



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 35 OF 2019

JOSEPH ANJICHI ABURILI

OBED ABURILI OTENYOAPPELLANTS

VERSUS

GEORGE OCHOLA

DORCAS AYOMA MBALANYARESPONDENTS

JUDGEMENT

The appellant named herein Joseph Anjichi Aburili, being dissatisfied with the judgment and order of the Honourable Mr. W.K. Cheruiyot, SRM in Vihiga PMC ELC No. 18 of 2019 delivered on 23rd August, 2019 hereby appeals against the whole of the said judgment on the following grounds:-

1. The learned trial magistrate erred in both law and fact by dismissing the appellant's injunction application, yet the same had laid out sufficient basis to warrant the injunction order being granted.
2. The learned trial magistrate perpetrated an illegality by while washing an offence committed by the respondents in dealing with the property of a deceased without a valid confirmed grant.
3. The learned trial magistrate erred in both law and fact in failing to consider the appellant's submissions before arriving at his decision.
4. The ruling was against the weight of evidence.

Reasons wherefore the appellant prays for:-

- (a) This appeal to be allowed with costs.
- (b) The ruling of the Honourable Mr. W.K. Cheruiyot, Senior Resident Magistrate in Vihiga PMC ELC No. 18 of 2019 delivered on 23rd August, 2019 be set aside in its entirety and substituted with an order allowing the appellant's Notice of Motion application dated 24th April, 2019 by injunctioning the respondents from the appellants and the tenants therein.

The appellant's complaint before the subordinate court was that the 1st respondent used a Maseno Court grant that had been revoked by the Kisumu High Court to transfer the suit property land parcel No. West Bunyore/Ebusikhale/2253 to the name of the 2nd defendant. The issue is that the 1st respondent used a revoked grant to transfer the suit property. Secondly, as per the current grant issued in Kisumu High Court, the appellant and the 1st respondent are supposed to be co-administrators hence both ought to have executed the transfer instruments and not the 1st respondent only to make it effective. However, the instrument that transferred the suit property to the name of the 2nd respondent is in the name of the 1st respondent only. The transfer was as such illegal, null and void. No proper title passed to the 2nd respondent. Hence, it was incorrect for the learned trial magistrate to find that the appellant had not established a prima facie. The appellant pleaded that he and the estate of the deceased Obed Aburili Otenyo who was the original owner of the suit property stand to suffer irreparable loss if the 1st respondent is not injunctioned. She planned to evict the tenants of the estate. Hence, the appellant being a beneficiary of the estate was bound to suffer irreparable harm if an injunction was not granted. The appellant submitted that the balance of convenience tilts in his favour in that he was a co-administrator of the deceased's suit property. In the event the court declines to grant the injunctive orders, the tenants and other beneficiaries of the estate were bound to be evicted hence leading loss and wastage to the estate. Whichever way the trial magistrate looked at things, the balance of convenience tilted in favour of the appellant. However, the trial magistrate ruled otherwise. That the trial magistrate failed to consider the appellant's submissions before arriving at his decision. It behooves a court of law to consider all the submissions

before passing a decision. Failure to consider one's submission amounts to condemning one unheard.

They submit that, the learned trial magistrate perpetrated an illegality by white washing an offence committed by the respondents in dealing with the property of a deceased without a valid confirmed grant. That the 1st respondent admitted that he relied on a revoked grant to transfer the suit property to the 2nd respondent. Section 45 (1) of the Law of Succession Act provides that except with the authorization of the Act, or any other written law, or by grant of representation under the Act, no person shall, for any purpose, take possession or dispose or, otherwise intermeddle with any free property of a deceased person. Further, section 82 (b) (ii) of the Law of Succession Act states that no immovable property of a deceased person shall be sold before confirmation of grant.

The respondent submitted that the appellant herein was under duty to show that he owned L.R. No. West Bunyore/Ebusikhale/2253 or had a valid claim capable of defeating the 2nd respondent's claim. That the appellant did not demonstrate to the trial court that he owned L.R. No. West Bunyore/Ebusikhale/2253. The appellant did not show and has not shown what interest he has in L.R. No. West Bunyore/Ebusikhale/2253, which is capable of defeating the 2nd respondent's claim. The documents placed before the learned trial magistrate demonstrated that the 2nd respondent herein is the registered owner of L.R. No. West Bunyore/Ebusikhale/2253 and that she acquired the same from persons to whom it had been bequeathed for valuable consideration the appellant herein had absolutely no proprietary interest in the said parcel of land. That the appellant's complaint that the 1st respondent's registration was on the basis of a lower court grant which had since been revoked was explained by the 1st respondent vide his replying affidavit which is at page 34-32 of the record of appeal. The 1st respondent deponed that he was registered as proprietor of L.R. No. West Bunyore/Ebusikhale/2253 on 3rd May, 2011 and that during the pendency of Succession Cause number 77 of 2013 at Kisumu High Court, his registration was not cancelled and that at the conclusion of the said High Court Succession Cause the position remained as the lower court had shared out the estate of the deceased. The High Court did not alter the distribution that had been made by the lower court and consequently there was no need to cancel the registration and again register the High Court documents afresh. It is their humble submission that the learned trial magistrate was right in holding that the appellant had no established a prima facie case with high chances of success.

They submitted that the 1st respondent and his brother Joel Ngala Aburili were beneficiaries of L.R. No. West Bunyore/Ebusikhale/2253 and 203 while the appellant was a beneficiary of L.R. No. West Bunyore/Ebusikhale/204 and 2287. The distribution was made on 18th April, 2018 and the appellant wanted to continue enjoying proceeds from L.R. No. West Bunyore/Ebusikhale/2253 contrary to the distribution which had been made by the High Court. It is their submission that the appeal herein lacks merit and that the same should be dismissed with costs.

This court has considered the appeal and submissions therein. The appeal is based on the ground inter alia that the learned trial magistrate erred in both law and fact by dismissing the appellant's injunction application, yet the same had laid out sufficient basis to warrant the injunction order being granted. The appeal being one that seeks an injunction, has to be considered within the principles set out in the case of *Giella vs Cassman Brown & Co Ltd* 1973 E.A 358 and which are:-

1. *The applicant must show a prima facie case with a probability of success at the trial*
2. *The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,*
3. *If in doubt, the Court will decide the application on a balance of convenience.*

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity. The appellant's complaint before the subordinate court was that the 1st respondent used a Maseno Court grant that had been revoked by the Kisumu High Court to transfer the suit property to the name of the 2nd defendant. The issue is that the 1st respondent used a revoked grant to transfer the suit property. Secondly, as per the current grant issued in Kisumu High Court, the appellant and the 1st respondent are supposed to be co-administrators hence both ought to have executed the transfer instruments and not the 1st respondent only to make it effective. I have perused the lower court file and find that indeed the 1st respondent used a Maseno Court grant to transfer the suit property to the 2nd respondent however the same had not been revoked when the 1st respondent transferred it to his name. Secondly the High Court never cancelled the said title which is now in the name of the 2nd respondent. The High Court in Kisumu also distributed the suit property in favour of the 1st respondent who transferred the same to the 2nd respondent. This reconfirmed the order of the Maseno Court on the issue of division of property. I find that the appellant has not established a prima facie case with a probability of success at the trial. In *Mwanasokoni vs. Kenya Bus Service* (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the ruling as it was based on cogent evidence. This appeal is dismissed for lack of merit with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 27TH JULY 2021.

N.A. MATHEKA

JUDGE