



**Ondieki v Gitiera (Civil Appeal E007 of 2022)
[2023] KEELC 16541 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16541 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
CIVIL APPEAL E007 OF 2022**

JM KAMAU, J

MARCH 27, 2023

**(FORMERLY AT PRINCIPAL MAGISTRATE’S COURT ELC CASE NO. E011
OF 2022)**

BETWEEN

ZADRACK WERE ONDIEKI APPELLANT

AND

PETER OMENTA GITIERA RESPONDENT

(Being an Appeal against the Judgment of Honourable M.C. Nyigei Principal Magistrate, Nyamira dated and delivered on the 13th day of July 2022 by Hon. M.C. Nyigei– PM in the original Nyamira PMCELC Case No. E011 of 2022)

JUDGMENT

1 There is a suit in Nyamira CMCC No. ELC E011 of 2022 before the Honourable Maureen Cherono Nyigei – PM, where a Ruling was read and delivered on 13/07/2022. The said suit was filed contemporaneously with an Application by way of Motion under certificate of urgency on 16/03/2022 for orders that: -

1. This Application be certified as urgent and service of this Application be dispensed with in the first instance.
2. The court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their Agents and/or Servants from trespassing on, wasting, construction on, alienating or otherwise interfering or dealing with the Plaintiff’s property being Title Deed Number West Mugirango/siamani/8340 and 8341 pending the hearing and determination of this Application.



3. The court be pleased to grant an injunction restraining the Respondents whether by themselves, their Agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property being Title Number West Mugirango/siamani/8340 and 8341 pending the hearing and determination of this suit.
 4. The court be pleased to grant an order reverting the subsequent number Titles West Mugirango/siamani/8340 And 8341 To The Mother Title West Mugirango/siamani/3440 pending hearing and determination of the main suit.
 5. The Officer Commanding Nyamira Police Station do enforce compliance of the orders above.
 6. The costs of this Application be provided for.
 7. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
2. The Appellant depones that to enable him to respond to the aforesaid Application he needed certain documents from the Land Registrar, Nyamira which his Advocates requested for vide letter dated 28/04/2022 some of which were not supplied and his Advocates on record were hence forced to file Grounds of opposition awaiting the requested documents. The documents were never supplied by the time the Application came up for inter partes hearing. The Application was then determined and allowed without considering the Appellants' Submissions which were in the court file but which the trial magistrate said that she could not trace in the court file. The Appellant argues that the court determined the Application in favour of the Respondents but had the trial Magistrate considered the Appellants' Submissions, it would have invariably reached a different conclusion.
3. The Appellant vide Application dated 14/07/2022 prayed that orders be given that the execution of the lower court orders be stayed and that there be a stay of proceedings in Nyamira CMCC No. ELC E011 of 2022 pending the Appeal against the order of 13/07/2022. He says that he is ready to deposit the title deed in respect of West Mugirango/siamani/8341 of which he is in actual occupation and possession. He also fears that should the orders of the lower court be executed, the Respondent may go ahead and fell down the mature gum trees thereon which fetches him money which he uses to educate his children. The Respondent on his part filed a Replying Affidavit sworn on 27/07/2022 and argues that there is no sufficient cause to justify the granting of the Application since there is no likelihood of substantial loss and that by the court granting the offending orders, the Appellant has not been placed in a different position than he was in before the said orders. He therefore prays that this Application be dismissed with costs. Upon hearing the said Application on 31/10/2022, I declined to grant the orders sought for and ordered that the Appeal be set down for hearing within 10 Days which I now proceed to decide.
4. The Appeal seeks that the orders of the Trial Magistrate dated 13/07/2022 be set aside and quashed and that this Court do direct that the lower Court takes evidence before reaching its final decision on the matter. The Grounds of the Appeal are that: -
1. The Learned Magistrate erred in law and in fact in not considering the Appellants' written arguments and Submissions dated 4th July, 2022 but received in court on 7th July, 2022 and placed before her on even date.
 2. If the Learned Trial Magistrate had taken into account the Appellant's said written arguments and Submissions, she would have not reached the conclusion she reached.



3. The Learned Trial Magistrate was very wrong in law in granting Prayer No. 3 of the Respondent's Application dated 16th March, 2022 when she was very much aware from the Respondent's pleadings that LR. No. West Mugirango/siamani/3440 was not in existence as it had been closed on sub-division.
 4. The Learned Trial Magistrate was wrong in law in granting Prayer 3 of the said Respondent's Application while the Respondent did not exhibit an extract or official search of LR. No. West Mugirango/siamani/8341.
 5. The Learned Magistrate erred in law and in fact in issuing a temporary injunction against the Appellant in respect of Lr. No. West Mugirango/siamani/8341 Even When She Was Convinced That Lr. No. West Mugirango/siamani/8341 was/is registered in the Appellant's name.
 6. The Learned Trial Magistrate was wrong in law in issuing an order of interim injunction against the Respondent herein who is the sole registered owner of Lr. No. West Mugirango/siamani/8340.
 7. The Learned Trial Magistrate was under legal obligation to take Judicial Notice of the law of injunctions in Kenya and specifically the land law which governs land in Kenya especially Ss.24, 25 and 26 of the [Land Registration Act](#) No. 3 of 2012.
 8. The Ruling of the Learned Trial Magistrate was not based on law and facts.
 9. It is proposed to this Honourable Court that:
 - a. The Ruling and/or the order of the Learned Trial Magistrate dated and delivered on 13/7/2022 be set aside and quashed.
 - b. This Honourable Court be pleased to direct that the court take evidence before rendering its final decision on the matter because apart from the annexed Letter of Administration and Certificate of Death, no materials placed before the Trial Court to prove that succession was not done.
 - c. costs of this appeal be borne by the Respondent.
- 5 I have considered the rival submissions and observe that the order made on 19/7/2022 the subject of this Appeal is an interim one, pending the Hearing and determination of the suit in Nyamira CMCC No. ELC E011 of 2021. It grants a restraining order against the Appellant from trespassing onto, wasting, constructing or alienating, interfering or otherwise dealing with the Respondents' (in this Appeal) purported Title Nos. West Mugirango/siamani/8340 and 8341 pending the hearing and determination of the suit before the learned trial Magistrate. I wish to address the law as to why interim/ interlocutory orders are granted pending the Hearing of a civil suit. The same was explained by Mabeya J in [Benl Development Limited v First Community Bank Limited](#) [2021] eKLR High Court at Nairobi Commercial & Tax Division Civil Suit No. 406 Of 2019.:
- Interim injunctions are not meant to be punitive of a party to a proceeding. They are meant to preserve the state of things pending the court investigating the dispute. They are rather meant to afford the parties an opportunity of being heard on their grievances.”
- 6 Since no allegations of bias have been brought out, I would not order stay of proceedings for this would negate the principle enshrined under Section 1 of the [Environment and Land Court Act](#) of 2011 and



Sections 1A and 1B of the *Civil Procedure Act*, Cap 21 of the laws of Kenya. In fact, it would be for the benefit of all the parties that the Hearing of the suit at Nyamira CMCC ELC No. E011 of 2022 be expedited in order that all the parties' interest or otherwise are determined. As I said in the Ruling I delivered on 31/10/2022, I would wish to restrain myself from going deep into the matter since the final orders in the trial court are yet to be delivered and my weighty reasoning would prejudice the Hearing of the suit by the Learned Trial Principal Magistrate.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 27TH DAY OF MARCH 2023.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Appellant: Mr. Momanyi

Respondent: N/A

