



**Waititu v Kinuthia (Environment and Land Appeal 013 of 2021)
[2023] KEELC 21079 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21079 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL 013 OF 2021
PM NJOROGE, J
OCTOBER 30, 2023**

BETWEEN

NIXON KAMAITHA WAITITU APPELLANT

AND

LEONARD KIARIE KINUTHIA RESPONDENT

JUDGMENT

1. This is an Appeal concerning an interlocutory Ruling delivered by Hon. S M Mungai, Chief Magistrate, at Isiolo on 13th July, 2021. The main suit, CM’S ELC Case No. 15 of 2020, was filed at Isiolo Chief Magistrate’s Court on 8th December, 2020 though the plaint is dated December 7, 2020.
2. The court notes that its decision in this matter will not change the fact that the main suit remains unheard and undetermined. Perhaps, had the parties proceeded to have the suit heard on its merits, the issues being canvassed in this interlocutory appeal would have been laid to rest. In passing, I note that the main suit was filed almost 3 years ago. For this reason, this is one of the cases that count towards the ballooning of backlog in the Judicial System.
3. The Memorandum of Appeal in this matter is in the following format;

Memorandum of Appeal

(Under order 42 rules 1 of the Civil Procedure Rules)

Take Notice that the Appellant herein, Nixon Kamaitha Waititu, being aggrieved by the Ruling and Order of the Magistrate’s Court (the Hon. S M Mungai, Chief Magistrate) made and/or issued on 13th July, 2021, hereby appeals against the entirety of the decision as of right to the Environment and Land Court of Kenya.

This appeal is premised on the following grounds;



1. That the Learned Magistrate erred in law and in fact in allowing the prayers sought in the Plaintiff's Notice of Motion dated 7th December, 2020.
2. That the Learned Magistrate erred in law and in fact by finding that the Plaintiff/Applicant had established the three conditions set out in the case of *Giella Versus Cassman Brown (1973) EA 358* and *Mrao Versus First American Bank of Kenya & 2 Others*, to warrant the grant of injunction as sought.
3. That the Learned Magistrate especially erred in law and in fact by finding that the Plaintiff/Applicant would be exposed to injury that could not be adequately compensated by way of damages, in light of the fact that the Plaintiff/Applicant has purportedly applied to register himself as the owner of the suit property at the Isiolo County Department of Lands.
4. That the Learned Magistrate erred in law and in fact in failing to appreciate that the Plaintiff/Applicant himself had admitted to purchasing the subject parcel of land from one James Gitonga B. Waititu on 6th February, 2014 vide an alleged agreement for sale executed by both parties.
5. That the Learned Magistrate erred in fact and in law in failing to consider the evidence of the Defendant/Respondent that the suit property has never belonged to the said James Gitonga B. Waititu who allegedly sold it to the Plaintiff/Applicant, but actually belonged to one Ngunju B. Waititu, the Defendant/Respondent's Deceased Mother.
6. That the Learned Magistrate erred in fact and in law by failing to consider that the Plaintiff/Applicant has not presented any document as evidence that the suit property ever belonged to James Gitonga B. Waititu, who allegedly sold it to the Plaintiff/Applicant.
7. That the Learned Magistrate erred in fact and in law by questioning the capacity of the Defendant/Respondent in this case, as the Defendant/Respondent appeared in his own capacity having been personally sued by the Plaintiff/Applicant. That it is also evident that the Defendant/Respondent is claiming the suit property as a beneficiary of his mother, the lawful owner of the suit property.
8. That the Learned Magistrate misapplied the law on trespass by finding that the Plaintiff/Applicant has a right, legal or equitable, which requires protection by injunction; and by finding that the Plaintiff/Applicant has been in possession of the suit property.
9. That the Learned Magistrate Misapplied the legal principle of *nemo dat quod non habet* as embodied in section 23 of the *Sale of Goods Act*, by finding that the Plaintiff/Applicant has good title to the suit property wherein he stated that on the face of it the Plaintiff is the registered owner.

Reasons Wherefore the Appellant prays that;-

- a. This Appeal be allowed and the ruling and order of the Magistrate's Court at Isiolo (the Hon. S.M Mungai, Chief Magistrate), made and/or delivered on 13th July, 2021 be set aside;
- b. That the Ruling and order of the Magistrate's Court at Isiolo (the Hon. S.M Mungai, Chief Magistrate), made and/or delivered on July 13, 2021 be substituted with an order disallowing/dismissing the Plaintiff's Notice of Motion dated 7th December, 2020;



- c. Any other orders that the Honourable Court deems fit;
- d. Costs of this appeal be awarded to the Appellant.

Dated at Nairobi this 6th Day of August, 2021.

Michael Daud & Associates

Advocate For The Appellant

4. The application has been canvassed by way of Written Submissions.
5. The issues raised by both parties are centered on the ownership of the suit property. It is for this reason that the appellant argues that the principles enunciated in the cases of *Giella Versus Cassman Brown* [1973] EA 358 and *Mrao Versus First American Bank of Kenya & 2 others* [KLR] have not been satisfied. The appellant submits that the respondent did not establish that his claim could not be satisfied through an award of damages. I opine that satisfaction of a claim through payment of damages should not be the predominant condition. A court of law looks at the totality of the circumstances of each case and considers the greater interest demanded by substantial justice.
6. The respondent is insistent that the orders issued in the impugned ruling were properly granted and explains the facts of this case and proffers persuasive authorities.
7. I opine that many of the facts and issues being raised by the parties can only be properly heard and determined during the hearing of the main suit. When dealing with an appeal against an interlocutory ruling, a court of law must be careful not to handle such an appeal in a manner which will have the effect of tying the hands of the trial court. More pointedly, the court should not make final announcements in matters which will be heard and determined by the trial court.
8. I have carefully read and considered the pleadings in this matter. I have also carefully read and considered the ruling delivered by the lower court. My conclusion is that the Hon. Magistrate in the lower court eruditely considered the relevant facts, issues and the law and that his ruling was properly made and served the greater interest of justice at that interlocutory stage. I opine that the real solution in this matter is for the main suit to be heard and determined on its merit.
9. In the circumstances, I issue the following orders;
 - a. This appeal is dismissed.
 - b. Costs shall be in the main suit.

DELIVERED IN OPEN COURT AT ISIOLO THIS 30TH DAY OF OCTOBER, 2023 IN THE PRESENCE OF:

Court assistant: Balozi/Rahma

Miss Nyasani holding brief for Mrs Waititu for the Appellant.

Respondent advocate absent.

HON. JUSTICE P.M NJOROGE

JUDGE

