



**Mwiiri v Mbugua & another (Environment and Land Appeal
E070 of 2024) [2025] KEELC 3010 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3010 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E070 OF 2024**

JA MOGENI, J

APRIL 2, 2025

BETWEEN

DAVID MWAURA MWIIRI APPELLANT

AND

MARY WATIRE MBUGUA 1ST RESPONDENT

PAULINE NYAIRURU MUNGA 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the Ruling of the Principal Magistrate Hon. Sharon Muteitsi Mwayuli delivered on 11/07/2024 in Kikuyu Law Courts at the Chief Magistrates Court MCCC/ELC110 OF 2015.
2. The brief background of this case is that vide a Notice of Motion Application dated 31/01/2024 the 2nd Respondent sued the Appellant for the following orders:
 1. That the Application be certified urgent and heard ex parte in the first instance
 2. That pending inter partes hearing of this Application, the Honorable Court be pleased to stay further execution of the Judgment and Decree of the Judgment and Decree of this Court and the order given on 10th September 2019 and such stay do operate as an injunction restraining the Plaintiff whether by himself, his agent, servant, employees, family members or any person claiming under him from transferring, charging, selling evicting the Plaintiff or in any way from interfering with the Interested Party's ownership of all that property registered as KABETE KARURA/3268.
 3. That the Honorable Court be pleased to set aside the Judgment entered in this matter and all consequential orders issued therefrom



4. That the Honorable Court be pleased to join the Applicant in this suit as a Defendant or interested party as the Honorable Court may deem fit
 5. That following (4) above, the Applicant be granted leave to file a Defence and Counter-claim against the Plaintiff and the Defendant.
 6. That the Honorable Court be pleased to order the Land Registrar, Kiambu to cancel the transfer of all that property registered as KABETE KARURA/3268 and revert the title to the Defendant, pending the hearing and determination of this suit.
3. In her determination, the Principal Magistrate allowed the Application dated 31/01/2024 and the Intended Interested Party who is the 2nd Respondent in the Appeal was allowed to file her Defence and Counter-claim.
 4. The grounds of the Application was that the Applicant purchased all that property registered as KABETE KARURA/3268 from the Defendant vide a sale agreement dated 27/02/2013 and upon payment of the purchase price the Applicant was handed all the completion documents. However in the cause of registering the transfer, she found that there was a caution lodged which had been registered against the title by one Peter Waweru Munyu. In the cause of the proceeding the Plaintiff in the Application filed a Chamber Summons Application and a Preliminary Objection seeking to have the suit dismissed. Through these pleadings the Applicant learnt that the Plaintiff had instituted the present suit against the Defendant.
 5. That despite the Plaintiff/Appellant not having disputed that the intended Defendant/Applicant was in actual possession of the suit property but failed to inform the Court about her existence. As a result the Court delivered a Ruling allowing the intended Defendant/Applicant to file a defence and counter claim. At the same time the Court granted the prayers sought in the Notice of Motion Application dated 31/01/2024 and the Court stated:
 - “ 3. The Notice of Motion dated 31st January, 2024 is hereby allowed.”
 6. Prayer 6 of the Notice of Motion Application dated 31/01/2024 read as follows:
 - “ 6. That the Honorable Court be pleased to order the Land Registrar, Kiambu, to cancel the transfer of all that property registered as Kabete Karura/3268 and revert the title to the Defendant, pending hearing and determination of this suit.”
 7. It is this order that facilitated the filing of this Appeal by the Appellant vide a Memorandum of Appeal dated 23/07/2024 on the following grounds:
 1. That the Learned Principal Magistrate erred in law and in fact when she allowed the 2nd Respondent Notice of Motion Application dated 31st January 2024 entirely and by the said Ruling cancelled Title Number Kabete/Karura 3268 lawfully registered in the Appellant/Applicant's name at an interlocutory stage.
 2. That the learned Principal Magistrate erred in law and in fact when she allowed the 2nd Respondent Notice of Motion dated 31st January 2024 entirely and by the said Ruling allowed the 2nd Respondent prayer for ownership and possession of property Land Reference number Kabete/Karura 3268 lawfully registered, owned and in possession of the Appellant/Applicant at an interlocutory stage.



3. That the learned Magistrate erred in law and in fact when she failed to appreciate that the 2nd Respondent did not have a recognizable interest in the issues raised in Civil Case number 110 of 2015, whereas the 2nd Respondent had sued the 1st Respondent in MC. ELC Case Number 66 of 2019 at Kiambu Law Courts for breach of a Sale Agreement entered into between the 1st & 2nd Respondents with respect to property Land Reference number Kabete/Karua/3268.
4. That the learned Magistrate erred in law and in fact when she failed to distinguish the authorities cited and relied upon by the Appellant in his written submissions to Court against the 2nd Respondent Notice of Motion dated 31st January 2024.
5. That the learned Magistrate erred in law and in fact when she failed to appreciate that by allowing the Notice of Motion Application dated 31st January 2024 in its entirety, the 2nd Respondent had imposed her own cause of action in a suit where she was not the primary party and that an exercise of discretion should be exercised to avoid an injustice or hardship but not to assist another party to the disadvantage of another.
6. That the learned Magistrate erred in law and in fact in finding that the 2nd Respondent had met the conditions necessary for the Court to allow the Notice of Motion dated 31st January 2024 in entirety.
8. The Appellant prays for the following:
 - a. That the Appeal be allowed
 - b. That the Ruling of the Honourable learned Principal Magistrate Sheila Muteitsi Mwayuli dated 11th July 2024 as against the Appellant be set aside, with orders substituted therefore, dismissing the 2nd Respondent Notice of Motion Application dated 31st January 2024 with costs.
 - c. That the Appellant be granted the costs of this Appeal.
9. It is the Appellant's contention that the orders issued by the Court on 11/07/2024 cancelled the title in his name and bestowed ownership to the suit property to the 2nd Respondent in an interlocutory stage which orders are final in nature.
10. The appeal has been canvassed by way of written submissions. Only the Appellant and the 2nd Respondent filed their submissions.
11. The Appellant filed his submissions dated 6/02/2025 and submitted that he had put up structures and connected electricity on the suit property once he was granted ownership and that he was in peaceful occupation of the suit property until the Court set aside the Judgment dated 24/04/2018 and in its decision enjoined the Defendant/2nd Respondent and granted her leave to file a defence and counter-claim. At the same time the Court cancelled the transfer of the suit property and reversed the ownership to the 1st Respondent.
12. He further submitted the 2nd Respondent's Application was allowed in its entirety and this conferred ownership of the suit property to the 1st Respondent and effectively cancelling the transfer of the title registered in the Appellant's name at the interlocutory stage which is a matter that cannot be decided at the interlocutory stage since there was no hearing of witnesses and consideration of totality of the evidence.
13. In his submissions he relied on the following cases Court of Appeal in Vivo Energy Kenya limited v Maloba Petrol Station Limited &. 3 Others [2015] eKLR, Stephen Kipkebut t/a Riverside Lodge and



Rooms v Naftali Ogola [2009] eKLR, Olive Mwhiki Mugenda &. Another v Okiya Omtata Okoiti &. 4 Others [2016] eKLR, Affluent limited v ludco limited & 3 Others (Environment & land Case E053 of 2022) [2023] KEEIC 16726 (KLR) (27 March 2023) (Ruling), Hadija Abdirahman v Bhupendra Radhod & 3 others [2022] eKLR.

14. In all the cases relied upon by the Appellant, they underscore the fact that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage. That it is only in special circumstances that final orders can be given at an interlocutory stage and the special circumstances must be explained.
15. On her part the 2nd Respondent filed her submissions dated 13/05/2025. In her submissions it was her contention that despite having a clear interest in the suit property the Appellant had failed to have her included in the suit as a party and had allowed the suit to proceed without her knowledge. This was the reason she had moved the Court through the Application dated 31/01/2024. It was her submission that the Appellant had conspired with the 1st Defendant to conceal her interest and obtain an unfair advantage.
16. That from her perusal of the case in Kikuyu that conferred title to the Appellant she realized that the Appellant was seeking proprietorship of the suit property from the 1st Respondent/Defendant just like herself. Further that the Judgment in the Kikuyu case delivered on 24/04/2018 had been obtained in violation of her constitutional right to be heard as a result of which she had been divested off her property.
17. She further submits that her right to be heard was compromised by failure to be included in the suit that issued the Appellant with title to the suit property. She has relied on the cases of Egal Mohamed Osman v Inspector General of Police & 3 Others [2015]eKLR, where Korir J(as he then was) cited the case of the Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Application No. 18 of 2010, Onyango Oloo v Attorney General [1986-1989] EA 456, JMK v MWM & another [2015] eKLR, Onyango v Attorney General [1986-1989] Ea 456, Alton Homes Limited & another v Davis Nathan Chelogoi & 5 others [2020] eKLR, among others
18. It was the 2nd Respondent's submission that the right to be heard is sacrosanct as provided by *the Constitution* in Article 50 (1) and her being denied that right renders the decision made nullity from the onset. Thus the Learned Magistrate did not err in her decision. She further submitted that since both parties are claiming a purchaser's interest of the same suit property, it follows that they should each be afforded a chance to be heard by the Court to establish their rights.
19. She urged the Court to find that the Court exercised its discretion rightly when it enjoined the 2nd Defendant/Respondent to the suit.

Analysis and Determination

20. Before getting into the substance of the appeal, it is instructive to call to remembrance the duty to be borne by a Court invited to consider a first appeal. In *Selle v Associated Motor Boat Co.* [1968] E.A 123, the legal parameters and considerations for guiding a Court of first appeal were set out as follows:

“The appellate Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this



respect. In particular, the Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

21. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi* Civil Appeal No. 77 of 1982 [1982-1988] 1 KAR 278 pronounced itself thus:

"A member of an appellate Court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

22. From the foregoing, the mandate of this Court in the present instance is to evaluate the factual details of the case as presented in the trial Court, to analyze them and to arrive upon its independent conclusion, but always bearing in mind that the trial Court had the advantage of seeing and hearing the parties.

23. Now, to the substance of the appeal. From the issue framed for determination, this Court is called upon to examine the anatomy of an Application which did not proceed to trial where the Honorable Magistrate issued interlocutory orders. This the Court has to do in a bid to evaluate whether or not the trial Court erred, as is the Appellant's position in issuing the orders that reversed its ownership of the suit property. The orders issued were final in nature cancelling the title to the suit property and therefore the proprietorship of the Appellant.

24. From the facts of the case it is undisputed that the 2nd Respondent was granted leave to be enjoined in the suit and the Judgment that was made was set aside following the Ruling delivered by the Honorable Magistrate. The Court by granting the orders sought in the Application dated 31/01/2024 meant that the suit property reverted in its original form as it were.

25. It is also undisputed that the Appellant herein is the registered owner of the suit property having obtained title vide a Court order issued on 10/09/2019 which was not appealed against, reviewed or set aside. Thus he has the title of the suit property issued to him on 4th January 2022.

26. It does also emerge from the impugned Ruling that the learned magistrate proceeded to issue final orders relating to an order to the Land Registrar, Kiambu to cancel the transfer of all that property registered as Kabete/Karura/3268 and revert the title to the Defendant/1st Respondent pending the hearing and determination of CMCCELC 110/2015 without trial. What the magistrate was seized of were interlocutory Applications. She should not have proceeded to issue final orders at that stage.

27. An order of this nature would be mandatory in nature and I will rely on the decided cases to explain the position I finally take. The leading authority on this issue is the case of *Locabail International v Agro Export* [1986] 1 ALLER 901 wherein it was stated as follows:

"A mandatory injunction ought not to be granted on an interlocutory Application in the absence of special circumstances and only in clear cases where the Court thought that the matter ought to be decided at once, or where the injunction was directed at simple and summary act which could easily be remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the Court had to feel a high sense of assurance that at the trial it would appear that the



injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

28. Further, in *Homes Limited v Shandahu* [1971] 1Ch. 34, the following was stated:

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the Court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the Court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.”

29. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the Court of Appeal in the case of *Kenya Breweries Ltd v Washington Okeyo* [2002] EA 109 had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was as correctly stated in VOL 24 of Halsbury’s Laws of England 4th Edition paragraph 948 that:-

“A mandatory injunction can be granted on an interlocutory Application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a mandatory injunction will be granted on an interlocutory Application.”

30. From the above narrative it is clear that the Learned Magistrate erred in her decision that cancelled the Appellant’s title without providing the special circumstances that warranted the cancellation. I note that the 2nd Respondent had not been given an opportunity to ventilate her case but by granting her the opportunity to be enjoined she would get the opportunity to prove her case of proprietorship when the opportunity shall come up during the hearing of the case. Thus there were no established special circumstances to deserve an order for an interlocutory order that is mandatory in nature. This limb of the appeal therefore succeeds.

31. For the above reasons, this appeal succeeds partially. The Ruling of the Magistrate Court will be set aside and will be substituted with an order of status quo for the suit property. Meaning there shall be no dealing of any manner of the suit property, no sale, transfer, charging, and or alienation of any manner pending the determination of the suit in the Magistrate’s Court. Parties shall bear their respective costs of this appeal.

Disposal Orders

32. In the end, this appeal is disposed as follows:

- a. The Ruling and Orders rendered on 11/07/2024 by Hon S Mwayuli, Principal Magistrate, in Kikuyu CMC E & L Case No 110 of 2015 are hereby partially set aside and are substituted with an order of status quo to preserve the substratum of the suit until the matter is heard and finally determined.
- b. The suit shall now proceed for hearing expeditiously before another Magistrate other than Hon. Sheila Mwayuli.



- c. The suit shall be mentioned before the Senior Principal Magistrate Kikuyu Court for directions within the next 14 days.
- d. The Order for filing of the 2nd Respondent's Defence and Counter-claim is upheld as granted and directed by the Honorable Magistrate vide the Ruling on 11/07/2024.
- e. Parties shall bear their respective costs of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 2ND DAY OF APRIL, 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

Judgement read in virtual Court in the presence of:

Mr. Kibet for the Appellant

1st Respondent – Absent

Ms. Kariuki holding brief for Mugo for the 2nd Respondent

Melita - Court Assistant.

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MOGENI J

JUDGE

