



REPUBLIC OF KENYA



KENYA LAW
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**Mbutu v Mwangangi (Environment and Land Appeal E001 of 2023)
[2025] KEELC 3169 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3169 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

AY KOROSS, J

APRIL 8, 2025

BETWEEN

STEPHEN KIOKO MBUTU APPELLANT

AND

ANTHONY MUTUKU MWANGANGI RESPONDENT

*(This is an appeal from the ruling of the SPM Hon. Khapoya S. Benson,
which was delivered on 7/06/2023 in Kithimani ELC Case No. 20 of 2022)*

JUDGMENT

Background

1. The subject of this appeal emanates from an interlocutory ruling rendered by the learned trial magistrate on the notice of motion dated 30/05/2022 which the respondent filed.
2. In it, the respondent sought temporary injunctive reliefs restraining the appellant, his agents, servants and/or personal representatives from trespassing, dealing, alienating, mapping, surveying, selling, offering for sale, disposing of, or in any way dealing with land parcel no. L.R. No. Yatta Ekalakala/252 (suit property) pending hearing and determination of the substantive suit in which the respondent was the plaintiff and the appellant the defendant.
3. This motion was supported by the grounds in support thereof, the respondent's affidavit that was sworn on the even date, and a further affidavit that he deposed on 13/06/2022.
4. In brief, he stated he bought the suit property from the appellant at ksh. 1,480,000/- of which he had paid the purchase price, save for the balance of kshs. 80,000/-.
5. He asserted he was constrained from paying this balance due to a breach of the agreement by the appellant, particularly for failing to avail the completion documents.



6. He averred that subsequently, the appellant leased the suit property to 3rd parties, which culminated in an AJS mechanism whereby both parties were found to be at fault, and the award that ensued therein issued certain orders against both parties.
7. This motion was opposed by the appellant's lengthy replying affidavit, which she deposed on 27/06/2022 and a further affidavit sworn on 25/08/2022.
8. Essentially, he stated that the parties had entered an agreement for sale, which was breached by the respondent, and the agreement stood terminated, and he was thus at liberty to sell it to 3rd parties.
9. He further averred that he had always been in occupation, possession and control of the suit property and was carrying out farming before he leased it out to other 3rd parties for them to conduct farming.
10. Additionally, on 30/01/2016, the respondent attempted to trespass on the suit property, and he was warned by the police officers and these acts of trespass occasioned losses to him. He stated that as of now, the suit property was leased to John Mutwiri Mbaya, and he tendered a copy of the lease agreement to the court.
11. He stated that as per the terms of the agreement, he had issued a completion notice to the respondent, but the respondent had failed to fulfil its terms by paying the balance of the purchase price of kshs. 80,000/=. In his view, the contract stood rescinded per the terms of the agreement.
12. He averred that he had always been ready to complete the transactions and had all the completion documents, including the Land Control Board (LCB) consent, and the suit property did not have encumbrances.
13. He further stated that the AJS mechanism was biased, did not involve the area chief, and was improperly set up, and he did not agree with its award.
14. He stated that any injunctive reliefs issued were against the rules of natural justice since the respondent had not made full disclosures, and in his view, the respondent had not established a prima facie case and urged the court to dismiss it.
15. The motion was canvassed by both parties' written submissions with the law firm of M/s. Nyasani E. N. & Co. Advocates for the respondent filing written submissions dated 7/09/2022.
16. The counterpart law firm of M/s. Carolyn K. Muumbuo Co. Advocates, who represented the appellant, filed written submissions dated 7/10/2022.
17. The matter was subsequently reserved for ruling, and in the impugned decision, the learned trial magistrate framed one issue for determination, which was whether the threshold for granting an interlocutory injunction had been met.
18. In the impugned decision, the learned trial magistrate proceeded to state there was the need to preserve the suit property, and he granted orders of temporary injunction pending the hearing and determination of the suit with costs being in the cause.

Appeal to this court

19. The above outcome did not augur well with the appellant, and dissatisfied with the impugned ruling, the appellant preferred an appeal to this court on 16 grounds as set out in his memorandum of appeal dated 3/07/2023.



20. However, before this court proceeds further, it is paramount to address 2 of the inadequacies of the grounds of appeal. The 1st one is on new issues raised by the appellant on appeal that were never the subject of the impugned ruling, and the last one is on the repetitive nature of the grounds of appeal.
21. On the 1st limb, the subject of this judgment is the impugned ruling, yet the appellant raised grounds of appeal on certain directions and orders made by the learned trial court on diverse dates, particularly on 14/06/2022.
22. All these new issues raised by the appellant on appeal were never subjected to determination by the trial court, and since they were never pleaded, canvassed, raised, or succinctly made issues before the trial court to enable it to exercise its mind upon them, they will be disregarded. See *Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited)* [2019] eKLR.
23. In any case, these issues raised as grounds 1, 2, 3 and 4 of the appeal were long overtaken by events before the learned trial magistrate rendered the impugned ruling, and the timelines for appealing against them have long passed. As a result, these grounds are misplaced.
24. On the 2nd limb, the other 12 grounds all touched on the learned trial magistrate's exercise of discretion and in these humble court's view, these grounds contravened the provisions of the law on the nature and form of a memorandum of appeal as provided in Order 42 Rule 1 (2) of the Civil Procedure Rules which states: -

“The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”
25. The essence of Order 42 Rule 1 (2) of the Civil Procedure Rules is to assist the court and parties in framing the issues and to identify the core grounds the appellant is aggrieved against as derived from the decree.
26. With due respect to the appellant, the grounds of appeal as charted out in the memorandum of appeal fell short of this law as they were not concise and in converse, were argumentative, narratively stated the evidence, repetitive and digressed into the substance of the suit that was before the trial court.
27. Consequently, the grounds of appeal can adequately be summarised as a singular ground, whether the learned trial magistrate erred in the exercise of his discretion when issuing the orders of temporary injunction.
28. In the end, the appellant implored this court to allow the appeal with costs, set aside the impugned ruling and consequential orders and dismiss the motion. Further, the matter be heard by any judicial officer with pecuniary jurisdiction other than the learned trial magistrate and costs of the appeal.

Submissions.

29. As directed by the court, the appeal was canvassed by the appellant's written submissions dated 15/01/2024 which shall be considered by the court in rendering its decision. Nevertheless, the respondent did not participate in these proceedings.

Issues for determination

30. As was stated in the case of *Abok James Odera t/a A. J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, this court is alive that its role as a first appellate court is



to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate stand or not and give reasons either way.

31. Turning to the matter at hand, this court has carefully considered the records, appellant's submissions, provisions of law relied upon, and judicial precedents cited, and the issues for resolution are as follows: -
 - a. Whether the learned trial magistrate erred in the exercise of his discretion when issuing the orders of temporary injunction.
 - b. What orders should this court grant, including an order as to costs?

Analysis and determination

32. These issues that have been earlier highlighted as arising for determination shall be dealt with together.
33. The law that guides courts when they exercise judicial discretion on temporary interlocutory orders is found in Order 40 Rule 1 of the Civil Procedure Rules, and it states as follows: -

“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.”
34. This judicious discretion is based on the law and evidence, and an applicant has to meet the threshold of the 3 tests, which are inter alia, establish a prima facie case, demonstrate irreparable injury, and that the balance of convenience tilts in his favour.
 35. The principles for the grant of temporary injunction were well settled in the case of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358, which were similarly restated in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR in the following words: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
 - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.”
36. When determining an interlocutory application such as the one before the trial court, it had to be careful not to prejudice a party by making conclusive findings of fact or law on substantive issues that are the preserve of trial as was stated by Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002.



37. In the impugned ruling, the learned trial magistrate did appreciate the law and stated the respondent had demonstrated he had an interest in the suit property that warranted preservation.
38. This court's understanding of this reasoning is that the learned trial magistrate was satisfied that the respondent had established a prima facie case.
39. In considering this test, this court adopts the definition of the term prima facie case as defined by the Court of Appeal decision of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR, which stated: -
- “In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”
40. Before the trial court, both parties agreed that an agreement existed between the parties, and the respondent had paid a substantial sum thereof.
41. The issue of whether there was a breach by either party or not has to be tested and determined during the main hearing of the suit, and this court agrees with the finding of the learned trial magistrate on this test.
42. This is because, as an alleged purchaser, the respondent has not made a frivolous claim but has a right that has allegedly been infringed upon.
43. On the 2nd pillar of the establishment of irreparable loss, *Banis Africa Ventures Limited v National Land Commission* [2021] eKLR cited with approval *Halsbury's Laws of England* [*Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.*] which stated thus: -
- “It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant 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 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 act in respect of which relief is sought is likely to destroy the subject matter in question.”
44. Both parties agreed in their averments that the respondent, despite being an alleged purchaser, was not in occupation of the suit property.
45. It emerged that both parties had an existing agreement that allegedly bound the parties, and a glance at the agreement makes provisions for the rescission thereof, and though the trial magistrate did not make a finding on this, this court finds the respondent's loss could be compensated by an award of damages.



46. As for the 3rd test of the balance of convenience, which the learned trial magistrate did not consider, both parties are in consensus that the appellant was in possession and had even leased it out to 3rd parties.
47. The learned trial magistrate did not consider this 3rd pillar. Consequently, in considering this issue, this court finds that compared to the respondent, the appellant would have been highly inconvenienced if the orders of injunction were granted. See Pius Kipchirchir Kogo v Franklin Kimeli Tenai [2018] eKLR.
48. Another related critical issue that sufficed was whether the trial court could injunct what has already happened. The answer to this is negative, and this position has been upheld in a line of court decisions and hereby adopts the court's rendition in Stanley Kirui v. Westlands Pride Limited (2013) eKLR, which stated: -
- “...the court cannot injunct what has already happened. I will be guided by the findings in case of Mavoloni company Ltd vs Standard Chartered Estate Management Ltd, Civil Appeal No. 266 of 1997 (1997) LLR 5086, where the court held that “an injunction cannot be granted once the event intended to be injuncted has been overtaken by events.” Similar findings were held in the case of Esso Kenya Ltd Vs Mark Makwata Kiya, Civil Appeal No. 69 of 1991 where it was stated “an injunction cannot issue to restrain an event that has taken place.”
49. By the appellant being in possession, it was erroneous for the learned trial magistrate to grant orders of temporary injunction concerning trespass as by issuing such an order, it was principally evicting the appellant from the suit property or put another way, it issued an order of mandatory injunction.
50. Had the learned trial magistrate sequentially considered all the principles of law on temporary injunctions, this court is sure that he would not have reached the conclusions he arrived at.
51. For the reasons and findings stated above, this court ultimately concludes that the learned trial magistrate erred in granting the orders he did. In the circumstances, this court is entitled to interfere with the exercise of discretion by the learned trial magistrate.
52. Accordingly, this appeal is allowed; the court sets aside the court orders issued on 7/06/2023 and substitutes it with an order dismissing with costs the respondent's notice of motion dated 30/05/2022. The appellant will have the costs of this appeal.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 8TH DAY OF APRIL, 2025.

HON. A. Y. KOROSS

JUDGE

08.04.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

M/s Muumbo for appellant.

N/A for respondent.

Ms Kanja Court Assistant.

