Nyakio v Olugutu & another (Environment and Land Appeal E033 of 2021) [2025] KEELC 3528 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3528 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL E033 OF 2021

MD MWANGI, J

APRIL 30, 2025

BETWEEN

MOSES MUCHIRI NYAKIO ..... APPELLANT

AND

SAYETUA EMA OLUGUTU ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO ..... 2ND RESPONDENT

(Being an appeal from the ruling and orders of Hon. Cheloti (SRM), Learned Magistrate in Kajiado MCELC E031 of 2021)

JUDGMENT

Background

1. This appeal was initiated by way of a memorandum of appeal dated 25th November 2021. It is an appeal from the ruling and orders of Hon. Cheloti (SRM), Learned Magistrate in Kajiado MCELC E031 of 2021 delivered on 9th November 2021. The Appellant, who was the Applicant in the application giving rise to the ruling listed 4 grounds of appeal, namely;

    i. That the Learned Magistrate erred in law and in fact dismissing the Appellant's application against the weight of the evidence tendered by and on behalf of the Appellant.

    ii. That the Learned Magistrate erred in law and in fact in making final determination on issues of a fact, a preserve of the trial court and in doing so wrongly determined the ownership of Plot No. A1015 Namanga at an interlocutory stage.

    iii. That the Learned Magistrate erred in law and in fact in failing to find that the Appellant had established a prima facie case with a probability of success.

iv. That the Learned Magistrate erred in law and in fact in failing to apply correctly the test as to whether the Appellant would suffer irreparable loss by reason of the 1st Respondent's conduct of constructing on the suit premises.

2. The Appellant prays that the ruling and orders of Hon. Cheloti (SRM) be set aside and an injunction do issue restricting the 1st Respondent by himself, his agencies and or servants from trespassing and or constructing on Land Parcel No. A/1015 Namanga, pending the determination of Kajiado ELC No. E031 of 2024 (before the Chief Magistrate's Court at Kajiado. He too prays for the costs of the appeal.

3. The impugned ruling was in respect to the amended application dated 28th April 2021 filed in court on 30th April 2021. The Plaintiff/Applicant, now Appellant, had sought for a restraining order against the Respondents by themselves, their agents and or servants restraining them from further building and or trespassing and or in any way interfering with Plot No. A/1015 Namanga pending the hearing and determination of the suit.

4. The Appellant's basis of the application was that he was the administrator of the estate of the late Felista Wanjiru Kanyi, who was the proprietor of the subject property. The plot had been allotted to her way back on 11th October 1991 by the 2nd Respondent's predecessor in title, the Olkejuado County Council, way back on 11th October 1991. However, on 3rd November 2020, he discovered that the plot had been wrongfully and fraudulently allocated to the 1st Respondent on allegations that the late Felista Wanjiru Kanyi had withdrawn her claim over the plot. The Appellant affirmed that the late Felista Wanjiru Kanyi had been paying rates for the plot and had provided receipts to confirm the same.

5. The 1st Respondent had, after the purported allocation, trespassed into the plot and built a temporary house therein. The Appellant therefore sought a temporary injunction, as earlier explained, pending the hearing and determination of the suit before the trial court.

6. The application was opposed by the 1st and 2nd Respondents who filed replying affidavits dated 13th May 2021 and 27th July 2021, respectively.

7. The Learned Magistrate in her impugned ruling identified two issues for determination being;

   a. Whether or not the instant application meets the required threshold before a grant of interlocutory injunction can issue.

   b. Whether or not the orders sought are merited.

8. The Learned Magistrate found that the application failed to meet the threshold and proceeded to dismiss it with costs.

Directions on the hearing of the appeal.

9. With the concurrence of the parties, the court directed that the appeal be canvassed by way of written submissions. The submissions by the Appellant and the 1st Respondent are on record. The 2nd Respondent did not participate in the appeal. The court has had the opportunity to read and consider the submissions on record in writing this judgment.

Issues for determination

10. Having considered the entire record of appeal, and the submissions by the parties, two issues present themselves for determination, namely.

A. Whether the Appellant's application meets the threshold for the grant of an order of interlocutory injunction.

B. Whether the Appellant was entitled to the orders sought.

Analysis and determination

11. This being a first appeal, I am conscious of the mandate of a first appellate court to re-evaluate the evidence before the trial court as well as the judgment or ruling and arrive at its own independent conclusion on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh scrutiny and make conclusions about it as stated in the now well-known case of Selle and another –vs- Associated Motor Boat Company Limited & others (1968) EA 123.

12. The law on interlocutory injunctions is well settled. The case of Giella -vs- Cassman Brown (1973) EA 358, established the principles as follows;

> " First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of probabilities."

13. The court in considering whether or not to grant an interlocutory injunction exercises judicial discretion. It is a well-established principle that an appellate court will not interfere with the exercise of discretion by the trial court, even if, in the shoes of the trial court, it would have come to a different conclusion.

14. The Court of Appeal in James Maina & 3 others –vs- Attorney General & 4 others (2017) eKLR, explained that the principle that the discretion involved is the discretion of the trial court, not of the appellate court.

15. The circumstances under which an appellate court will therefore interfere with the exercise of discretion by the trial court are limited as articulated by Madan J (as he then was), in the case of United India Insurance Company Limited –vs- East African Underwriters (Kenya) Ltd (1985) EA 898, in the following words;

> " The Court of Appeal will not interfere with a discretionary discretion of the judge appealed from simply on the ground that its members, if sitting in the first instance would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established; first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken into account; fourthly, that he failed to take account of considerations of which he should have taken account, (f) and fifthly, that his decision, albeit a discretionary one, is plainly wrong."

16. The Court of Appeal in the case of James Maina (supra) also referred to Charles Newbold, P in Mbogo & another –vs- Shah (1968) EA 98, where the Learned Judge had stated that;

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter

and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been some injustice."

17. In this case, the trial Magistrate in a two paragraphs determination concluded that;

> "I have perused the instant application, affidavits in support and against, statement of defence, submissions and, the annexed authorities and documents, I find the issues for determination are whether or not the instant application meets the required threshold before a grant of interlocutory injunction can issue and whether or not the orders sought are merited.
>
> It is trite law that before an order of injunction can issue, the requisite threshold has to be satisfied. From the foregoing, the instant application has failed to meet the principles required before an order for an injunction can be granted. To wit, the application dated 28th April, 2021, is dismissed for lack of merit. The costs of the application to be borne by the Plaintiff."

18. The trial court ought to have explained what informed its conclusion that the application by the Plaintiff failed to meet the threshold. Otherwise, its decision can only be described in one word; arbitrary.

19. Mativo J (as he then was), in the case of Republic –vs- Kenya Revenue Authority Ex Parte Stanley Mombo Amuti; (2018) EKLR, discussed judicial discretion at great length. The insights in the ruling are useful guidelines for judges and judicial officers who often times work under great pressure but have the responsibility to exercise their authority judiciously in accordance with sound and reasonable judicial principles. The judicious exercise of discretion can only be discerned from a demonstrable analysis of the facts of the case against judicial principles before a conclusion is arrived at one way or another.

20. Mativo J observed that;

> "It is well settled that whenever the court is invested with the discretion to do certain acts as mandated by statute, the same has to be exercised judiciously and not in an arbitrary manner. The classic definition of "discretion" by Lord Mansfield in Republic –vs- Wilkes (45) (is) that "discretion" when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not humour; it must not be arbitrary, vague and fanciful, but legal and regular. Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit (46). Discretion must be exercised in accordance with sound and reasonable judicial principles."

21. The Learned Judge further quoted the King's Bench in Rookey's case {77 ER 209; (1597) 5 co. Rep 99}, where the court stated as follows:

> "Discretion is a science, not to act arbitrarily according to men's will and private affection; so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has sometimes ignorantly imputed to this

court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity is by the *constitution* entrusted with."

22. Exercising this court's powers as a first appellate court, I have re-evaluated the evidence before the trial court as well as the ruling of the court and the submissions by the Appellant and the 1st Respondent. The Appellant's case was that the late Felista Wanjiru Kanyi was hitherto the proprietor of the subject plot and the plot was therefore owned by her estate upon her demise. The Appellant is the administrator of the estate of the Late Felista Wanjiru Kanyi. He had attached a copy of the letters of allotment dated 11th October 1991 issued to Felista Wanjiru Wakanyi by the Olkejuado County Council spelling out the conditions for the allotment.

23. The 1st Respondent too as affirmed in his replying affidavit sworn on 13th May 2021 was also armed with an allotment letter for Plot No. 2665/Business-Namanga Trading Centre, allegedly issued on 8th March 2007; also by the defunct Olekejuado County Council.

24. In a further affidavit sworn on 5th July 2021, the Appellant asserted that the late Felista Wanjiru Kanyi was indeed living at Kisongo Village in Namanga in 1991. However, through the initiative of the 2nd Respondent, the residents of the village were relocated to the suit premises and allotment letters issued to them. The late Felista Wanjiru Kanyi took possession of hers and she and her successors have been in possession since then.

25. The Appellant further alleged that a validation process in the year 2011 by the officials of the 2nd Defendant reconfirmed the plot to Felista Wanjiru Kanyi. Beacons were placed in situ after a survey process and are present to date. A further validation in 2019 also re-confirmed the position according to the Appellant. The Appellant claims both plots numbers A1014 and A1015 as belonging to the late Felista Wanjiru Kanyi. There is even a temporary house built by her traversing both plots.

26. The court's responsibility is to consider the evidence by the Appellant against the principles for the grant of an injunction as set out in the Giella –vs- Cassman Brown case.

27. The 1st consideration is whether the Appellant had established a prima facie case. In this respect, I am guided by the Court of Appeal decision in Nguruman Limited -vs- Jan Bonde Nielsen and 2 others (2014) eKLR, where the court emphasized that;

> " The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes that on the face of it the Applicant's case is more likely or not to ultimately succeed."

28. With this in mind, and without examining the merits of the case closely, the court's view is that the Appellant has established a prima facie case. On the face of it, the Appellant has demonstrated a right which has been or is threatened with violation.

29. On the 2nd condition, irreparable injury, the Court of Appeal in the Nguruman Cause, (supra) explained that,

> " On the second factor, that the Applicant must establish that "he might otherwise" suffer irreparable injury which cannot adequately be remedied by damages in the absence of an injunction is a threshold requirement and the burden is on the Applicant to demonstrate, prima facie, the nature and extent of injury. Speculative injury will not do. There must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

30. Odunga J, (as he then was) in the case of JM -vs- SMK & 4 others (2022) eKLR, in defining, irreparable injury made reference to the Halsbury's Laws of England, 3rd edition volume 21, paragraph 739 at page 352, which defines irreparable injury as,

> " Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the Plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted if the injury in respect of which relief is sought is likely to destroy the subject matter in question."

31. The Appellant in this case submitted that he stood to suffer irreparable damages unless the injunction was granted because he would be prevented from distributing the estate of the deceased to her beneficiaries in accordance with the wishes of the late Felista Wanjiru Kanyi.

32. Considering that the late Felista Kanyi had resided on the suit property since 1991, I agree with the Appellant that he may suffer irreparable injury. A home does not only have a fiscal value but also a great sentimental value which cannot be equated to monetary value.

33. Warsame J, (as he then was) in the case of Joseph Siro –vs- HFCK & 3 others (2008) eKLR, had this to say on the subject of injunctions,

> " Damages is not an automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction more so, a party cannot be condemned to take damages in lien of his crystalized right which can be protected by an order of injunction."

34. The final consideration is the balance of convenience. As regards the balance of convenience, this court agrees, with the decision in Pius Kipchirchir Kogo --vs- Frank Kimeli Tenai (2018) eKLR, where the court held as follows;

> " The meaning of balance of convenience in favour of the Plaintiff is that an injunction is not granted and the suit is ultimately decided in favour of the Plaintiff, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience, it is really the balance of inconvenience and it is for the Plaintiff to show that the inconvenience caused to them would be greater than that which would be caused to the Defendants. Should the inconvenience be equal, it is the Plaintiffs who suffer. In other words, the Plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

35. It is not lost on the court that the 1st Respondent had under oath admitted that his intention was to dispose of the suit property to a third party. From the foregoing and with that information in mind, the balance of convenience tilts in favour of the Appellant.

36. The upshot from the foregoing is that the appeal by the Appellant herein succeeds. The ruling and orders of Hon. Cheloti SRM issued on 9th November 2021 in Kajiado MCELC E031 of 2021 are hereby set aside and substituted with an order of temporary injunction restricting the 1st Respondent by himself, his agents and or servants or any one claiming through him from trespassing and or constructing on Land Parcel No. A1015 Namanga pending the hearing and determination of Kajiado MCELC E031 of 2021.

37. The Appellant is granted the costs of this appeal against the 1st Respondent as well as the costs of the amended notice of motion dated 28th April 2024 before the trial court.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 30TH DAY OF APRIL 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kabaila h/b for Mr. Mutiso for the Appellant

Mr. Serpepi for the 1st Respondent

Ms. Kemunto h/b for Mr. Nyakwana for the 2nd Respondent

Court Assistant: Mpoye

M.D. MWANGI

JUDGE