



**Wamalwa & another v Webala (Environment and Land Appeal
E050 of 2024) [2025] KEELC 4549 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4549 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E050 OF 2024**

EC CHERONO, J

JUNE 12, 2025

BETWEEN

TERESINA NASIMIYU WAMALWA 1ST APPELLANT

MERCELYNE NASAMBU WAMALWA 2ND APPELLANT

AND

PETER WAMALWA WEBALA RESPONDENT

JUDGMENT

Introduction

1. Vide a Memorandum of Appeal dated 13/11/2024, the Appellant's who were the Plaintiffs in the former suit have preferred this appeal challenging the ruling of Hon. M.A. Onyango delivered on 07/11/2024 in Bungoma CMC ELC CASE NO. 105 OF 2024.
2. The brief background of the case is that the Appellants commenced this suit vide a plaint dated 26/09/2024 wherein they averred that the defendant fraudulently registered himself as the sole proprietor of the family land i.e. land parcel no. E.Bukusu/S.Nalondo/9XX2 without obtaining their spousal consent and sold off a large portion to their detriment. That they filed a caution which the Respondent cunningly removed. They set out particulars of fraud against the Respondent and sought for a permanent injunction against him and his agent, costs and interests of the suit.
3. Contemporaneously with the plaint, the Appellants filed an application by way of Notice of Motion seeking for the following orders;
 - a. That service of this application be dispensed with in the first instance and the matter be certified.
 - b. That it pleases the honourable court to order for a restriction on land parcel no. E.Bukusu/S.Nalondo/9XX2 pending hearing and determination of this suit.



- c. That a temporary injunction be issued restraining the respondent by himself, his agents and or servants from disposing, transferring, sub-dividing and or in any way alienating family land and properties to wit parcel no. land parcel no. E.Bukusu/S.Nalondo/9XX2 pending hearing and determination of this suit.
 - d. That costs be provided for.
4. The application was based on the grounds on the face of the application supported by the affidavit of the 1st Appellant sworn on an even date where she reiterated the facts as averred in the plaint.
 5. The Respondent herein filed a replying affidavit in opposition to the application sworn on 15/10/2024 where he deposed that he carved out a portion of the suit land measuring 0.3ha for purposes of settling school fees for one of his children and that the purchaser has already taken possession of the same with the blessings of the Appellants herein. He argued that the land is not ancestral land and that the Appellants had not established the conditions for issuance of injunctive orders.
 6. The Appellants filed a further affidavit sworn on 18/10/2024 where they contend that they were not in any way involved in the alleged sale and that the Respondent carried out the sale with proxies who have been reaping where they did not sow. They argued that the Respondent's actions will only jeopardize the harmony of their large family.
 7. Upon determining the said application, the trial magistrate in her ruling delivered on 07/11/2024 held that the application lacked merit and proceeded to dismiss the same with costs to the Respondent.
 8. Aggrieved by the trial court's ruling, the Appellants preferred the current Appeal on the following grounds;
 - a. The learned magistrate failed to appreciate the magnitude and weight of the appellants plight in respect of aduos acts of the respondent.
 - b. The learned trial magistrate erred in law and in fact when she overlooked a legal requirement of spousal consent when one has to sell off family land or matrimonial property and simply dismissed the application.
 - c. The learned trial magistrate seriously interpreted the facts as argued and wrongly held that the respondent was the title holder and cannot be challenged if he decides to sell it off.
 - d. The findings of the trial magistrate are contrary, oppressive and amount to a miscarriage of justice.
 - e. The principals for a grant of restriction or injunction were flagrantly applied.
 9. The Appellant sought to have the appeal and the application dated 26/09/2024 allowed with costs.
 10. The parties took directions and agreed that said application be canvassed by way of written submissions.
 11. The Appellants filed their submissions dated 09/04/2025 and submitted that land parcel number E.BUKUSU/S.NALONDO/9XX2 is a matrimonial property according to Section 6(1) of the *Matrimonial Property Act*. That the suit property is a family land and forms part of ancestral land. They relied in the case of M v M Civil Appeal No. 74/2002 (2008) IKAR, 247. They also relied on the provisions of Section 93 of the Land Registration Act. They further argued that according to Section 12(1) and 12(5) of the *Matrimonial Property Act*, the suit property cannot be disposed of without their consent. They cited RWK v SKM & 2 Others [2024] KEHC 1621 (KLR). It was submitted that



they seek a temporary injunction to preserve the suit property as they have satisfied the conditions set out in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.

12. The Respondents filed submissions dated 04/04/2025 where they argued that the application has been overtaken by events as the purchaser of the said portion has already taken possession of the same. Reliance was placed in the cases of *Muyumba Watita & 51 Others V Joannes Satia & 4' Others* (2020) eKLR and *Erick V.J. Makokha & 4' Others Vs. Lawrence Sagini & 2' Others* Civil Application No. 20 of 1994 (12/94 UR).

Analysis and Determination.

13. I have considered the Memorandum of appeal, the record of appeal and the rival submissions by counsel.
14. The grant or refusal for an order of temporary injunction is a discretionary power of the trial Court to be considered in accordance with the facts and the applicable law. This is therefore an appeal against the exercise of that discretion by the trial magistrate in granting the order of temporary injunction. In considering such an appeal, this Court will be guided by the general principles which apply when an Appellate Court may interfere with the discretionary jurisdiction of the trial Court. Those principles were set out in the case of *Mbogo & Another -v- Shah* 1968 E.A. 93 where the court held;

“An Appellate Court will not interfere with the exercise of the trial Court’s discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice.”

15. The two issues that can be discerned from the grounds of appeal are whether the land in issue is matrimonial property and whether the trial court properly directed itself in considering the conditions for granting an injunctive order.
16. I note that the former suit is at the interlocutory stage and is yet to be heard and determined on merits. Consequently, it is my considered view that this court is not in a position to make a definitive determination whether or not the suit land constitutes matrimonial property within the meaning of the *Matrimonial Property Act*. Such a determination is a substantive issue that goes to the root of the parties’ claim and requires the presentation of comprehensive evidence. These are matters that can only be properly ventilated and adjudicated upon at a full hearing. Deciding this issue at this stage would be premature and amount to usurping of the trial court’s mandate and risk prejudging the merits of the case. The question whether or not the suit land qualifies as matrimonial property is therefore deferred to be determined by the trial court upon a full evaluation of the facts and applicable the law.
17. The trial magistrate has also been faulted for misdirecting herself on the law with regard to the principles of temporary injunction and particularly as set out in the case of *Giella -v- Cassman Brown & Company Ltd* 1973 EA 358 and also *Mrao -v- First American Bank Of Kenya & 2 Others* 2003 KLR 125. The conditions for the grant of an injunction are provided for under Order 40 rule 1 (a) and (b) of the Civil Procedure Rules, to wit; a) the Applicant must show that he has a prima facie case with a probability of success, b) that the Applicant will suffer irreparable injury that cannot be compensated by an award of damages and c) if in doubt, the Court will decide the case on a balance of convenience.



18. On the first condition, a prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003)Eklr as follows;

“a prima facie case in a civil application includes but is not confined to a genuine and arguable case”. It is a case 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 as to call for an explanation or rebuttal from the latter.”

19. The appellants’ claim over the land is based on the assertion that they are the wives of the Respondent and that the suit land is ancestral /family land and forms matrimonial property. on the other hand, the Respondent is the registered owner of the said land. The trial court in determining whether this condition has been met considered the provisions of Section 26 of the *Land Registration Act* on the indefensibility of title and the protection accorded to him under Article 40 of *the Constitution*. In my view therefore, the trial court properly directed itself with regards this condition.

20. As regards the issue whether the Respondent will suffer irreparable harm which cannot be adequately compensated by an award of damages, the court observed that the Appellants argument was that the Respondent received monies but they do not know how the same was utilized save for the amount used to pay for school fees. The trial court in my view considered the Appellants’ arguments in arriving at its finding and I find no reason to interfere with the same. The applicant must demonstrate that it is a harm that cannot be quantified in monetary terms.

21. It is therefore my considered view that in arriving at its conclusion, the trial court made a reasonable finding on a balance of convenience. As such, I find no reason why this court should interfere with the finding of the trial court.

22. Arising from the above, I find that this appeal is devoid of merit and the same is hereby dismissed with each party to bear their own costs. The original file shall be remitted back to the lower court for hearing and determination on merits.

23. Mention before the trial magistrate Hon. Onyango on 24/06/2025 for directions and further orders.

24. It is so ordered

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 12TH DAY OF JUNE, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Wanyama for the Respondent.
2. 1st Appellant-present.
3. 2nd Appellant-present.
4. Bett C/A.

