



**IN THE COURT OF APPEAL  
AT ELDORET  
(CORAM: O'KUBASU, GITHINJI, ONYANGO OTIENO J.J.A.)**

**CIVIL APPEAL NO. 260 OF 2005  
BETWEEN**

**TOROTICH MISOI MERENG .....APPELLANT**

**AND**

**MOHAMED ALI .....FIRST RESPONDENT  
SETTLEMENT FUND TRUSTEES .....SECOND RESPONDENT**

***(An appeal from the Ruling and Order of the High Court of Kenya Eldoret Jeanne Gacheche J.) dated  
the 9<sup>th</sup> day of June 2005 in***

***H.C.C.C. No. 139 of 2004)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is appeal from the Ruling and Order of the superior court (Gacheche J) dated 9<sup>th</sup> June, 2005 dismissing an interlocutory application for injunction pending the hearing of the suit.

On or about 10<sup>th</sup> November 2004 Toroitich Misoi Mereng, (appellant) filed a suit at High Court Eldoret against the two respondents for recovery of land parcel number **KUINET SETTLEMENT SCHEME Plot Number 256** (suit land) and permanent injunction.

The appellant averred in the plaint, *inter alia*, that on 6<sup>th</sup> June, 1983, the 2<sup>nd</sup> Respondent, Settlement Fund Trustees (SFT) allocated the suit land measuring 5 acres to the appellant; that on 7<sup>th</sup> June, 1983, the appellant paid a deposit of Shs. 625/= and was put in possession of the land; that sometime in 2004 the appellant discovered that SFT had allocated the suit land to the 1<sup>st</sup> respondent; that the 1<sup>st</sup> respondent had on 1<sup>st</sup> November 2004 collected a Discharge of Charge and Transfer documents for registration; that the appellant had not received any notification of arrears of instalments from SFT before the allocation to 1<sup>st</sup> respondent, and, that, the allocation to 1<sup>st</sup> respondent was fraudulent and illegal. The 1<sup>st</sup> respondent filed a defence denying allegations of fraud and illegality. Further the 1<sup>st</sup> respondent averred that the suit land was allocated to him legally and procedurally and that the land had been registered in his name. There is no Defence on record from the 2<sup>nd</sup> respondent.

Thereafter the appellant filed an application for interlocutory injunction to restrain the respondents from, among other things, entering into the suit land, dealing with or obtaining title to the suit land. The application was supported by the appellant's affidavit and documents. Annexed to the application was a letter from the Senior Chief Soy Location indicating that the appellant was allocated the suit land as compensation for his ten acres land which he had donated for public utility.

The 1<sup>st</sup> respondent filed grounds of opposition to the application but did not file a replying affidavit. In addition the 1<sup>st</sup> respondent's counsel attended the hearing of the application. However, the 2<sup>nd</sup> respondent did not file any documents nor participate at the hearing of the application.

The trial judge after hearing the application made findings of fact, *inter alia*, that the appellant did not abide with the terms and conditions as stipulated in the Charge in that he did not remit half – yearly instalments. The trial judge further made a finding that although the Charge document and Letter of Allotment were silent on the nature of action to be taken in default, **section 174** of the **Agriculture Act** and **sections 31(a)** and **33(1)** of the **Agricultural Finance Corporation Act** which the court quoted, applied. The superior court ultimately concluded.

*“Having defaulted in the payments and taking the above provisions of law into account, he cannot now be heard to claim that he is the owner of the subject land. Needless to say, though he remained in occupation, there is no evidence that he actually acquired the title at any one stage.”*

The appellant challenges those findings and contends that the learned judge erred in the exercise of judicial discretion.

We appreciate that this court cannot interfere with the exercise of discretion by the superior court unless we are satisfied that the judge misdirected herself in some matter and as a result arrived at a wrong decision or unless it is manifest that the judge was clearly wrong in exercise of her discretion and as a result there has been miscarriage of justice (**see Mbogo –Vs- Shah [1968] EA 93**).

The respondents did not attend the hearing of the appeal. Mr. Cheptarus, learned counsel for the appellant submitted, *inter alia*, that the suit in the superior court has not proceeded because the Ruling under appeal determined the issue of ownership of the land; that the provisions of the Agriculture Act and the Agricultural Finance Corporation Act relied on by the learned judge were not raised by any party in the submissions; that even if the provisions applied, the 2<sup>nd</sup> respondent did not issue any notice to the appellant; that the trial judge did not apply the principles for granting an injunction, and, lastly that the appellant who has been in possession of the suit land would suffer irreparable damage unless an order of injunction was granted.

It is apparent from the Ruling of the superior court that the court finally determined the dispute over the ownership of the suit land. It is also apparent that the superior court had very scanty evidence on the basis of which it could have determined the dispute as the respondent had filed neither a replying affidavit nor documentary evidence. Furthermore the superior court relied on the provisions of the Agriculture Act and the Agricultural Finance Corporation Act without giving an opportunity to the appellant's counsel to address the court on the applicability of such provisions. Furthermore, the superior court failed to appreciate that if section 33(1) of the Agricultural Finance Corporation Act indeed applied, then SFT was required, in case of default, to serve a notice on the appellant demanding payment and thereafter if the charged land had to be sold, then to sell the land by public auction after publishing a 21 days notice of sale in the Gazette, among other things.

The appellant complained in the plaint that SFT failed to issue a notification and that the suit land was re-allocated to the 1<sup>st</sup> respondent illegally fraudulently and unlawfully. Since SFT did not file a defence or a replying affidavit or make submissions in the superior court, there was no basis for finding that the suit land was lawfully repossessed or re-allocated.

On our own analysis of the material before the superior court we are satisfied that the superior court misdirected itself on the principles for granting an interlocutory injunction and as a result failed to exercise its discretion judicially. We are further satisfied that the appellant established a case for grant of an interlocutory injunction.

Accordingly, the appeal is allowed, the Ruling and Order of the superior court dismissing the application for injunction is set aside and in lieu thereof we grant an order of injunction in terms of the

chamber summons dated 10<sup>th</sup> November 2004 pending the determination of the suit.

The costs of this appeal and the application in the superior court shall be costs in the suit.

**Dated and delivered at Eldoret this 11<sup>th</sup> day of November, 2011.**

**E. O. O’KUBASU**

.....  
**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**