



**Wamalwa & another v Webala (Environment and Land Appeal
E050 of 2024) [2025] KEELC 271 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 271 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E050 OF 2024
EC CHERONO, J
JANUARY 30, 2025**

BETWEEN

TERESINA NASIMIYU WAMALWA 1ST APPELLANT

MARCELYNE NASAMBU WAMALWA 2ND APPELLANT

AND

PETER WAMALWA WEBALA RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated 13/11/2024 which seeks the following orders;
 - a. Spent.
 - b. Spent.
 - c. That a temporary injunction be issued restraining the respondent by himself, his agents and or servants from disposing, transferring, sub-dividing and or in any way alienating family land and properties to with parcel No. E.Bukusu/S.Nalando/9932 pending hearing and determination of this appeal.
 - d. That costs be provided for.
2. The motion is based on seven (7) grounds apparent on the face of the application supported by an affidavit of Teresia Nasimiyu Wamalwa, the 1st Applicant herein sworn on 13/11/2024.
3. The gist of the application is that the applicants herein are said to be the wives of the respondents and that they all reside at Kimukung'i. It is also alleged that the respondent has been disposing off family properties without the Applicants' consent leading to the placement of a caution over land parcel No. E.Bukusu/S.Nalando/9932(hereinafter 'the suit land') which they allege was cunningly removed by the Respondent and sold off about 3 acres. That they placed a further caution on the remaining piece



but the Respondent has since embarked on sub-dividing the land and is likely to dispose of the same. They argued that a portion of the suit land had been sold for Kshs.1,030,000/= a transaction which was not disclosed to them by the Respondent which prompted the filing of a suit before the Bungoma Chief Magistrates court seeking a restriction order to be placed on the property which application was dismissed. The Applicants argued that the respondent's actions are likely to leave them destitute since they have no source of income.

4. The Respondent filed a replying affidavit sworn on 22/11/2024 and deposed that the suit land is not ancestral land and that he sold a portion of the same with the consent of the Applicants' for purposes of settling school fees for his son in college. He argued that the Applicant's application for injunction before the Bungoma Chief Magistrates Court was dismissed and the current application has not been substantiated.
5. Vide submissions dated 18/12/2024, the Applicant argued that the suit land is both ancestral and matrimonial property and if the Respondent is allowed to dispose of the same without their spousal consent, they would suffer irreparable damages. They cited the case of Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (2018) eKLR.
6. The Respondent also filed submissions dated 22/11/2024 where he argued that the Applicants have not satisfied the requirements for the grant of the orders sought and that the application has been overtaken by events.

Legal Analysis and Decision

7. I have carefully considered the application, the affidavit in support, the response thereto as well as the rival submissions. From the materials placed before me, It is my view that the sole issue for determination in the application is whether the applicants have met the threshold for the grant of a temporary injunction pending hearing and determination of the appeal herein. Order 42 Rule 6(6) of the Civil Procedure Rules, 2010 gives this court the discretionary power to grant a temporary injunction pending appeal, where the ends of justice demand so, and where the Appellant has instituted an appeal.
8. The grounds for the grant of a temporary injunction pending appeal are now well settled. In the case of Patricia Njeri & 3 Others vs. National Museum of Kenya [2004] eKLR, the court stated as follows;
 - (a) ".....an order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
 - (b) the discretion should be refused where it would inflict greater hardship than it would avoid.
 - (c) the applicant must show that to refuse the injunction would render the appeal nugatory.
 - (d) the court should also be guided by the principles in Giella vs. Cassman Brown [1973] EA 358."
9. The court in the case of Giella vs. Cassman Brown [1973] EA 358, set out the guiding principles for the grant of interlocutory injunctions as follows;

"The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience."



10. In the instant case, the Applicants have stated that they have a prima facie case in that their appeal raises arguable grounds with probability of success. They argue that they are the wives of the Respondent and that the Respondent ought to seek for their consent prior to disposing of matrimonial or ancestral property which consent has to be in writing. That this was not done prior to the disposal of the suit land and thus, their appeal is arguable and this issue amongst others should be heard and determined on merit.
11. Notably, the title document for the suit land has not been attached to the application and from where this court sits, it is unclear whether indeed the Respondent is the registered owner of the suit land and what the status of the said land is. However, it has been argued that the suit land is a family/matrimonial property which has not been denied by the Respondent. It is not also denied that the suit land requires spousal consent prior to being disposed. Considering that this Appeal is based on this point of lack of spousal consent at the time of disposing the suit land, I am satisfied that the Applicants have demonstrated a prima facie arguable and not frivolous appeal
12. On the issue as to whether the Applicant shall suffer irreparable injury should the temporary injunction be disallowed, the Applicant has argued that the property being family/ancestral land is meant to be bequeathed to their children who are over 21 and they are worried the Respondent is squandering the proceeds of the sell. The Respondent on his part argues that the suit property has never been ancestral land and that the application has been overtaken by events since the sell has already occurred and the purchaser has taken possession of the land. On the grounds that the suit land is alleged to be an ancestral/family land which is an intergenerational property in nature and not like any other land, I find that the Applicants would suffer cultural and emotional loss and injury which may not be compensated by an award of damages.
13. On the third issue, I find that the balance of convenience tilts in favour of granting the orders sought.
14. For the above stated reasons, I find the the application dated 13/11/2024 merited and the same is hereby allowed in the following terms;
 - i. A temporary injunction be and is hereby issued restraining the Respondent by himself, his agents and or servants from disposing, transferring, subdividing and or in any way alienating family land and properties to wit; parcel No. E.Bukusu/S.Nalondo/9932 pending hearing and determination of thia Appeal.
 - ii. The Appellant to compile, file and serve their record of appeal within 30 days from today.
 - iii. The costs of the application to abide this appeal.
 - iv. Order accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JANUARY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Olonyi H/B Sichangi for Appellant
2. M/S Masengeli for the Respondent
- 3 Bett C/A

