



**Laban v Kiriimi (Environment and Land Appeal 9 of 2018)  
[2023] KEELC 18952 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18952 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 9 OF 2018**

**CK NZILI, J  
JULY 19, 2023**

**BETWEEN**

**PAULINE MUTHONI LABAN ..... APPELLANT**

**AND**

**TABITHA GACHERI KIRIMI ..... RESPONDENT**

*(An appeal from the ruling of the Hon. E. Mbicha SRM  
delivered on 7.3.2018 in Meru ELC Case No. 6 of 2018)*

**JUDGMENT**

1. By an amended record of appeal dated December 13, 2022, the appellant faults the trial court's decision dated March 7, 2018 on the basis that it:
  - i. Introduced or examined facts and documents to which the respondent did not plead.
  - ii. Imposed on the appellant a burden to deposit monthly installments of Kshs.10,000/= as a condition precedent to the prohibitory injunction without any basis or justification.
  - iii. Referred to a charge sheet and a bank statement which was neither filed nor served upon the appellant.
  - iv. Disregarded the evidence on record which showed that the appellant was the owner of the suit property who had no reason to deposit any money before the court.
  - v. Considered facts and evidence not produced before the court.
  - vi. Decided on issues of facts rather than weighing up the relevant strength of each side's propositions of evidence.



2. This being a first appeal, the court is mandated to re-hear or re-appraise the lower court file to come up with independent findings on both facts and law, while appreciating that the trial court had the benefit and opportunity to see and hear the witnesses first-hand. See *Peters vs. Sunday Post Ltd* (1958) EA 424.
3. At the trial court, the appellant as the, the plaintiff by a plaint dated January 22, 2018, had sued Moses Kirimi Mbogori (deceased), represented by the respondent as the legal administrator of his estate). She averred that she was the registered owner of LR No. Meru Municipality/23980/570 following a sale agreement on August 20, 2015 and transfer to her for Kshs.1.5 Million, during the subsistence of their marriage with the deceased.
4. The appellant averred that marital differences arose in 2017, and the deceased purported to force her to move out of the suit property, of which she registered a caveat against the land. In efforts to frustrate and or force her to surrender the suit property. The appellant averred that the deceased misled the police that he had allegedly lost his title documents to the property and that she was a mere tenant, of which auctioneers were allegedly sent the house on the suit parcel to levy distress for non-existent rent arrears.
5. The appellant prayed for a permanent injunction barring and restraining the respondent, his agents, servants, or employees from entering, occupying, trespassing, or claiming title to land or in any way whatsoever, dealing with the title to the property in any manner inconsistent with her rights or interests. The plaint was accompanied by a list of witnesses statements, documents dated January 22, 2018, and a further list of documents dated April 3, 2018.
6. Alongside the plaint, the appellant also filed an application dated January 22, 2018 seeking interlocutory prohibitory orders of injunction restraining the respondent from in any way whatsoever interfering with her occupation, use, and possession of the suit property pending hearing and determination of the suit. The application was supported by an affidavit sworn by Pauline Muthoni Laban on January 22, 2018, in which she attached a copy of the transfer of the property dated July 13, 2015, official search dated December 22, 2017, letters dated 16<sup>th</sup> & December 19, 2017, official search dated December 22, 2017, a letter from Kenya Revenue Authority dated October 31, 2016, letter dated January 9, 2018 proclamation notices by Jocet Auctioneers dated January 19, 2018, auctioneers fee note dated January 19, 2018 and a copy of the land title deed are marked as annexures PML. The trial court issued an interim injunction order on January 23, 2018 with an inter-parties hearing for January 31, 2018.
7. The respondent entered an appearance on January 29, 2018 and filed a replying affidavit sworn by Moses Kirimi Mbogori on January 29, 2018. He denied that the appellant was his spouse or held a clean title to the suit land since the signature appearing on the documents was a forgery as he never appended any to the purported sale agreement or transfer forms before any advocate or witnesses. He averred that any signatures or witnesses to it by a lawyer and the appellant were partners in crime, which forgery and subsequent theft of his land was the subject of police investigations.
8. The respondent averred that the appellant was a mere tenant to his property, which he had bought in 2004 for Kshs.1,413,900/= and who had been paying rent to him till she suddenly stopped doing so in December 2016. He averred that after paying full consideration for the suitland, he was issued with a title deed produced as an annexure MK “1” and rented out the same to third parties until 2010, when the appellant became a tenant.
9. The respondent averred that in August 2010, he realized his title deed was missing, made a report to the police, and was issued with a police abstract which enabled him to acquire a provisional title deed from the land registrar, which he attached as annexures marked MK “3 & 4”. It was averred that the respondent gave the appellant the title deed as a requirement for water connectivity to the house in



August and forgot about it until December 2017. The respondent averred that as he was seeking for a loan from Kenya Commercial Bank (KCB), he established that he had lost his title deed. He annexed the application for water connection as MK “5”. The respondent averred that when he enquired from the appellant about the title deed, she became violent and insisted that the property was hers and that he should leave it only for him to visit the land offices in Nairobi and establish that she had allegedly fraudulently transferred the suit property to her names.

10. The respondent averred that he immediately made a report to the police. Further, the respondent averred the rent arrears were standing at Kshs.196,000/= and that he had been paying the County Government of Meru land rates as per annexure marked MK “6”. He termed the appellant as a fraudster who was out to benefit from the gains of fraud.
11. By way of a counterclaim, the respondent averred that in August 2015, the appellant, without any color of right, consent or knowledge, fraudulently transferred LR No 23980/57/ Title No. IRN 551 Meru District to herself. He sought to cancel the title, reinstate his name as the owner, and rent arrears of Kshs.196,000/=. The defense and counterclaim were accompanied by a list of witness statements and documents, including a copy of a title deed, provisional title deed, county government rates payment receipts, rates demand notice, lease agreement with the appellant, and a demand notice. Additionally, the respondent filed a further list of documents dated February 19, 2018 which included a charge sheet in Meru Chief Magistrates Criminal Case No. 452 of 2018, Republic vs. Pauline Muthoni Laban dated February 15, 2018 and a Bank statement from KCB Ltd. From the record, it is not clear if the appellant filed any reply to the defense and defense to the counterclaim.
12. By consent of the parties, the application dated January 22, 2018 was canvassed through written submissions dated February 7, 2018 and February 2, 2018, respectively. The trial court proceeded to render its decision on March 7, 2018, granted a temporary injunction as per prayer no three thereof, and ordered a deposit of Kshs.10,000/= on the last day of every month court, which would be refunded to the appellant if she were to succeed in the suit. Directions were also granted that the matter be heard on a priority basis.
13. With leave of court, parties agreed to canvass the appeal through written submissions which were to be filed by June 5, 2023. None was filed by the said date by any of the parties, save for one brought to the court’s attention purportedly court-stamped on June 13, 2022. Even assuming that there was an error in receiving the documents, still, the filing was outside the timelines set by the court.
14. The court has meticulously reviewed the lower court file, the record of appeal, the grounds of appeal, and the written submissions. The issues falling for the court’s determination are:
  - i. If the record of appeal complies with the law.
  - ii. If the appeal has merits
  - iii. What is the order as to costs?
15. Order 42 of the [Civil Procedure Rules](#) requires that key documents to the appeal must form part of the record of appeal unless the appellate court dispenses with them. In this appeal, the record of appeal and the supplementary record of appeal are dated April 3, 2018 and May 10, 2023, respectively. The primary pleadings in the lower court file, as alluded to in this judgment, include the witness statements and the list of documents, have not been included in the record of appeal, yet at the time the ruling appealed against was delivered on February 21, 2018, there was already a defense and a counterclaim filed, and which the respondent had alluded to in his written submissions dated February 5, 2017 to the application for interim orders.



16. In the defense and counterclaim by the respondent, the sanctity of the title deed held by the appellant had been challenged. No reply to the defense and defense to the counterclaim had been filed to refute the alleged fraud or illegality to its acquisition by the appellant. A lease agreement, charge sheet and bank statements had been filed as part of the respondent's list of documents as at February 20, 2018. The statement of defence and counterclaim was filed on February 2, 2018. This was before the appellant filed her written submissions dated February 2, 2018.
17. On February 21, 2018, both parties appeared before the trial court and confirmed the filing of written submissions. They eventually took a ruling date of March 7, 2018. The appellant was aware of the respondent's pleadings and the accompanying documents. That is why the appellant wrote a letter dated March 23, 2018 and eventually filed a further list of documents dated April 3, 2018, confirming that the lease agreement dated December 20, 2013 was genuine. The appellant had also forwarded a witness statement by the respondents dated February 1, 2018, to the documents examiner. The appellant knew that there was a counterclaim and documents on the court file brought by the respondent since the pleadings had closed. This is why an application dated April 6, 2018 was filed to bar the law firm of L. Kimathi Kiara & Co. Advocates from representing the respondent since he was the maker of the lease agreement.
18. It is trite law that parties are bound by their pleadings and courts determine issues raised in those pleadings. The trial court in rendering its decision was bound in law to look at all the pleadings on record at the time. The basis of grounds No's 1, 2, 3, 4, 5 & 6 of the amended record of appeal that the trial court considered extraneous facts, matters and documents that were alien before it and therefore reached a decision unsupported by the pleadings, evidence and the law in my considered view lacks merits.
19. Even after considering the material before it, the trial court nevertheless exercised its discretion and granted a temporary order of injunction in favor of the appellant on condition that she deposits monthly rent which would be refundable should the suit succeed in her favor. The appellant is appealing against an order which she had prayed for and was issued by the trial court. To succeed in such an endeavor, the appellant has to demonstrate that the trial court misconstrued the law or incorrectly granted the injunction. See *Giella vs Cassman Brown & Co. Ltd* (1973) E.A.
20. The court in my view, considered the guiding principles for a grant of temporary injunction. In exercising its discretion the trial court may impose such terms as are just as provided under Order 40 Rule 2(2) of the [Civil Procedure Rules](#). To this end, the trial court record shows that there was a tenancy agreement dated December 20, 2013, which a forensic report dated March 29, 2018, had confirmed as genuine and signed by the two parties. A charge sheet and a bank statement were already before the trial court and which it took into consideration. The appellant had been apprehended on February 16, 2018, concerning making and uttering a false document namely title deed LR No.5541 LR 23980/57 Plot No. KRE/57 bearing the names of respondents.
21. The appellant has deliberately omitted all these documents in the record of appeal and the supplementary record of appeal, yet they formed the basis of the ground of appeal.
22. In the case of [Gilbert Kabage v J Njenga Gichuki](#) (1995) eKLR, the court observed that such an omission was fatal and rendered an appeal incompetent. Needless to say, since the documents were already before the trial court, the respondent had counterclaimed for the suit property including displaying documents that the appellant was a tenant as opposed to an absolute proprietor of the land.
23. He had pleaded that rent arrears of Kshs.196,000/= were due. The respondent had displayed a bank statement showing that the appellant had paid rent in August 2017. The facts pleaded in the



counterclaim had not been challenged by way of defence to the counterclaim. The replying affidavit to the notice of motion had also attached several documents and included the aspect of tenancy relationship which the appellant had not controverted. The appellant alleged that she was the owner of the suit land and therefore she should not have been ordered to be making a monthly rental deposit before the trial court.

24. It is trite law that a court may not interfere with a discretionary power of a trial court unless it misdirected itself on the facts or law and applied the wrong principles of law. Order 40 2 (2) of the Civil Procedure Rules granted the trial court powers to issue interim injunctive orders on such terms as are just.
25. In this appeal there was already a counterclaim to the suit. The respondent had also submitted that they were willing to allow the appellant to occupy the suit premises pending the hearing and determination of the suit, so long a rent due was deposited before the trial court.
26. Other than a transfer document and a search, the appellant had no certificate of title under her name. Similarly, the appellant had not attached any payment of the consideration for the suit land. An injunction as held in Mrao v First American Bank of Kenya Ltd (2003) eKLR, is established if the right has been infringed for the opposite party to rebut it. In this appeal, there is no evidence that the appellant had even complied with the conditional injunction issued on March 7, 2018. The trial court had also ordered that the matter be heard on a priority basis. There was no stay issued by this court against the orders to deposit the monthly rent. The appellant instead and against orders which were favourable to her ostensibly to delay this matter appealed to this court. Obviously, the injunction issued has resulted to be an injustice to the respondent. This goes against the overriding objective of this court under sections 1A, 1B & 3A of the Civil Procedure Act. See Kanubhai Somabhai Patel & another v Rapid Communication Ltd (2015) eKLR.
27. In Ochola Kamili Holdings Ltd v Guardian Bank Ltd (2018) eKLR, the court held that if a party upon getting an injunction sits on the matter and uses the orders to the prejudice of the opponent or oppresses the other, or denies him, justified payments, such post – injunction behavior would be a ground to discharge an injunction since an order obtained as such amounts to an abuse of the purpose for which the injunction was obtained for it defeats the ends of justice. Consequently, I direct that the interim injunction issued shall remain in force for only six months on condition that the appellant shows proof of compliance with payments of KShs.300,000/= as at the issuance of this ruling, otherwise, the orders shall stand discharged.
28. The appeal is hereby dismissed

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 19<sup>TH</sup> DAY OF JULY 2023**

**In presence of**

C.A John Paul

Appellant

Miss Akinyi for Anyoka for appellant

Mwirigi B Advocate present

**HON. CK NZILI**

**ELC JUDGE**

