



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC APPEAL NO. 10 OF 2018

JOEL OTOIGO NYANSING'A.....PLAINTIFF

VERSUS

ANNAH KWAMBOKA NYANSIG'A.....DEFENDANT

RULING

INTRODUCTION

1. The Appellant herein Joel Otoigo Nyansing'a filed this appeal against the Ruling of Hon. R.B N. Maloba Senior Resident Magistrate, Kisii in CMCC NO. 293 of 2009. In the said ruling the learned Magistrate dismissed an application for injunction to restrain the Respondent (defendant) from inter alia accessing and interring the remains of her late son Geoffrey Bosire Nyansing'a on land parcel number Nyaribari/Chache/B/B/Boburia/412 pending the hearing and determination of the suit. The appeal is based on the following grounds:

1. The learned Magistrate erred in law and fact by holding that the Respondent has land as against the Appellant.
2. The learned Magistrate erred in law and fact by basing her ruling on the decision of Kiogoro Land disputes Tribunal whose decision was never adopted as an order of the court in Kisii CMCC Miscellaneous Civil Application No. 123 of 2006 by holding that the Respondent has a claim over the land as against the estate of the late Marko Nyasing'a.
3. The learned Magistrate erred in law and fact by holding that the respondent was married to the late Marko Nyansing'a Miyienda thereby contradicting the decision of the High Court in Kisii HC P & A No. 320 of 2002
4. The learned Magistrate erred in law and fact by holding that the Respondent had four children with the said Marko Nyansing'a Miyienda deceased who is the registered owner of the disputed parcel of land
5. The learned Magistrate erred in law and fact by holding that the Respondent has a claim as against the share of the appellant and yet the appellant is only a part holder of the disputed land and he is not the administrator of the estate of Marko Nyansing'a who died testate.

2. The brief facts of the case are as follows: The Appellant (Plaintiff) filed an application to restrain the Respondent (Defendant) from entering, erecting any structures, damaging any property, interring the body of one Geoffrey Bosire Nyansing'a demarcating, alienating or doing any other thing on all that land known as Nyaribari/Chache/B/B Boburia /412 pending the hearing of the application.

3. The suit property is registered in the name of Marko Nyansing'a (deceased) who was the father of the appellant. The Respondent opposed the application on the grounds that it was fatally defective, frivolous and an abuse of the court process. The court visited the suit property after which the application was canvassed by way of written submissions. The court then delivered its ruling in which it held that the Applicant had failed to prove that he had a prima facie case with a probability of success as the Respondent had an equitable/beneficial interest in the suit property as one of the widows of Marko Nyansing'a who is the registered owner of the suit property and as such, she could not be evicted therefrom. She further observed that the Appellant 's application went against the award of the Kiogoro Division Land Disputes' Tribunal case no. 17 of 2005 in which the elders held that the Respondent was married to the deceased in accordance with Abagusii customary law and was therefore entitled to a share of his property.

ISSUES FOR DETERMINATION

4. Having considered the Memorandum of Appeal and counsel's submissions, the singular issue that falls for determination is whether the court ought to interfere with the lower court's exercise of discretion in dismissing the application for injunction.

ANALYSIS AND DETERMINATION

5. I note that the grounds of appeal as framed touch on the merits of the suit rather than whether the lower court applied the principles of injunctions in dismissing the application for injunction.

6. I must from the outset make it clear that this ruling is in respect of the appeal against the refusal to grant the application for injunction pending the hearing and determination of the main suit and not whether the suit is meritorious. The issue as to whether or not the respondent is a widow of the deceased and whether the decision of the Land Disputes Tribunal was proper are therefore not in issue as this would amount to making determinations on the main suit.

As was stated in the case of *Mbogo V Shah 1967 EA 93*

“The Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice.

7. The appellant has not demonstrated that the learned magistrate exercised her discretion wrongly. I have read the ruling of the learned magistrate and I have noted that in arriving at her decision she was guided by the three principles laid down in *Giella v Cassman Brown* which require that an applicant demonstrates that he has a prima facie case with a probability of success, that he will suffer irreparable loss if the order of injunction is not granted and if the court is in doubt, it should base its decision on a balance of convenience. The appellant has not faulted the learned magistrate for failing to follow the said principles. Instead he has gone into the merits of the case. **8.** It is trite law that the role of a Court faced with an interlocutory application for injunction is not really to make final findings but to weigh the relative strength of the parties' cases. This was so held in the case of *Mbuthia Vs Jimba Credit Corporation Ltd (1988) KLR1*, where the court stated as follows:-

“in an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties' cases,”

9. In view of the foregoing, I find no merit in the appeal and I dismiss it with costs to the respondent.

Dated, signed and delivered at Kisii this 21st day of November 2019.

J.M ONYANGO

JUDGE