereof. Finally, it is common ground that the said order was indeed served upon the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants personally, if the affidavit of service sworn on the 22<sup>nd</sup> November, 2010 and on record is anything to go by. At any rate the 1<sup>st</sup> and 3<sup>rd</sup> defendants have conceded that they are aware and or knowledgeable of the order in their replying affidavit. What then appears to be in contention is whether the defendants have breached or acted in defiance of the said court order.

According to the plaintiff, the defendants have maliciously and with impunity defied the court order by routinely entering into the suit premises and destroying his sugar cane ratoon crop by grazing their cattle thereon. They have also turned a portion of the suit premises into a football pitch and finally on 10<sup>th</sup> May, 2011, the defendants violently and forcibly evicted and chased him from the suit premises and have since barred him from re-entering the suit premises.

However in so far as the defendants are concerned, they have done none of the above. They have all along obeyed the court order and have no intention of disobeying the same now and or in future until the case is heard and determined. They see the instant application as a calculated ploy to intimidate them in to succumbing to the whims of the plaintiff, this suit notwithstanding. That the plaintiff is exploiting the injunctive orders oppressively so as to cow them and for vengeance which conduct should be deprecated. The 1<sup>st</sup> defendant is an old man incapable of violently attacking the plaintiff who is a young and energetic man nor can he play football. Neither does he have cattle to graze in the suit premises. As for 3<sup>rd</sup> defendant he works and resides in Naivasha. He could therefore have not attacked and evicted the plaintiff on the day alleged as he was at his work station. In the same vein, he could not engage in football or be grazing cattle in the suit premises.

No doubt the orders sought by the plaintiff are drastic and of serious consequences as they involve curtailment of the liberty of the defendants. Before they are granted therefore, this court must be satisfied not on balance of probability or prove beyond reasonable doubt but to a standard in between the two, that the defendants committed the acts complained of since contempt proceedings are quasi criminal in nature. As correctly observed by counsel for the defendants, the court is faced with two rival positions taken by the plaintiff and defendants, which contradict each other and the court must be satisfied from the material placed before it that the only deduction open is that no other person other than the cited defendants chased away the plaintiff as alleged, have been grazing their cattle on the suit premises and finally, have turned a portion of the suit premises into a football pitch.

On the material before, I am unable to hold that the defendants have committed the acts complained of. The plaintiff appears to me to be a very methodical and meticulous person. He is very good at collecting and storing evidence, if the taking of photographs and the letters he has authored to several organs of state he has annexed on the material placed before me is anything to go by. If indeed, the defendants had turned a portion of his suit premises into a football pitch, where is the photographs showing people engaged in football game in that portion of the suit premises. Football is not played by one or two people. Much as he has annexed in his further supporting affidavit a photograph which he purports that it shows, a portion of the suit premises with goal posts standing thereon, my scrutiny of the photograph does not support that contention. All I can see is a portion of land which is fallow. I cannot see the goal posts. But even if there are, where is the evidence that the same were fixed by the cited defendants and or that they are the ones who have turned that portion into football field? Football is not played in secrecy. If the defendants had turned a portion of the suit premises into a football field and played football thereon, it would not have been impossible to take photographs of a match in progress and the defendants in action. Again it is not disputed that the 1<sup>st</sup> defendant is an old man of over 75 years. Is such person capable of playing football? I have my doubts. Of course, there is a letter dated 11<sup>th</sup> July, 2011 by the chief of Central Kamyamkago location in which he says “**...I would like to fully confirm that till this date that the disputed land had been turned to a football field and there is nothing going on, on that fertile piece of land...**”. It is instructive that this letter was authored after the defendants had filed their replying affidavit in which they had raised the issue as to whether such occurrence would have passed without the knowledge of the local administration. It is possible therefore that the letter was generated purposely to counter the foregoing. In any event the letter does not say that the portion of the

suit premises was turned into a football pitch at the instigation of the defendants. Finally, one would have expected that knowing that the suit premises belonged to the plaintiff and had been invaded and turned into a football pitch, the chief would, as a member of the provincial administration have taken remedial measures to ensure that peace and tranquility prevailed in his area. He does not do such a thing. Instead he wails along with the plaintiff. It is doubtful really, whether that is the situation on the ground. Further how come such an event was not captured in the letter of the assistant chief of the same area dated 1<sup>st</sup> July, 2011 annexed to the defendant's replying affidavit? Between the chief and his assistant chief, who is closer to the suit premises? No doubt it would be the assistant chief ordinarily in the pecking order or seniority in provincial administration.

How about assaulting and chasing away the plaintiff from the suit premises on 10<sup>th</sup> May, 2011? The 1<sup>st</sup> respondent has deposed that he is an old man of over 75 years in capable of visiting violence on the plaintiff. The area assistant chief has also written a letter confirming the fact and that he had not received any report of the incident. This fact has not been disputed. If anything, the plaintiff concedes that whereas the 1<sup>st</sup> defendant is an old man, he is nonetheless violent and forms the fulcrum upon which the violence being meted upon him revolves. What I understand the plaintiff to be saying is that although the 1<sup>st</sup> defendant did not personally visit violence on him and chased him away, he nonetheless instigated the same. However, this is a complete departure from what the plaintiff said in his grounds and affidavit in support of the application. He was categorical that ***“on 10<sup>th</sup> May, 2011 the 1<sup>st</sup> and 3<sup>rd</sup> defendants/respondents violently and forcibly evicted and chased the plaintiff from entering onto the suit land”***. What is the court to take with regard to the shifting position of the plaintiff? I think that the plaintiff is not being candid with the court. I doubt very much that an old man of over 75 years can act in the manner complained of by the plaintiff. Visiting violence on someone is in any case a criminal offence. How come the plaintiff has not taken up the alleged assault with the police for appropriate remedy.

The case for the 3<sup>rd</sup> defendant is that he could not have committed what he is being accused of on the material day as he was away at his work station in Naivasha. There is a letter from his employer confirming that fact. There is therefore no way that he could have been engaged in the acts alleged since he was in Naivasha on the material day. The letter speaks for itself. It has not been impugned. It is also instructive that the two letters by the chief and assistant chief respectively do not make any reference at all to the incident of 10<sup>th</sup> May, 2011. Assuming that the two members of the provincial administrators were neutral parties to the dispute, could such an incident not come to their attention? The two all, acknowledge knowing the parties herein and if the allegations being fronted by the plaintiff were true, then nothing would have prevented them from stating that the defendants committed atrocities complained of against the plaintiff.

The same arguments and conclusion will go for the allegation that the defendants have been grazing cattle on the suit premises. Further there is no evidence that the defendants own cattle. Apart from the plaintiff merely asserting in his affidavit that the 1<sup>st</sup> respondent owns cattle, which he himself grazes in the sugarcane plantation, there is no other evidence to back up the claim. The 1<sup>st</sup> defendant has denied owning such cattle. It was therefore incumbent upon the plaintiff to bring forth such evidence as to counter the 1<sup>st</sup> defendant deposition. Perhaps photographs of the 1<sup>st</sup> defendants alleged cattle grazing in the suit premises would have done the trick.

Finally, I may observe that there has been a long standing legal battle between the parties herein and the possibility of one party using the process of this court so as to settle personal scores cannot be completely ruled out. It is for this reason that the court must be cautious in entertaining the instant application. To my mind, it would be unsafe for this court to proceed and curtail the freedom of the defendants based on shaky evidence which does not at all connect them with the acts complained of by the plaintiff. Accordingly, the application is dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

**Ruling dated, signed and delivered** at Kisii this 23<sup>rd</sup> day of September, 2011.

**ASIKE-MAKHANDIA**  
**JUDGE**