



**Dishon v Marekia (Environment and Land Appeal E010 of 2022)  
[2023] KEELC 17112 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17112 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E010 OF 2022**

**JG KEMEI, J**

**APRIL 27, 2023**

**BETWEEN**

**JOSEPH MWANGI DISHON ..... APPELLANT**

**AND**

**GILBERT KIMANI MAREKIA ..... RESPONDENT**

*(Appeal against the ruling delivered on January 11,  
2022 in Kikuyu SPMCC MCEL&C No 49B of 2021.)*

**RULING**

1. Dissatisfied with the trial court's ruling delivered on January 11, 2022 in Kikuyu SPMCC MCEL&C No 49B of 2021, the Plaintiff now Appellant, instituted this Appeal vide a Memorandum of Appeal dated February 10, 2022 on grounds that;
  - a. The Learned Senior Principal Magistrate erred in law and in fact in dismissing the Appellant's Application dated July 30, 2021.
  - b. The Learned Senior Principal Magistrate erred in law and in facts by wrongly applying the principles for granting of injunctive reliefs thus exercised her discretion wrongly.
  - c. The Learned Senior Principal Magistrate erred in law and in fact by finding that the Applicant had not established a prima facie case against the weight of the evidence.
  - d. The Learned Senior Principal Magistrate fell in error by not addressing the issue as to whether the Applicant would suffer irreparable loss if the Application was disallowed.
  - e. The Learned Senior Principal Magistrate fell in error by finding that the Applicant had defaulted on the principal sum against the evidence on record.



- f. The Learned Senior Principal Magistrate erred in law and in facts by finding that the loss could be compensated by an award of costs whereas the claim is about illegal transfer of the Applicant's land.
  - g. The Learned Senior Principal Magistrate completely disregarded the Appellant's evidence, submissions and authorities cited and thus fell in error.
  - h. The Learned Senior Principal Magistrate erred in law and in fact by delving into the merits or otherwise of the entire case summarily, against the evidence on record and therefore came to the wrong conclusion.
  - i. The Senior Principal Magistrate's Ruling and Orders were against the weight of the evidence on record and therefore bad in law.
2. The Appellant urged this Court to allow his appeal, set aside the trial Court Ruling and allow his Application dated 30/7/2021 and costs of the Appeal.
  3. By way of a brief background, the Appellant filed an application dated 30/7/2021 in the trial Court seeking inter alia orders of temporary injunction against the Respondent and his agents from interfering with land parcel known as Karai/Karai/5663 (the suit land) pending the hearing and determination of the suit. The Respondent opposed the Application vide his Replying Affidavit sworn on 23/8/2021. The application was canvassed by way of written submissions. In its Ruling delivered on 11/1/2022, the Trial Court found that the Appellant had failed to establish her case to warrant the orders sought and thus dismissed the Application with costs provoking the instant Appeal.
  4. On 30/5/2022, directions were taken to canvass the appeal by way of written submissions. Earlier on 28/4/2022, the Respondent filed his Grounds of Opposition (sic) to the appeal dated 18/4/2022. He urged that the appeal is unmerited; both the appeal and trial Court proceedings are mala fides; the impugned Ruling was properly arrived at but should this Court be inclined to allow the appeal, the Appellant be ordered to deposit a sum of Kshs. 2.7 M in a joint interest earning account.
  5. The Appellant filed his submissions dated 5/9/2022 through the firm of Njehu Ndirangu & Co Advocates whilst the Respondent through the firm of Gitau SM & Co Advocates filed submissions dated 28/6/2022.
  6. Regarding grounds 2, 3, 4 & 6 in the Memorandum of Appeal, the Appellant reiterated his submissions in the lower Court as contained at pages 59 – 64 of the Record of Appeal. That whereas his Application contested the Respondent's immature transfer of the suit land contrary to the Agreement dated 27/3/2021 entered into by the parties, the trial Court narrowed the Application into a case of breach of contract. That the intention of the parties was well captured in Clauses 3 and 7 see page 32 of the Record of Appeal and in the event of default in repayment, the parties would sign a further agreement of 3 months.
  7. The Appellant further submitted that the Respondent's title deed and copy of official search clearly shows that the suit land was transferred on 14/6/2021, barely less than 3 months into the contract. To that end that the Appellant had established a *prima facie* case in his favor hence faulting the Learned Magistrate for exercising her discretion improperly. Reliance was placed on the case of *Mbogo v Shab* [1968] EA 93 on the parameters for an appellate Court's power to interfere with a trial Court's discretion.
  8. On grounds 5, 7, 8 & 9 in the Memorandum of Appeal, the Appellant faulted the Honourable Court for finding that the Appellant had defaulted in his repayments yet he was still paying the loan. That



the Court ignored his evidence, submissions and authorities on whether or not a prima facie case had been established.

9. The firm of Gitau SM & Co Advocates filed submissions dated 28/6/2022 on behalf of the Respondent. He outlined the background of the events leading to the lower Court suit and the impugned Ruling. He defended the Hon Court's findings as sound and properly arrived at upon analysis of the evidence placed before it. That should this Court allow the Appeal, it be conditional upon the Appellant depositing the sum of Kshs. 2.7M in a joint account.

### **Analysis & Determination**

10. The main issue for determination is whether the appeal is merited.
11. The law on the duty of the first appellate Court is well settled. In the case of *Abok James Odera T/A A J Odera & Associates v John Patrick Machira T/A & Co Advocates* [2013] eKLR the Court of Appeal stated that the primary role as a first appellate Court is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
12. In exercise of its appellate duty, it is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the Court that tried the case and exercised its jurisdiction to reach the impugned decision. Accordingly, it is not enough that the appellate Court might itself have come to a different conclusion. This was the holding of Sir Kenneth O'Connor in the Court of Appeal of East Africa case of *Peters v Sunday Post Limited* [1958] EA 424.
13. This is an interlocutory appeal challenging the Ruling of the trial Court declining the Appellant's Notice of Motion dated 30/7/2021. The record of appeal shows that the Application was opposed through the Respondent's Replying Affidavit sworn on 23/8/2021 and 2<sup>nd</sup> Defendant's Grounds of Opposition dated 18/8/2021. However, the then 2<sup>nd</sup> Defendant, Kiambu Land Registrar has not been enjoined in this appeal. The application was canvassed by way of submissions of rival parties dated 27/9/2021 and November 29, 2021 respectively.
14. The underpinning law on temporary injunctions is provided for under Order 40 rule 1 of the *Civil Procedure Rules* that;
  - “ 1. Cases in which temporary injunction may be granted [Order 40, rule 1.]  
Where in any suit it is proved by affidavit or otherwise—
    - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
    - (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”



15. It is trite therefore that injunctive reliefs are discretionary orders that are issued in deserving cases and not as a matter of right. It is noteworthy to reiterate the holding in the celebrated case of *Mbogo and another v Shab* [1968] EA 93 that;
- “... that this Court will not interfere with the exercise of...discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
16. In the case of *Giella v Cassman Brown* [1973] EA 358 the Court held for one to succeed in an application for injunctive orders;
- a. Applicant must demonstrate a prima facie case with a probability of success.
  - b. Applicant must demonstrate that he will suffer an irreparable injury which would not be adequately compensated by an award of damages.
  - c. If the Court is in doubt on the above 2 requirements, it will decide the matter on a balance of probabilities
17. It is trite that at the interlocutory stage the Court is not looking at the merits of the case but only if the Applicant has established a prima facie case. I have perused the agreement dated the 27/3/2021 in which the Appellant borrowed Ksh 2 million against his title for the suit land.
18. The agreement provided that the loan was payable over a period of 8 months with a monthly interest of 7%. In furtherance of the agreement the Appellant surrendered the original title, spousal consent and transfer forms to the Respondent. It was a term of the agreement that upon full repayment the documents would be returned to the Appellant.
19. It was further agreed that in the event of default in repayment within the agreed time (3) months the parties shall enter into a further agreement for a further period of 3 months and in default within the stipulated 3 months the lender would register the land in his name.
20. Going by the covenants of the parties in the event of the first default of 3 months the parties would enter another agreement of 3 months. The land was transferrable after the last 3 months default period, which would have been in the month of September 2021.
21. A scrutiny of the title shows that the same was transferred to the Respondent on the 14/6/2021 which was 3 months after the agreement of sale. I find that the transfer was made prematurely and for that reason I find that the Respondent did not prove a prima facie case.
22. Be that as it may, to preserve the substratum of the suit, the balance of convenience tilts in the Court granting status quo orders in the following terms; no dealings shall be registered on the title of the suit land pending the hearing and determination of the suit in the trial Court.
23. The appeal is merited. It is allowed. The orders in the trial court are set aside in its entirety.
24. I order costs be payable to the appellant.
25. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27<sup>TH</sup> DAY OF APRIL, 2023  
VIA MICROSOFT TEAMS.**



**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Njehu for the Appellant

Gitau for the Respondent

**Court Assistants – Kevin/Lilian**

