



**Ongaga v Mirambo (Environment and Land Appeal E015 of 2022)
[2023] KEELC 17763 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E015 OF 2022**

JM KAMAU, J

MAY 25, 2023

BETWEEN

WILFRED MORARA ONGAGA APPELLANT

AND

JOSEPH MIRAMBO RESPONDENT

*(Being an Appeal from the Ruling of the Magistrate's Court at
Nyamira by Hon. W.K. Chepseba - CM delivered on the 27th day of
September, 2022 in Nyamira CMC MISC. ELC Case No. 24 of 2019)*

RULING

1. There is an Appeal from the Chief Magistrate's Court, Nyamira ELC Civil Suit No 24 of 2019. In the said suit the Plaintiff sought for the following prayers: -

Special Damages.

1st Defendant to be compelled to transfer 4 portions of West Mugirango/Siamani/4854 to the Plaintiff and to account for monies from the sale of 6 portions out of the said parcel; for the 2nd Defendant to be compelled to pay Kshs 100,000/= for destroying properties and for an order of vacant possession of the aforesaid suit property.

2. The Plaintiff grounded his case on the premise that he was operating rental business and farming within Nyamira County on the parcel of land known as West Mugirango/Siamani/4854. The 1st Defendant, who is the Plaintiff's father, had given him 4 portions out of the suit property worth Kshs 5,000,000/= with developed rental houses, with tenants and also with plants thereon. The said 1st Defendant had sold 6 other developed portions to other people "without consent of the family members." He did not account for the monies received nor did he give any reason for the sale. He therefore asked the court to place an inhibition on the suit land, West Mugirango/Siamani/4854 under the name of the



1st Defendant and that the same be sub-divided into 4 portions to be registered in the name of the Plaintiff. The 3rd Defendant, the Honourable Attorney General denied all the averments contained in the Plaint and prayed for the dismissal of the suit. The 1st and 2nd Defendants equally denied the claims in the Plaint and sought for the dismissal of the suit and insinuated that this suit was *res-judicata* since the reinstatement of the inhibition sought by the Plaintiff was a subject of Miscellaneous Civil Application Number 60 of 2016 at Kisii ELC Court which was dismissed on November 13, 2018 by the Honourable Mr. Justice Mutungi and an Appeal preferred in the Court of Appeal, Kisumu being Civil Appeal No 93 of 2019. On March 30, 2022 the Plaintiff made an Application to the lower court for the following orders:

- 1). That the Application is of utmost urgency be certified as urgent and service thereof be dispensed in the first instant and be heard *ex-parte* as such account of urgency.
 - 2). That the Honourable court fast track this matter herein and/or protect the Applicant during hearing/determination of this matter from unlawful threats by his agents, servants and/or employees who are planning to put new allegations against the Applicant to be put to prison.
 - 3). That temporary injunction be issued against the Respondent, their agents, servants and/or employees from trespassing onto, erecting structures, interfering with and/or in any manner dealing with the suit property until this matter has been heard and determined.
 - 4). That the Respondent be stopped from raising this matter herein and the criminal already appealed to the High Court outside the court premises.
 - 5). That the Applicant seeks leave out of time to amend the Plaint.
 - 6). Costs be provided for.
3. On the November 8, 2022, the Honourable W.K. Chepseba, Chief Magistrate, Nyamira dismissed the said Application with the following observations: -

“.....I have considered the averments and the Submissions herein. The Applicant has not made out any prima facie case to warrant him get prayer 2, 3, & 4. He has not given anything to show the threats, no evidence of ownership or L.R. No. of the property to be enjoined. On the issue for leave to amend, he has not given the draft Plaint to show what he intends to amend as required by the CPR. Therefore, I find that the Application has no merit and proceed to dismiss it with costs.”

4. Having been dissatisfied with the said Ruling, the Plaintiff appealed to this court vide his Memorandum of Appeal dated November 21, 2022 for the following reliefs: -
- 1). That the Ruling /Decree of the Honorable court dated November 8, 2022 be set aside.
 - 2). That contempt of court order be issued for refusal to maintain *status quo*.
 - 3). That the Appellant and his family be protected by this Honorable Court from undue harassment from the Respondent.
 - 4). That an order to issue restraining the Respondent, his servants or agents from doing any further construction and/or renting the suit premises until the matter herein had been heard and determined.
 - 5). That the cost of this Appeal be borne by the Respondent.



5. The Appeal is still pending in this court. On January 10, 2023, the Appellant who is the Plaintiff in the lower court photocopied his Application dated March 30, 2022 and filed the same in this court word by word. Even the Title of the Application still reads “the Chief Magistrate’s Court, Nyamira” and the suit No 24 of 2019. He sought the same prayers: -
- 1). That the Application is of utmost urgency be certified as urgent and service thereof be dispensed in the first instant and be heard ex-parte as such account of urgency.
 - 2). That the Honourable court fast track this matter herein and/or protect the Applicant during hearing/determination of this matter from unlawful threats by his agents, servants and/or employees who are planning to put new allegations against the Applicant to be put to prison.
 - 3). That temporary injunction be issued against the Respondent, their agents, servants and/or employees from trespassing onto, erecting structures, interfering with and/or in any manner dealing with the suit property until this matter has been heard and determined.
 - 4). That the Respondent be stopped from raising this matter herein and the criminal already appealed to the High Court outside the court premises.
 - 5). That the Applicant seeks leave out of time to amend the Plaintiff.
 - 6). Costs be provided for.
6. The Grounds as well as the depositions are the same. He even goes to the extent of asking this court to grant him leave to amend his Plaintiff out of time, a jurisdiction that is exclusively vested in the Trial Court in the first place.
7. The Respondent opposes the Application on the ground that the same is not properly before this court. He asks that the same be dismissed with costs.
8. The court heard the Applicant in his oral submissions and could not understand how an Application given a Title for the lower court was in the first place admitted at the Registry of this court.
9. How did it find its way here? The same ought not to have seen the four corners of this court and should even have been rejected at the Registry. The Application must have lost direction, so to speak. It is a waste of court’s invaluable time the same having been heard and dismissed and an Appeal lying before this court for determination. The Court feels that the Applicant ought to wait for the determination of the Appeal on the refusal to grant the prayers sought by the Applicant in the Chief Magistrate’s Court. You cannot ask this court to redetermine an Application that was dismissed when the dismissal of that Application is the subject of this Appeal. The Application dated March 30, 2022 is accordingly struck out with costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 25TH DAY OF MAY 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Appellant: In person

Respondent: Mr. Omwega

