



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

Civil Appli 41 of 2009

GEORGE ORANGO ORAGOAPPLICANT

AND

LIEWA JAGALO

1. GEORGE

LIEWA

2. AMBROSE

OCHIENG' LIEWA

3. DAVID

OKELLO OREGA

4. SAMWEL

5. ROSE ACHIENG AKECH.....APPLICANT

(Application for injunction pending the hearing and determination of the intended appeal against the ruling and order of the High Court of Kenya

at Kisii (Mr. Justice D. Musinga) dated on 5th February, 2009

in

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

RULING OF THE COURT

As at 5th March, 2002, one *Akech Jagalo* of Migori District, was the registered owner of Land Parcel No. Kanyamkago/Kawere 1/1219 measuring 8.8 hectares. The record shows that Akech Jagalo had disputes over that land with George Liewa Jagalo, the 1st respondent in this notice of motion, way back in 1994 and that the superior court made decisions on that dispute. However, as at that date 5th March 2002, Akech Jagalo died and by then, the registration of the land, part of which is now in dispute, into his name, which was dated 3rd September 1981, had not been affected and he died the title holder of the suit land. His daughter, Rose Achieng' Akech (Rose) the fifth respondent and the eldest daughter of the deceased's only four daughters, took out letters of administration intestate and the same was issued by the Principal Magistrate's Court at Migori on 31st August, 2005. On 30th June 2006, that grant was confirmed and a

certificate of confirmation issued. Armed with that confirmation of the grant, Rose, who was married, entered into a sale agreement with the applicant George Orango Orago in which she agreed to sell and did sell to the applicant and the applicant agreed to buy and did buy from her 2.8 hectares of that suit property. That portion was excised from the entire parcel and registered as Land Parcel No. Kanyamkago/Kawere 1/3212 in the name of the applicant. The record shows that the first respondent George Liewa Jagalo, a brother to the deceased Akech Jagalo, and his (Liewa's) two sons Ambrose Liewa the second respondent, and David Ochieng' Liewa the third respondent were not happy with the sale of the land which they claimed as ancestral land belonging to Jagalo family. It is alleged by the applicant that they trespassed on to the land in an attempt to stop the applicant from enjoying the fruits of the sale of the land to him. Samwel Okello Orege the fourth respondent joined the first three respondents in their attempt to resist or frustrate the sale.

In a plaint dated 18th April, 2008 and filed in the superior court on 21st April 2008, the applicant sued the first four respondents namely George Liewa Jagalo, Ambrose Liewa, David Ochieng' Liewa and Samwel Okello Orege seeking a declaration that the appellant is the registered owner of L.R. No. Kanyamkago/Kawere 1/3212; a permanent injunction restraining them from trespassing onto, interfering with and/or in any other manner, whatsoever dealing with the suit land; general damages for trespass, and costs of the suit. Together with that plaint, the applicant also filed a chamber summons dated 18th April 2008 in which he sought orders inter alia that:-

“3. The Honourable court be pleased to grant an order of temporary injunction restraining the defendants by themselves, agents, servants and/or anyone claiming under the defendants/respondents, from trespassing onto, interfering with and/or in any other manner whatsoever, dealing with the suit land, that is, L.R. No. Kanyamkago/Kawere 1/3212, pending the hearing and determination of this suit.

4. Costs of this application be borne by the defendants/respondents.”

That application was premised on grounds that the applicant is the lawful and/or registered proprietor of the suit land and by virtue of being the registered proprietor, he is entitled to exclusive possession and occupation of the same land; that, his rights are vindicated by the provision of **sections 27 and 28** of the Registered Land Act Chapter 300 Laws of Kenya; that the actions of the respondents are bound to alter or affect the character and/or texture of the suit land; that the respondents intend to deny the applicant the right to use his land, whereas the applicant has a prima facie case against the respondents; that depriving the applicant of the right to cultivate the suit land amounts to denying him his livelihood and that the applicant is thus bound to suffer irreparable loss. That application was strenuously opposed by the respondents who had filed defence to the plaint and also filed a counter-claim in which the fifth respondent Rose Achieng' was cited and was thus brought into the suit. They also filed a replying affidavit in their opposition to the notice of motion.

The superior court (Musinga J.) after full hearing of the chamber summons dismissed it stating that though the applicant is no doubt the registered proprietor of the suit land, there are however weighty issues of law raised by the respondents challenging various aspects of the applicant's case. He itemized the same issues. For fear of prejudicing the hearing of the intended appeal, we will not consider those reasons in this ruling. The applicant felt aggrieved by that dismissal and intends to appeal against it. He filed a notice of appeal on 9th February 2009. In the meantime, he moved to this Court by way of notice of motion dated 18th February 2009 and filed on 23rd 2009 in which he is seeking one main order and that is an order that:-

“2. The Honourable Court be pleased to grant an order of injunction restraining and/or prohibiting the respondents, more particularly, the 1st, 2nd, 3rd and 4th respondents herein by themselves, agents, servants and/or anyone claiming under the said respondents from trespassing onto, interfering with and/or in any other manner, whatsoever, dealing with L.R. No. Kanyamkago/Kawere 1/3212, pending the hearing and determination of the intended appeal to this Honourable Court against the ruling and order of Hon. D. Musinga Judge, dated and delivered on the 5th day of February 2009.

3. Costs of and occasioned by this application do abide the outcome of the intended appeal.”

Several grounds are cited in support of the notice of motion. These are in brief; that the applicant has a substantive and arguable appeal which raises pertinent issues of law; that the applicant’s intended appeal shall be rendered nugatory and academic if the injunction sought is not granted as the applicant is currently the registered proprietor and/or owner of L.R. No. Kanyamkago/Kawere 1/3212, which he purchased from the 5th respondent and which the 5th respondent got by way of being the administratrix of the estate of her father, Akech Jagalo who was the owner of the whole land before the suit land was excised, and registered in the applicant’s name; that all the legal requirements were complied with before the applicant acquired the suit land; that the superior court, vide its ruling has impeached and/or impugned the letters of administration in the absence of a valid application for revocation in the Probate and Administrative Cause and that the applicant is bound to suffer substantial loss.

Mr. Ogutu, the learned counsel for the applicant, submitted before us that the intended appeal is arguable on grounds among others that the learned Judge of the superior court, in rejecting the applicant’s application did not consider that whether there was fraud as alleged, in the process of registration of the title into the name of the 5th respondent, the appellant was not aware of the same and was therefore a bonafide purchaser without notice and that being the case such allegations of fraud should not be visited upon the applicant’s title; whether a title obtained could be negated before the alleged fraud is argued; whether under the law of succession, if the title to the land was revoked, the applicant’s title, being that of a bona fide purchaser without notice would also be affected and lastly, whether the interests of a person who has no title can override those of the title holder. On nugatory aspects, the thrust of Mr. Ogutu’s contention was that if we do not grant the orders sought, the applicant would lose all his investment and would lose the use of his land.

Mr. Otieno, the learned counsel for the respondents, on the other hand argued that as the learned Magistrate who issued letters of administration had no jurisdiction to do so, this Court cannot grant the orders sought as to do so would amount to protecting illegalities; that in any event the outcome of the appeal would not be rendered nugatory were it to succeed as the applicant is still the title holder and any damages to him as a result of loss of user can be adequately compensated by way of general damages. He submitted further that the applicant does not deserve the order sought which is an equitable in nature as he has not come to Court with clean hands in that he claims to have sugar cane on the suit land whereas he had cut all sugar cane formerly on the suit land and sold it. According to the respondent, there is no sugar cane on the land as alleged by the applicant.

Mr. K’Owino, the learned counsel for the 5th respondent supported the motion stating that the 5th respondent was the rightful administratrix of her deceased father’s estate irrespective of the manner in which she obtained letters of administration. He confirmed that the applicant was the registered owner of the suit land.

We have considered the notice of motion, the affidavits and grounds for the application; the submissions by all the learned counsel and the law. The application was brought pursuant to **rule 5 (2) (b)** of this Court’s Rules. The law as regards the principles the Court applies when considering such an application are now well settled. The Court, in deciding such an application exercises discretionary jurisdiction. In doing so however, the applicant must satisfy the Court, first, that his appeal or intended appeal is arguable, that is to say the appeal or intended appeal is not frivolous. Secondly, he must also satisfy the Court that if the Court refuses the application, the success of the intended appeal, were it to succeed would be rendered nugatory - see ***Reliance Bank Ltd vs. Norlake Investments Ltd (2002)*** 1 EA 227; ***Githunguri vs Jimba Credit Corporation Ltd & Others*** (No.2) (1988) KLR 838. In Githunguri’s case, this Court held inter alia as follows:-

“The general principles on which the Court would base its unfettered discretion were first, that the appeal should not be frivolous or the applicant must show that he has an arguable appeal and, secondly, that the Court should ensure that the appeal, if successful, should not be nugatory.”

As we have stated above, we have perused and considered the record as well as the submissions by the

learned counsel on all sides. We have also perused the draft memorandum of appeal annexed to the application. In our view, the issue as to whether the learned Magistrate who issued letters of administration and confirmed the grant had jurisdiction and the effect of that on the applicant's title to the suit land noting that the applicant was a purchaser from one of the parties and he may or may not have had notice of whether or not the Magistrate had jurisdiction is an arguable point. Secondly there is the question as to what extent the applicant's title can be challenged on the allegation that the 5th respondent had no capacity to take out letters of administration in respect of the suit land which the respondents maintain is ancestral land and lastly, without exhausting all arguable issues in the intended appeal, is the issue as to whether the suit land, having been registered under the Registered Land Act Chapter 300 Laws of Kenya, would still be in law considered a trust land subject to customary land usages. We need not say any more. We agree with Mr. Ogutu that the intended appeal is arguable.

The next requirement that we need to be satisfied on is as to whether, if the intended appeal succeeds, the success would be rendered nugatory by our refusing to grant this application. The intended appeal will be against the decision of the superior court to grant injunction against the respondents pending the hearing and determination of the suit now before the superior court. It is not in dispute that the applicant is still the registered owner of the suit land. He has title documents to the land and that being so, none can dispose of the land or even use it for obtaining any loan. If on the other hand the respondents were to enter the suit land for any purpose without his consent, it would amount to trespass and the relevant laws of the land would be at the applicant's disposal. If the respondents take any action on the land that would devalue the land, the applicant would sue for damages. Indeed in his plaint, general damages for trespass is one of the claims he is making. In the circumstances, we are not persuaded that the intended appeal would be rendered nugatory were it to succeed by our refusing this application.

As the applicant is in law required to satisfy us on both limbs, and he has not succeeded in demonstrating that the intended appeal, were it to succeed would be rendered nugatory by our refusing to allow this application, this application cannot succeed. It is dismissed. Costs shall be in the intended appeal.

Dated and delivered at Kisumu this 8th day of May, 2009.

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR