



REPUBLIC OF KENYA



KENYA LAW
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**Thuo v Githinji (Environment and Land Appeal 97 of 2021)
[2023] KEELC 20279 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 97 OF 2021**

JG KEMEI, J

SEPTEMBER 28, 2023

BETWEEN

DANIEL NJUGUNA THUO APPELLANT

AND

AMOS NJUGUNA GITHINJI RESPONDENT

*(Being an appeal from the Ruling and Orders of Honourable C.
Mburu, SRM in Ruiru MCELC No. 7 of 2021 delivered on 8/11/2021)*

RULING

1. This Appeal arises from the decision/Ruling of the Hon C Mburu, SRM delivered on the November 8, 2021 in which the trial Court disallowed the application brought by the Appellant seeking injunctive orders *interalia* against the Respondent.
2. The Ruling aforesaid provoked this Appeal on the grounds as follows;
 - a. The Learned Magistrate erred in fact and in law in holding that the Appellants application for an injunction was not merited.
 - b. The Learned Magistrate erred in fact and law by making conclusions without listening to the parties' evidence.
 - c. The Learned Magistrate erred in law and in fact in denying the Appellant his constitutional right to a hearing.
 - d. The Learned Magistrate erred in law and in fact in failing to abide by the well-known principles enunciated in *Giella Vs. Cassman Brown* for the award of an interim injunction.
 - e. The Learned Magistrate erred in law and in fact in failing to find that the Appellant would be entitled to an order of specific performance.



- f. The Learned Magistrate erred in law and in fact in making a finding in favour of the Respondent, who had already defaulted on his obligations under the sale agreement.
 - g. The Learned Magistrate reached an absurd conclusion in seeming to find that the Respondent, a defaulter, had a better entitlement to the suit property than the Appellant.
 - h. The Learned Magistrate erred in law and in fact in failing to appreciate that the Appellant has tried every means possible to resolve the dispute with the Respondent who has flatly refused, objected to and obstructed every such move.
 - i. The Learned Magistrate erred in law and in fact in ruling that the interests of the Respondent override the right to access to justice as provided for in the *Constitution* of Kenya.
 - j. The Learned Magistrate erred in law and in fact in failing to appreciate the principles of interlocutory applications.
 - k. The Learned Magistrate erred in law and in fact in mixing up the issue of access to land, quiet enjoyment of land and issue of right to specific performance.
 - l. The Learned Magistrate erred in law and in fact in failing to have regard for the Appellant's exhibits.
 - m. The Learned Magistrate was influenced by extraneous matters and considerations.
 - n. The findings of the Magistrate were not supported by the evidence on record.
 - o. The trial Magistrate, erred and misdirected himself in relying solely on the submissions of the Respondent and failing to consider at all the Appellant's submissions.
 - p. The Learned Magistrate reached erroneous findings and conclusions both on fact and law.
3. Consequently, the Appellant sought the following orders on Appeal;
 - a. That the Court do make its own decision on the merits of the case, or in the alternative upon setting aside the judgment refer the case for determination before a different magistrate.
 - b. The cost of this Appeal be borne by the Respondent.
 - c. The Appeal be allowed.
 - d. That the Court does award such other or further relief as it may deem just and expedient under the circumstances of this case.
 4. The Appeal was canvassed by way of written submissions which I have considered.
 5. It was submitted that the Appellant has a *prima facie case* with a Probability of success having purchased the suit land from the Respondent for Kshs 300,000/- on execution of the agreement. That the Respondent has refused and is unwilling to cooperate and transfer the suit land to him even after completion of the succession cause and the title having been registered in his name. The Appellant relied on the case of *Amir Suleiman v Amboseli Resort Limited* (2004)eKLR and *Raphael Mulinge Muthusi & 2 Others v Mary Ndila Nyolo* ELCA 45 of 2021 in support of his proposition that the Appeal ought to be allowed and the suit land be preserved pending the hearing and determination of the main suit.
 6. The Respondent on the other hand submitted and denied ever selling the land to the Appellant and instead states that he owed one Mercy Wangari Kinyuki a sum of Kshs 190,000 and that the



Respondent agreed to lend him money so as to offset the debt owed to Mercy Kinyuki. That the Respondent and the said Mercy Kinyuki unduly coerced him to sign an agreement for sale as collateral and surety. That he was not afforded the opportunity to discuss the terms of the sale agreement including the consideration thereof. That he is ready and willing to refund the sums borrowed from the Appellant but the Appellant has been adamant in accepting the money, a clear manifestation of malice and fraud. That he resides on the suit land with his family and he has never -nursed any intentions of selling it least of all to the Appellant. That the land is matrimonial property and no spousal consent was obtained in support of the transaction. That the Appellant is a trespasser whose ill intentions are to acquire the suit land forcefully.

7. The Respondent submitted that the Appellant has not established a prima facie case given that he did not acquire any stake in the land. He faulted the Appellant for indicating the wrong land reference number in the plaint and failing to amend the same to reflect the correct reference number.
8. On irreparable loss the Respondent contended that the Appellant stands to suffer no loss since he does not reside on the land.
9. That the balance of convenience ought to favour the Respondent because the Appellant has made it difficult for him to refund the money borrowed from him.
10. The key issue 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 AJ 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. 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.”
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 rights. In the case of *Giella v Cassman Brown and Co Ltd* [1973] EA 358 the Court held that 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.

If the Court is in doubt on the above 2 requirements, it will decide the matter on a balance of probabilities

16. In this case it is not in dispute that the parties entered into an agreement of sale dated the June 23, 2015 in which the parties agreed to sell and buy a portion of the suit land being parcel 3949 measuring 0.241 hectares. At the time of the agreement the portion was part of the estate of the vendor’s father, Elijah Mwangi Mbugua, deceased. Thereafter the Respondent obtained title for the portion that is to say parcel 8942 in 2021. The Respondent has argued that he was forced to enter into a sale agreement for the sale of the land as collateral for a loan that he had borrowed from the Appellant to pay, one, Mercy Kinyuki. At this interim stage the Court is not required to look into the merits of the case and it suffices to state that there is an agreement between the parties. There is also an admission by the Respondent that he received the sum of Kshs 300,000/- from the Appellant for which the Appellant has refused to accept in refund. Undoubtedly the Respondent has not placed before the Court a copy of the loan agreement to support his averments. That said, the Court finds that there was a transaction between the parties and therefore the Appellant has established a prima facie case with a probability of success.

17. On the second limb of irreparable harm, the Court finds that although land is capable of valuation for purposes of compensation, the Court finds that the balance of convenience tilts in favour of granting status quo so as to preserve the suit land pending the hearing and determination of the suit. Grounds 5 -11 therefore succeed.

18. Back to the grounds of Appeal, the Court finds that to the contrary the parties were given a hearing by the Court. Infact they duly addressed the Court in person during the hearing of the application. The Court finds that grounds 1, 2, 3, 12-16 are not founded and consequently fail.

19. In the end the Appeal partially succeeds and the Ruling of the trial Court be and is hereby set aside to the extent that *status quo* be and is hereby ordered in terms of prayer no 2 of the application dated the February 9, 2021.

20. The costs of the Appeal shall be met by both parties equally.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.



J G KEMEI

JUDGE

Delivered online in the presence of;

Katei HB Makori for Appellant

Respondent – Absent but served

Court Assistants – Phyllis/Lilian

