



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 102 of 2001

(Appeal from the Decision and Ruling of the Mumias SRMCC NO. 357 of 2001 delivered on 4th December 2001 by N. B. K. NYAMATEGANDA, ESQ. Senior Resident Magistrate)

ELIZABETH

OKOYANAAPPELLANT

V E R S U S

HENRY AMWAYI

NDETERESPONDENT

J U D G E M E N T

This is a judgement from the Ruling of N. B. K. Nyamateganda Esq., delivered on 4-12-2001 in Mumias SRM Civil Case No. 357 of 2001. In that case, Henry Amwayi Ndetete, the present Respondent had sued Elizabeth Okoyana, the present appellant, seeking an order for exhumation of the remains of the body of her father. He wanted the said remains to be interred in a place other than on land No. Kisa/Emasatsi / 1082. His claim was that the said land had been sold by the deceased in 1984 to the Respondent. The latter alleged that he had paid the full consideration for it and had obtained a transfer of it to his name as well as possession. The Respondent's contention was that the Appellant had mobilized people after the death of her father and interred the latter's remains on the said land without the Respondent's consent or any justification. He further alleged that the Appellant had after the interment started making claims for the land.

The Appellant's defence was that the land had not been sold to the Respondent as alleged nor had it been transferred to him.

In his application dated 12-11-2001 the Respondent sought orders including an order that a temporary interlocutory injunction be made that the cadaver of the father of the Appellant that was interred on the said land be exhumed and preserved at Kakamega Provincial General Hospital mortuary pending the hearing and determination of the application.

After hearing the application which was contested, the learned trial magistrate ordered on 4.12.2001 that the Appellant be restrained from interfering and/or dealing with the Respondent's land No. Kisa/Emasatsi/1082 and further that the cadaver of the Appellant's father that was interred on the said land be exhumed and preserved at Kakamega Provincial Hospital Mortuary pending hearing and determination of the substantive suit. It was from this Ruling that the Appellant appealed.

In her Memorandum of appeal, the Appellant proffered five grounds of appeal as follows:-

1. *The learned trial Magistrate erred in law and fact in granting the substantive Order sought in the plaint at interlocutory level and on Chamber Summons application.*
2. *The learned trial Magistrate erred in law and fact in holding the appellant responsible for funeral arrangements of the late Kamulusi Anzaya Osodo when the decision to bury the deceased was taken by the deceased's clan and not the appellant.*
3. *The learned trial Magistrate erred in law and fact in granting an application which had been brought against a person who had no Letters of Administration and who could not sue nor be sued for and on behalf of the acts and or the deceased.*
4. *The learned trial Magistrate erred in law and fact in granting an injunction when the Respondent had not established that he had a prima-facial case against the appellant and or that the respondent would suffer irreparable loss, damage and or injury as laid down in the long cherished case of *Giella vs Cassman Brown & Co. Ltd. (1973) E.A. 358.**
5. *The learned trial Magistrate failed to address the issues raised by the appellant thereby occasioning Miscarriage of Justice.*

When the appeal came up for hearing on 23-2-2005, Mr. Shitsama who appeared for the Appellant urged the court to allow the appeal and reverse the orders of the lower court and grant the costs for the removal of the body and the costs of the appeal to the appellant.

In summary, Mr. Shitsama's submissions were that the trial magistrate determined the main suit without hearing it on merit; that the order by the trial magistrate contravened Order 39 of the Civil Procedure Rules; and that the principles for granting injunctions even if applicable were not established as no prima facie case was shown. In his view, the Respondent was not going to suffer any irreparable damage as a result of the body remaining buried on the land. No reasons, he said, were given for the ruling.

On his part, Mr. Waiyaki, counsel for the Respondent, opposed the appeal and supported the trial magistrate's orders. He said that the remains of the father of the Appellant were on somebody else's land. He contended that letters of administration were not necessary for the purpose of the suit against the Appellant because the latter was only a relative of the deceased and in any case, by burying the remains on the said land, the Appellant "had invited" the suit against herself.

It was Mr. Waiyaki's contention that the Respondent had suffered irreparable damage for the simple reason that he could not use the land as the remains of the Appellant's father had been interred on it. Moreover, he argued, the Appellant had no title to it and could not lawfully bury the remains on somebody else's land. It was also Mr. Waiyaki's contention that as the cadaver had been exhumed and removed to a mortuary, the court cannot reverse the lower court orders on appeal as that will mean restoration of the *status quo ante* which the court could not enforce.

I have perused the memorandum of appeal and given due consideration to the submissions of both counsel. First of all, a look at the orders appealed from. The suit was yet to be heard. The only relief sought in the plaint was removal of the cadaver from the land in question. In spite of this, the learned trial magistrate granted an order of injunction against the Appellant restraining the latter from interfering or dealing with the land.

It was wrong in law to grant the injunction as it was not a relief sought in the suit. He also ordered removal of the cadaver from the land thereby literally disposing of the suit. The correct procedure should have been to hear the suit itself on merit and determine the issue whether in law the Appellant could bury the remains of his father on the land. Interim or interlocutory orders unless recorded by consent ought not to finally determine the rights of the parties before the merits of the dispute have been canvassed. They are supposed to preserve the subject matter of suit or the rights of the warring parties pending final hearing and determination of a suit. In the instant case, the relief sought in the plaint having been granted, the suit was rendered infructuous and purposeless in that nothing remained to be tried or determined.

How can this be rectified in this case. Firstly the issue of whether the Appellant had letters of administration or not was immaterial because the issue was whether the Appellant had a right in law to bury her father's remains on the land in question. That did not require the Appellant to have Grant of Letters as the issue of estate of the deceased did not arise.

At the stage when the order for exhumation was made, the court had not determined who between the Appellant and the Respondent was the legal owner of the land in question. Without or before a determination of this issue, it was premature to grant the exhumation order. In his application for the exhumation order the Respondent claimed to have bought the land in question from the deceased. The documents exhibited by him in the application did not show payment of money in consideration and indeed both the Title Deed (annexture "HAN 1") and the FORM for application for consent of the Land Control Board (annexture "HAN II") indicated that the land was transferred to the Respondent not for a money consideration but rather as a gift. In her defence, the Appellant challenged the legitimacy of the transfer but made no counter-claim. Consequently, the Respondent, as matters stand, at least on the face of it, holds the legal title to and is the registered proprietor of the land in question. If I confirm the orders made by the trial court and dismiss the appeal, the effect of this will be to endorse the determination of the suit without the appellant being heard on merit. Two wrongs do not make a right. On the other hand, if the appeal is allowed without more, the parties will be put to considerable emotional stress and suffering as the setting aside of the orders will provide only a temporary reprieve for one party and create the potential for greater suffering, inconvenience and the cost, both emotional and material, shall not be justified. Each party is entitled to have its day in court but the court has a duty to ensure that neither party's rights or interest is prejudiced or compromised by interlocutory orders unless they are by consent. Prima facie, the Respondent by dint of the fact that he appears to hold the title deed appears to be the legal owner of the land in question. The Appellant on the face of it has no legal title to the land but is yet to establish what right she has to bury the remains of her father's body on that land.

Doing the best I can, I think the ends of justice will be served by an order setting aside all the orders made by the trial magistrate on 4-12-2001 and in their place substituting the following orders.

- (i) the remains of the body of the Appellant's father shall continue to be held at Kakameg Provincial General Hospital mortuary until the final determination of the suit;
- (ii) The suit shall urgently be set down for hearing and be heard and determined before 31st July

2005 before a magistrate other than N. B. K. Nyamategandah.

(iii) The costs of this appeal shall abide the result of the suit.

In effect, the appeal is allowed on these terms.

Dated at Kakamega this 20th day of May, 2005.

G. B. M. KARIUKI

J U D G E