



REPUBLIC OF KENYA



KENYA LAW
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**Makapia v Makapia & another (Environment and Land Appeal
E044 of 2022) [2023] KEELC 21013 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21013 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E044 OF 2022
DO OHUNGO, J
OCTOBER 25, 2023**

BETWEEN

SHABAN KANDIA MAKAPIA APPELLANT

AND

RASHID OMENDA MAKAPIA 1ST RESPONDENT

ASMAN OKANGA OSIEKO 2ND RESPONDENT

*(Being an appeal from the ruling and order of the Senior Principal Magistrate's
Court at Mumias (Hon. Thomas Obutu, Senior Principal Magistrate)
delivered on 15th September 2022 in Mumias MCELC No. E029 of 2022)*

JUDGMENT

1. The background of this appeal is that the respondents filed plaint dated 31st May 2022 in the Subordinate Court, against the appellant. They averred that they were joint beneficiaries and joint registered proprietors together with the appellant of the parcel of land known as South/Wanga/Ekero/515 (the suit property). That the appellant had grabbed the second respondent's portion and was cultivating it without the consent of the second respondent. They therefore prayed for judgment against the appellant for his eviction from the second respondent's portion, subdivision of the suit property between them, mesne profits, and costs.
2. Together with the plaint, the respondents filed Notice of Motion dated 31st May 2022, in which they prayed for an injunction to restrain the appellant as well as his servants from cultivating, wasting, alienating, or doing anything on the portion of the suit property belonging to the second respondent pending hearing and determination of the suit. They also sought an order directing the land registrar to register an inhibition against the suit property. Upon hearing the application, the Subordinate Court (Hon. Thomas Obutu, Senior Principal Magistrate) delivered the ruling on 15th September 2022 and granted both the injunction and the inhibition.



3. Aggrieved, the appellant filed this appeal through Memorandum of Appeal dated 22nd September 2022 wherein he prayed that the ruling of the Subordinate Court be set aside. The following grounds of appeal were listed on the face of the Memorandum of Appeal:
 1. That the learned Magistrate erred in law and facts by forming his evidence against the evidence on record which led to miscarriage of justice.
 2. That the learned Magistrate erred in law and facts by failing to appreciate that the suit land belongs to the deceased Faraj Wakara Isongo which led to miscarriage of justice.
 3. That the Learned Magistrate erred in law and facts that this suit is res-judicate (sic) to Kakamega 156 of 2002.
 4. That the learned Magistrate erred in law and facts by failing to authentically peruse the papers on record which led to miscarriage of justice.
 5. That the learned Magistrate erred in law and facts by failing to put into consideration the appellant submissions which led to miscarriage of justice.
4. The appeal was canvassed through written submissions. The appellant argued that since he filed a defence in which he denied the respondents' allegation that he was not entitled to two acres, there was need for each party to fortify their claim through evidence at trial and that the Subordinate Court erred in holding that the respondents were owners of the suit property. He further argued that legality of the respondents' title was disputed and that in those circumstances, an injunction ought not to have been granted since no prima facie case was established.
5. The appellant also argued that the second respondent never pleaded that he had ever been in possession of any portion of the suit property since the year 2001 and that having moved the court 20 years later in 2022, there was no proof of irreparable loss. He wondered what irreparable loss the second respondent would suffer if he waited for the case to be heard and determined on merit. He therefore submitted that the learned magistrate erred in failing to appreciate the evidence and thereby erroneously granted an injunction against the appellant. He urged this court to set aside the injunction and to instead order that the status quo obtaining as at the filing of the suit be maintained until the hearing and determination of the main suit.
6. In reply, the respondents argued that as presented, the appeal is addressing the merits of the main suit which is yet to be heard. That the issue of ownership of the suit property is yet to be determined and that since the appellant did not raise a preliminary objection that the suit was res judicata, he cannot raise res judicata in this appeal. They further argued that they had established a prima facie case and that they had been in occupation of their portions since the year 2002. That legality of the decree the appellant referred to is contested. The respondents therefore urged this court to dismiss the appeal with costs.
7. The principles applicable while considering an appeal such as the present one are that that an appellate court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision 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).



8. 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.
9. 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](#).
10. There is no dispute that the parties in this appeal are joint registered proprietors of the suit property. The respondents claim that the appellant grabbed the second respondent's portion of the suit property and was cultivating it without the consent of the second respondent. The contestation between them boils down to the question of what portion each purchased. Needless to state, that is an issue for determination at trial of the suit.
11. As a registered proprietor, the appellant just like the respondents, is entitled to the rights, privileges, and benefits under Section 24 of the [*Land Registration Act*](#). Those rights, privileges, and benefits cannot simply be discarded based on the respondents' affidavit allegations, which allegations are hotly contested by the appellant. I think the only just way to resolve the dispute is to have the suit heard and determined on the merits as opposed to injuncting one registered proprietor.
12. Nevertheless, based on the contestations between the parties, which include claims by the respondents that the appellant was attempting to have a partition registered along his perception of what he thinks is his entitlement, there is need to preserve the suit property from dispositions pending hearing and determination of the suit. The appellant seems to appreciate that too, and has proposed maintenance of status quo. The least disruptive way of achieving that is through an order of inhibition which will operate within the register of the suit property while letting the parties go on with their day to day lives on the ground.
13. I have said enough to show that in granting the injunction, the learned magistrate wrongly exercised his discretion and thereby arrived at a wrong conclusion. Consequently, this appeal succeeds in part. The ruling and order of the Subordinate Court is replaced with the following orders:
 - a. Prayer B of Notice of Motion dated 31st May 2022 is dismissed.
 - b. Pending hearing and determination of the suit in the Subordinate Court, an inhibition be registered against the parcel of land known as South/Wanga/Ekero/515.
 - c. Costs of Notice of Motion dated 31st May 2022 shall be in the cause.
 - d. In view of the outcome of this appeal, I make no order as to costs of the appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:



The Appellant present in person

No appearance for the Respondents

Court Assistant: E. Juma

