



Shichenje & 5 others v Mutola & 7 others (Environment and Land Appeal E030 of 2022) [2023] KEELC 21168 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21168 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E030 OF 2022
DO OHUNGO, J
OCTOBER 31, 2023

BETWEEN

FRED SHICHENJE 1ST APPELLANT
LISANZA OBADIA 2ND APPELLANT
APOLO AYUKU LISUTSA 3RD APPELLANT
ALFRED LILUMBI 4TH APPELLANT
ANDREW INGANJI 5TH APPELLANT
LIRHANDA MISSION STATION 6TH APPELLANT

AND

CHARLES SHIKALAMA MUTOLA 1ST RESPONDENT
VINCENT MADEGWA GIDADI 2ND RESPONDENT
ISAAC GUNDU 3RD RESPONDENT
BENSON ARIKAMA 4TH RESPONDENT
ODDLY LUNGATSO MANYENGO 5TH RESPONDENT
EDITH MUSHIRA 6TH RESPONDENT
HOSEA SHIKOLI 7TH RESPONDENT
LIRHANDA MISSION STATION CHURCH 8TH RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Kakamega (Hon. Linus Kassan, Chief Magistrate) delivered on 13th July 2022 in Kakamega MCELC No. 182 of 2019)



JUDGMENT

1. Aggrieved with ruling delivered by the Chief Magistrate's Court at Kakamega (Hon. Linus Kassin, Chief Magistrate) on 13th July 2022, the appellants filed this appeal through Memorandum of Appeal dated 28th July 2022 wherein they prayed that the ruling of the Subordinate Court be set aside, and that Notice of Motion dated 6th January 2022 be dismissed.
2. The following grounds of appeal were listed on the face of the Memorandum of Appeal:
 1. The trial magistrate erred in law by allowing the Respondent Notice of application dated 6/1/2022 for injunctive orders when there was overwhelming evidence that the respondent did not satisfy the known threshold for granting of injunctive orders sought in the said application.
 2. The trial magistrate erred in law and in fact by donating its powers and or jurisdiction to a police station and the commanding the OCS Shirsasari police station to enforce the very orders of the trial court which orders have appellants to intimation and harassment by the police officers.
 3. The trial magistrate erred in law and fact by unilaterally invoking the exercise of police powers to enforce purely civil orders or proceeding without putting in place any safe guard to guard against abuse of powers by the very third party or police officers commanded to enforce the order.
 4. The trial magistrate in law and in fact by finding that the appellants were abusing the due process of the court without any evidence to qualify such abuse and went on to protect the respondents who were in deed the ones abusing the court process.
 5. The trial magistrate in law and fact by ignoring the fact that there was already n existing court order issued by the same court vide a ruling delivered on 5.10. 2016 against the respondent and proceeded to issue orders against the appellants in a manner that has resulted to a crisis since all parties are now armed with competing court orders against each other over the same subject matter.
 6. The trial magistrate erred in law and in fact by failing to act or remain impartial in a dispute between the parties herein and acted in a manner to suggest that the court was out to intimidate and install fear to the appellants while affording undue advantage or leverage to the respondent.
 7. The trial magistrate erred in law and in fact by failing to properly analyse and appreciate the different parties causes, disputes in the various cases cited in the ruling as Kakamega ELC 201 of 2014, MCC Number 197 of 2016 and grossly condemned the appellants for abuse of the court process when the record clearly shows that the appellants only have one pending case against the Respondents who have filed all manner of determined, abandoned and undermined pleadings, applications or claims in the same suit.
3. The appeal was canvassed through written submissions. The appellants argued that the respondents did not establish a prima facie case with a probability of success and did not demonstrate that they were likely to suffer irreparable damage. They contended that the respondents did not satisfy the test in *Giella v Cassman Brown & Co Ltd* [1973] EA 358. They further argued that the injunction granted conflicted other existing orders and went ahead to fault the Subordinate Court for involving the police in enforcement of the injunctive orders. They therefore urged this court to allow the appeal with costs.



4. On their part, the respondents argued that they established a prima facie case with a probability of success and that the injunctive orders were properly issued since injunctive orders made on 5th October 2016 lapsed by virtue of order 40 rule 6 of the Civil Procedure Rules, 2010. They further argued that it was the appellants who were abusing court process. They therefore urged this court to dismiss the appeal.
5. The principles applicable while considering an appeal such as the present one are that an appellate court will not interfere with the exercise of discretion by a subordinate court unless it is satisfied that the decision of that court is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion. See Mombasa Cement Limited v Kitsao & 34 others (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment).
6. I have carefully considered the pleadings, the grounds of appeal and the parties' submissions. The issue that arises for determination is whether the reliefs sought in the application ought to have issued.
7. The respondents principally sought an injunction pending hearing and determination of the suit. To succeed in such an application, the applicant must establish a prima facie case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. See Giella v Cassman Brown & Co Ltd [1973] EA 358 and Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR.
8. The learned magistrate was dealing with consolidated cases which have been pending from as far back as the year 2014 yet the hearing of the cases has not proceeded. In the ruling, the learned magistrate ordered the parties to comply with order 11 of the Civil Procedure Rules, 2010 and to fix the consolidated cases for hearing and determination. I have perused the record and I find no fault with the manner in which the learned magistrate resolved the application. There is no valid basis upon which to interfere with his exercise of discretion given the circumstances of the case.
9. If the parties had heeded the learned magistrate's order and proceeded to immediately set the suit down for hearing, they would probably have a judgment on the suit by now. Yet here we are with parties still haggling on interlocutory issues and accusing each other of misleading the court on interlocutory issues. Litigants must be reminded that cases are filed so that they are heard and determined. They are not filed to yield multiplicity of interlocutory applications and endless rulings on interlocutory issues. I sense abuse of the court's process. That must stop immediately.
10. The learned magistrate did not err in the exercise of his discretion. I find no merit in the appeal, and I therefore dismiss it. I make no order as to costs. Parties should proactively prosecute the consolidated cases without any further delay.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF OCTOBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:



The First, Second and Fifth Appellants present

No appearance by the Third, Fourth and Sixth Appellants

Mr Munyendo holding brief for Mr Mutoka for the Respondents

Court Assistant: E. Juma

