



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Civil Appeal 62 of 2009

BETWEEN
GEORGE ORANGO ORAGO APPELLANT

AND

1. GEORGE LIEWA JAGALO

2. AMBROSE LIEWA

3. DAVID OCHIENG LIEWA

4. SAMUEL OKELLO OREGE.....

RESPONDENTS

(Appeal from the Ruling of the High Court of Kenya at Kisii (Musinga J.) dated and delivered on the 5th day of February 2009

in

H.C.C.C. NO.19 OF 2008)

JUDGMENT OF THE COURT

This is an appeal by **George Orango Orago**, the appellant, against the decision of the superior court (*Musinga J.*) given on 5th February 2009, in which he dismissed the appellant’s chamber summons dated 18th April 2008, in which the appellant had applied for a temporary injunction restraining **George Liewa Jagalo, Ambrose Liewa, David Ochieng Liewa** and **Samuel Okello Orege**, the 1st, 2nd, 3rd and 4th respondents, respectively, in the appeal, as defendants in **High Court Civil Case No. 19 of 2008**, in which the application was made, from trespassing on the subject matter of the litigation. The dispute in that suit concerns land known as **L.R. No. Kanyamkago/Kawere II/3212**, then and presently registered in the name of the appellant.

There are 11 grounds of appeal, but considering that this is an interlocutory appeal, consideration of some of the grounds, might encroach on the jurisdiction of the trial court as the suit in which the order appealed against was made, is still pending. We will deal with the appeal by considering whether in the circumstances of this matter the trial Judge properly exercised his judicial discretion under **O.XXXIX Rules 1 & 2** under which the application for a temporary injunction was

made. It is trite law that an appellate court will not interfere with exercise of judicial discretion unless it is shown that the trial Judge misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice (see **Mbogo And Another v. Shah** [1969] E.A. 93).

In his plaint dated 18th but filed in the superior court at Kisii, on 21st April 2008, the appellant averred, inter alia, that on or about 20th July 2006, he purchased the subject property from one **Rose Akech Achieng** as the legal Administratrix of one **Akech Jagalo**, who was the original registered owner of the land. The land measures 2.8 hectares and was originally, part of land known as Kanyamkago/Kawere 1/1219. Rose Akech Achieng was one of four daughters of Akech Jagalo (the deceased). The deceased was not survived by a son and hence Rose Akech Achieng becoming the Administratrix of his estate.

It was the respondents' case that parcel No. Kanyamkago/Kawere 1/1219, was registered in the name of Akech Jagalo as trustee for his own benefit and also for the benefit of his four brothers, among them **Everesto Odera** also known as Efanesto Odera Jagalo, **Isiah Otila Jagalo**, and **George Liewa Jagalo**. Everesto Odera, Isiah Otila Jagalo, like Akech Jagalo are deceased. George Liewa Jagalo, the 1st respondent is the father of David Ochieng Liewa, and also the uncle of Ambrose Liewa.

Rose Akech Achieng was the eldest daughter of Akech Jagalo. Upon her father's death she applied under **Succession Cause No.242 of 2002**, in the Senior Principal Magistrate's Court at Migori for letters of administration intestate of his estate. She is alleged to have understated the value of parcel No. Kanyamkago/Kawere 1/1219 to bring it within the jurisdiction of that Court which otherwise would not have had jurisdiction to handle the matter. It was after she obtained grant of representation that she sold a portion of that land to the appellant herein. Prior thereto the land was, the subject matter of another suit to wit **Kisii High Court Civil Case No.465 of 1994**, in which the 1st respondent had sued Akech Jagalo and Efanesto Odera Jagalo for, first, a declaration that the defendants held that parcel of land and parcel No. Kanyamkago/Kawere/692 in trust for him, among other two persons; second, an order for the sub-division of the land in equal shares and transfer of the resultant sub-divisions to all persons beneficially entitled to the same. Akech Jagalo was ordered to sub-divide parcel No. Kanyamkago/Kawere 1/1219 into three portions, measuring 5.07 ha, 3.43 ha and 0.30 ha. George Liewa Jagalo was to get the portion measuring 3.43 ha, and Gabriel Otuoma Jagalo 0.30 ha. Akech was to retain 5.07 ha. There was an order concerning the sub-division of the other parcel of land but the sub-divisions are not relevant to the matter before us. The decision in that case was given on 10th August 1995, before Rose Akech Achieng sold parcel No. Kanyamkago/Kawere 1/3212.

The respondents, in a replying affidavit to the application for injunction which was sworn by David Ochieng Liewa, apparently on behalf of the other respondents, deposed that the sale of land to the appellant, was not only secretive, but also fraudulent. In their view Rose Akech Achieng having been married more than 20 years earlier, had neither authority nor capacity to deal in the land, and to the extent that she applied for grant of Letters of Administration for her father's estate and sold the land in question, she acted fraudulently.

In his ruling Musinga J. held, inter alia, that while under section 93 of the Law of Succession Act, an administrator has the right to sell and transfer land held under a grant of representation he was apprehensive that Rose Akech Achieng may have fraudulently obtained the grant of representation to the estate of her father. Besides, the learned Judge was of the view that the appellant had not demonstrated that he would suffer irreparable loss unless the orders of injunction were granted. In the result, he declined to grant an injunction and thus provoked this appeal.

There are certain salient facts which prompted the appellant to seek orders of injunction. As soon as he got a transfer of the suit land to himself, the appellant ploughed the land and planted sugarcane. As soon as the sugarcane had matured the respondents either personally or through agents set the sugarcane on fire. The fire completely destroyed all the sugarcane. Thereafter as the ratoon was shooting, the respondents deliberately allowed their animals to graze the same. Besides they threatened the appellant and his employees with physical injury if they dared go onto the land to work on it. It is also instructive that the 3rd respondent has exhibited violence against the appellant. There is a pending criminal charge against him vide **Migori P.M's Court Cr. Case No. 44 of 2008.**

In his ruling Musinga J. neither took into account the burnt sugarcane, nor the fact that there had been previous proceedings over the land which culminated in the same being sub-divided among the deceased's brothers and herself. Besides, the respondents have not so far made any application to challenge the grant of representation made to Rose Akech Achieng. That grant may not be properly and successfully challenged in the suit pending before the superior court. It would also appear that the respondents are concerned that Rose Akech Achieng is a married woman, who ordinarily under Luo Custom would not have been entitled to inherit land from her own father. That, however, would not be a serious factor to bear in mind on the facts and circumstances of this case due to changed and changing times as the Law of Succession Act does not so much distinguish between male and female children of a deceased person.

Giella v. Cassman Brown & Company Ltd. [1973] EA 358 lays down the principles to guide a trial court in applications for an interlocutory injunction. To succeed the applicant must show a *prima facie* case with the probability of it succeeding upon trial. Secondly, that unless he is granted the injunction he is likely to suffer irreparable damage or loss which may not be adequately compensated in damages. Lastly, that in the event of doubt in either of the aforesaid grounds the balance of convenience favours the grant of an injunction.

It cannot be gainsaid that the appellant planted sugarcane on the suit property, nurtured it until maturity before the respondents invaded the land and set the sugarcane on fire. The appellant was in possession. *Prima facie*, he is the owner of the land and until his title to it is set aside, there would be no proper basis for dispossessing him of the land. The denial of injunction has the effect of dispossessing the appellant of his land. The purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property. The respondents appear to be concerned that Rose Akech Achieng, a married woman, is benefiting from the estate of her deceased father against the Luo Custom.

On the facts and circumstances of this case it is our view that, on a *prima facie* basis, the appellant demonstrated that he

had a good case with chances of success upon trial. The denial of an injunction would cause him such loss as may not be adequately compensated by an award of damages. Even the balance of convenience favoured the grant of injunction.

That being our view of the matter, we allow the appeal, with the result that the order of the superior court dated **5th February 2009**, dismissing the appellant's application dated **18th April 2008** is set aside, and in place thereof we substitute an order allowing the aforesaid application in terms of prayers **(2)** and **(3)** thereof. The costs of this appeal and the application for injunction to abide the outcome of the suit. It is so ordered.

Dated and delivered at Kisumu this 30th day of April 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR