



**Mutiso v Magu & another (Civil Appeal E044 of 2022)
[2023] KEELC 19803 (KLR) (30 August 2023) (Judgment)**

Neutral citation: [2023] KEELC 19803 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL E044 OF 2022
EK WABWOTO, J
AUGUST 30, 2023**

BETWEEN

TIMOTHY M. MUTISO APPELLANT

AND

IVY WANGU MAGU 1ST RESPONDENT

MARTIN NGAO MUTHAMA 2ND RESPONDENT

*(Being an Appeal arising from the Ruling and Order of the Principal Magistrate
(Hon. Kagoni E.M. PM) delivered on 3rd June 2021 in Chief Magistrates
Court at Nairobi, Milimani Commercial Courts in CMCC No. E508 of 2021)*

JUDGMENT

1. This is an appeal arising from the ruling of Hon. Kagoni EM PM delivered on 3rd June 2021 in respect to CMCC No. E508 of 2021. In the said ruling the Learned Magistrate allowed the application dated 12th April 2021 and granted the following orders:
 - i. That pending the hearing and determination of this suit, there be temporary order of injunction barring the defendant herein whether by himself, agents, employees or anybody acting under his instructions from taking possession of carrying out construction, alienating, transferring to a third party or any activity on or in any way dealing with the suit property known as L.R. 7785/631 (I.R. 69478) situated at Runda, Nairobi.
 - ii. That the OCS Runda Police Station be and is hereby ordered to ensure compliance of the orders issued herein.
 - iii. That costs of the application shall be in the cause.



2. Dissatisfied with the outcome, the Appellant filed this appeal through Memorandum of Appeal dated 28th June 2021. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:-

1. That the Learned Magistrate erred in law and fact in failing to find that the suit before him in the Subordinate Court was contrary to section 6 of the Civil Procedure Act and sub-judice a pending suit in Nairobi, Milimani ELC Case No. E074/2020. Timothy M. Mutiso & Anor Vs Martion Ngao Muthama & others despite having appreciated and noted that the 1st Respondent was a party claiming the subject matter of the suit under the 2nd Respondent who is a party to the above pending suit in the Superior Court.
2. That the Learned Magistrate misdirected on the facts and matters before him in the suit in the subordinate court thereby making an erroneous decision in law and fact contrary to Statute and judicial precedent of sub-judice rule as set out in section 6 of the Civil Procedure Act and relevant judicial precedent on the matter.
3. That the Learned Magistrate erred in law and fact in granting allowing the 1st Respondent's application dated 12.04.2021 before him despite overwhelming evidence that the said application failed the legal and evidential threshold set out in *Giella v Caseman Brown & Co. Ltd* [1973] E.A 358 and was otherwise an abuse of Court Process.
4. That the Learned Magistrate erred in law and fact in finding that the 1st respondent had established legal interest as per section 26 of the Land Registration Act No. 3/2012 yet the said 1st Respondent had no legal title or illustrated that she is the registered owner of the suit property.
5. That the Learned Magistrate misdirected himself on the law and matters before him consequently granting an injunction against the Appellant in respect to the suit property which orders were competing with similar orders of the Superior Court given on 25/02/2021 in Nairobi, Milimani ELC Case No. E074/2020. Timothy M. Mutiso & Anor v Martin Ngao Muthama & others over the same subject matter against the Respondents.
6. That the Learned Magistrate decision was biased and failed to take into account the Appellants Replying affidavit dated 20.04.2021 and the Appellants written submissions on the matter thereby making an erroneous decision in law leading to gross miscarriage of justice.
7. That the Learned Magistrate decision is ultra vires pecuniary jurisdiction hence a nullity in law.
8. That the impugned ruling and order of the Subordinate Court is wholly erroneous in law and fact, contrary to equity, statute, judicial precedent and a gross miscarriage of justice.

3. On the basis of those grounds, the Appellant sought the following orders:

- i. The Appeal herein be allowed by setting aside the ruling and order of the subordinate court given on 3rd June 2021 and dismiss the 1st Respondent's



Application dated 12.04.2021 in Nairobi CMCC No. E508 of 2021 with costs to the Appellant.

- ii. Any other relief that the court may deem fit and appropriate in the circumstances.
 - iii. Costs of this Appeal be awarded to the Appellant.
4. The Appeal was canvassed through written submissions. The Appellant filed written submissions dated 29th March 2023 through Litoro & Omwebu Advocates. No written submissions were filed by the Respondents despite being served and granted time to do so. Counsel for the Appellant outlined the following four issues for consideration by the court;
 - i. Whether the subordinate court had jurisdiction to determine the matter.
 - ii. Whether the subordinate court suit was contrary to section 6 of the Civil Procedure Act and subjudice.
 - iii. Whether the Learned Magistrate erred in law and fact in finding that the 1st Respondent had established legal interest as per section 26 of the Land Registration Act No. 3 of 2012.
 - iv. Whether the Learned Magistrate decision was biased and failed to take into account the Appellants Replying Affidavit together with written submissions.
5. On whether the Learned Magistrate had jurisdiction to entertain and determine, it was the Appellant's argument that section 4 of the Civil Procedure Act states that nothing in the said law shall operate to give jurisdiction to court where it does not have jurisdiction. It was further argued that the Learned Principal Magistrate has a pecuniary jurisdiction of Kshs 10,000,000.00 yet the 1st Respondent's Supporting Affidavit to the Application dated 12/04/2021 upon which the impugned order was given, alleged that the 2nd Respondent sold the suit property to the 1st Respondent at kshs 20,000,000/- by a Sale Agreement dated 7/04/2020 at pages 23-25 of the Record of Appeal.
6. The Appellant contended that the Learned Magistrate ignored the Respondent's admission on the pecuniary value of the subject matter as well as the Appellants submissions and went ahead to determine the matter. Reliance was placed on the case of Phoenix of E.A. Assurance Company Limited v S.M. Thiga t/a Newspaper Service [2019] eKLR.
7. The Appellant submitted that there was also a pending suit, Milimani ELC No. E074/2020 Timothy M. Mutiso & Another v Martin Ngao Muthama & others and that despite the court having appreciated and noted that the 1st Respondent was a party claiming the subject matter of the suit under the 2nd Respondent who is party to the above pending suit in this court where both suits raised common dispute, issues and sought competing reliefs over the same subject matter, the subordinate court proceeded to entertain the suit and granted interim injunctive orders. Reliance was placed on the cases of Kinatwa Co-operative Saving & Credit Society Limited v Kinatwa Prestige Ltd [2021] eKLR and ASL Credit Limited v Abdi Basid Sheikh Ali & Another [2019] eKLR.
8. It was also argued by the Appellant that the 1st Respondent had failed to show that she had a legal title and further failed to demonstrate that she is a registered owner of the suit property since the title referred to was a challenge in ELC Case No. 74 of 2020 where the court had given interim orders of injunction to restrain trespass against the Respondents on 18th August 2020 and 25th February 2020. Counsel has argued that the Learned Magistrate allowed the 1st Respondent's Application without any



basis or evidence of prima facie case since there was no legal basis for the subordinate court to allow an injunction on a balance of probabilities when the Applicant had not illustrated a prima facie case and irreparable loss.

9. The Appellant also submitted that the Appellant's Replying Affidavit together with written submissions were not considered by the Learned Magistrate in his impugned ruling. The court was urged to find merit in the appeal and allow the same with costs.
10. I have considered the record of Appeal. I have also considered the Appellant's written submissions in this Appeal and the itemized grounds of appeal. In determining the issues raised in the Appeal this court is cognizant of its duty on a first appeal as set out in the case of *Selle & Another v Associated Motor Boat Co. Ltd & others* [1968] EA 123 cited with approval in *China 2 hogxing Construction Company Ltd v Ann Akeru Sophia* [2020] eKLR.
11. As has also been restated in the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A., a court sitting on Appeal will not interfere with a discretionary decision appealed from simply on the ground that the court, if sitting at first instance, would or might have given different weight to that given by the court to the various factors in the case.
12. This court sitting on Appeal is only entitled to interfere if one or more of the following matters are established; first, that the court misdirected himself in law; secondly, that the court misapprehended the facts; thirdly, that the court took account of considerations of which he should not have taken account; fourthly, that the court failed to take account of considerations of which he should have taken account, or fifthly, that the court's decision, albeit a discretionary one, is plainly wrong.
13. In my humble view, the following issues stand out as key issues for determination by this court which can dispel the Appeal. These are:
 - i. Whether the trial court had jurisdiction to entertain the suit.
 - ii. Whether the trial court erred in the exercise of its discretion in granting the interlocutory reliefs sought.
 - iii. What are the appropriate reliefs to issues herein?

Issue No. I

Whether the trial court had jurisdiction to entertain the suit.

14. In buttressing grounds 1, 2, 5 and 7 the Appellant submitted that the trial court did not have jurisdiction to grant the orders sought. It was submitted that the pecuniary jurisdiction of the Learned Magistrate was Kshs 10,000,000/- and yet the stated value of the suit property was Kshs 20,000,000/- The Appellant also submitted that the suit was subjudice in view of *Milimani ELC E074/2020 Timothy M. Mutiso & Another v Martin Ngao Muthama*.
15. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction



or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

16. In the instant case, the current jurisdiction of a Principal Magistrate is Kshs 10,000,000 and the value of the property having been stated at Kshs 20,000,000 the Learned Magistrate did not have the pecuniary jurisdiction to hear the matter.

Issue No. II

Whether the trial court erred in the exercise of its jurisdiction in granting the orders sought.

17. In her application before the subordinate court, the 1st Respondent sought a temporary injunction restraining the Appellant from engaging in certain activities pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now settled. In *Giella v. Cassman Brown & Co. Ltd.* [1973] E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer an irreparable injury that cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.
18. As stated above, for an applicant for a temporary injunction to succeed, he must demonstrate that he has a prima facie case against the respondent and that he stands to suffer irreparable harm unless the injunction is granted.
19. In the case of *Mbogo v Shah* [1968] EA 93 with regard to when an appellate court can disturb the exercise of discretion of a lower court. It was said in the said case that the appellate court ought not to interfere with the exercise of such discretion unless the appellate court is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and occasioned injustice.
20. In view of the foregoing and having found that the Learned Magistrate did not have jurisdiction to entertain the suit it therefore follows that he erred in exercising his discretion in granting the orders sought.

Issue No. III

What are the appropriate reliefs to issue herein?

21. Having found that the Learned Magistrate did not have jurisdiction to hear the matter, the appeal filed herein is merited and the reliefs sought ought to be granted. In view of the foregoing, I will allow the appeal and set aside the ruling and orders issued by the Learned Magistrate on 3rd June 2021. I will also proceed to strike out the entire suit filed before the subordinate court since the 1st Respondent ought not to have filed a fresh suit before the subordinate court when a similar matter relating to the same



subject property was still pending before the ELC for determination. The 1st Respondent ought to have pursued her claim at Milimani ELC No. E074/2020.

22. In conclusion, the court finds merit in the appeal and proceeds to issue the following orders:

- a. The orders given by the subordinate court on 3/06/2022 and the entire ruling are hereby set aside.
- b. The entire suit filed before the subordinate court Milimani Commercial CMCC No. E508 of 2021 Ivy Wangu Magu v Martin Ngao Muthama & Timothy M. Mutiso is hereby struck out.
- c. Each party to bear own costs of the appeal and costs of the proceedings before the subordinate court.

23. Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH AUGUST 2023.

E.K. WABWOTO

JUDGE

In the presence of:-

Mr. Litoro for Appellant.

N/A for 1st and 2nd Respondents.

Court Assistant – Caroline Nafuna.

E.K. WABWOTO

JUDGE

