



REPUBLIC OF KENYA



**Muthoka & another v Makau & 3 others (Environment and Land Appeal  
E028 of 2022) [2024] KEELC 5282 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5282 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E028 OF 2022**

**A NYUKURI, J  
JULY 10, 2024**

**BETWEEN**

**ANNA MWENDE MUTHOKA ..... 1<sup>ST</sup> APPELLANT**

**MARY NDILA MUTHOKA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GERALD WAMBUA MAKAU ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE MAKAU MBUVA ..... 2<sup>ND</sup> RESPONDENT**

**CYRUS MAKAU ..... 3<sup>RD</sup> RESPONDENT**

**RICHARD KYALO MAKAU ..... 4<sup>TH</sup> RESPONDENT**

***(COUNTY SECRETARY OF THE COUNTY GOVERNMENT  
OF MACHAKOS ....RESPONDENT AND DR. JOSHUA  
KIMANI .....EX-PARTE APPLICANT)***

**JUDGMENT**

**Introduction**

1. This is an interlocutory appeal against the ruling of Honourable B. Bartoo, Senior Resident Magistrate, delivered on 14<sup>th</sup> July 2022 in Machakos MC ELC No. 12 of 2022. In the impugned ruling, the learned trial magistrate dismissed the appellant's application dated 11<sup>th</sup> February 2022 and amended on 29<sup>th</sup> March 2022 wherein they had sought orders of temporary injunction to restrain the 1<sup>st</sup> respondent from interfering with the parcel of land known as Mavoko Town Block 3/122 (suit property) pending hearing and determination of the suit.



## Background

2. The appellants herein who are the plaintiffs in the lower court filed suit against the defendants, (the respondents herein) by way of plaint dated 11<sup>th</sup> February 2022 and amended on 29<sup>th</sup> March 2022 seeking the following orders;
  - a. The Honourable Court do issue a declaration that a constructive trust arose after January 9<sup>th</sup> 2014 over the property measuring 0.625 acres and located in the larger lot of land titled as MAVOKO TOWN BLOCK 3/122 with the said land held in trust by the 2<sup>nd</sup> Defendant in favour of the plaintiffs which trust subsists to date.
  - b. An order do issue compelling the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants as holders of MAVOKO TOWN BLOCK 3/122 and 3<sup>rd</sup> and 4<sup>th</sup> defendants as administrators of the estate of deceased to undertake the necessary procedures including survey and sub-division of MAVOKO TOWN BLOCK 3/122 and to sign all necessary documents for title to the property comprising 0.625 acres to issue to the plaintiffs and in default the plaintiffs to undertake the survey and subdivision and thereafter the Registrar Machakos Lands Registry do sign all relevant documents of transfer.
  - c. A permanent injunction restraining the 1<sup>st</sup>, 3<sup>rd</sup> – 5<sup>th</sup> defendants either by themselves, their servants, agents, workers or any other persons claiming under them from entering, trespassing, moving into, seeking to occupy, alienating, relocating from and/or in any other manner whatsoever from interfering with the plaintiffs' rights to ownership, possession, occupation or use of the property.
  - d. Damages against the 1<sup>st</sup> defendant.
  - e. Costs of this suit.
  - f. Any other prayer that this Honourable Court may deem fit to grant in the circumstances.
3. The plaintiff averred that on 9<sup>th</sup> January 2014, the plaintiffs purchased from the 2<sup>nd</sup> defendant the suit property measuring 0.625 acres being part of Mavoko Town Block 3/122 which property was registered in the name of Justus Makau Mbuva (deceased). That the deceased was father to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. They stated that a constructive trust arose against the 2<sup>nd</sup> defendant upon the aforesaid purchase. They stated that their fence was destroyed by the 1<sup>st</sup> defendant on 2<sup>nd</sup> February 2022.
4. They averred that they have learnt that probate proceedings were taken out by the 3<sup>rd</sup> and 4<sup>th</sup> defendants vide Machakos P & A No. 1083 of 2012 and property vested in the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants to be held by them for "family interest". Further that the P & A proceedings recognized other sale transactions involving the deceased's estate done before grant of letters of administration and that it would be discriminatory not to recognize their sale agreement.
5. The plaint was filed simultaneous with the notice of motion dated 11<sup>th</sup> February 2022, which was amended on 29<sup>th</sup> March 2022. In that application, the plaintiffs sought orders that the 1<sup>st</sup> respondent be restrained from trespassing, alienating, subdividing, beaconing, fencing, evicting, removing or interfering with the plaintiffs' quiet possession of the suit property or in any manner interfering with the suit property pending hearing and determination of the suit property. The basis of the application being that the plaintiffs had purchased the suit property on 9<sup>th</sup> January 2014 and that they realized that the defendants had carried out succession of the late Justus Makau Mbuva vide P & A No. 1083 of 2012, recognizing sales that occurred before confirmation of grant. They stated that the defendants



had refused to recognize their rights in the suit property and were planning to subdivide the same into commercial plots to the plaintiffs' detriment.

6. They further stated that on 2<sup>nd</sup> February 2022, the 1<sup>st</sup> respondent had damaged the plaintiffs' fence on the suit property and threatened to relocate the plaintiffs to another location within Mavoko Town Block 3/122. They were apprehensive that if subdivision proceeds, the character of the subject matter will be altered and that they will suffer loss.
7. The application was opposed. Gerald Wambua Makau, the 1<sup>st</sup> defendant swore a replying affidavit dated 14<sup>th</sup> April 2022. He stated that the property Mavoko Town Block 3/122 is registered in the name of his late father Justus Makau Mbuva and that probate and administration proceedings vide Machakos P & A No. 1083 of 2012 were done and concluded on 10<sup>th</sup> March 2014 and a confirmed grant issued. That the grant was confirmed in accordance with the mode of distribution in summons filed on 15<sup>th</sup> October 2013 and that the purported sale to the plaintiffs was done before confirmation of grant. Further that the 2<sup>nd</sup> defendant failed to disclose the same to court as he knew that was an illegal transaction.
8. He maintained that the sale of 0.625 Hectares of the suit property was unlawful as the 2<sup>nd</sup> defendant lacked capacity to transact on the suit property. He blamed the plaintiffs for failing to conduct due diligence before purporting to purchase the suit property. He stated that the confirmed grant shows that the suit property is to be held in trust for other beneficiaries and therefore it was not available for sale by the 2<sup>nd</sup> defendant. He asserted that the deceased's estate beneficiaries are the ones in possession of the suit property where they farm and have a dam. He stated that in February 2022, the plaintiffs trespassed on the suit property and surveyed and curved out a portion and put up a fence purporting to have purchased it in 2014. He denied negotiating with the plaintiffs.
9. He stated that the recognized sales done before confirmation of the grant were because all beneficiaries gave their consent. It was his position that he will suffer irreparably together with other beneficiaries of his father's estate if the application is allowed.
10. In a rejoinder, the 1<sup>st</sup> plaintiff filed further supporting affidavit dated 27<sup>th</sup> May 2022. She averred that the beneficiaries of the estate were aware of the sale to the applicants. She also stated that at the time of purchasing the suit property, no farming activities or the dam were on the suit property.
11. Upon hearing the parties, the trial court delivered its ruling on 14<sup>th</sup> July 2022 dismissing the application on the basis that the plaintiffs had failed to demonstrate a prima facie case as they purchased land from a person who had no right to sell the suit property, and so there was no constructive trust.
12. Aggrieved with the trial court's decision, the appellant filed a Memorandum of Appeal dated 8<sup>th</sup> August 2022 and which was amended on 24<sup>th</sup> April 2023. In the amended Memorandum of Appeal, the appellants raised the following 10 grounds of appeal;
  - a. The Learned Magistrate erred in law in finding that a prima facie case with a probability of success had not been established after incorrectly finding that a constructive trust only arises after sale to a registered owner of land even when the law in this regard only requires assets to be in the hands of a named defendant.
  - b. The Learned Magistrate erred in law by failing to find that the appellants had on the constructive trust cause of action established a prima facie case by showing; an equitable obligation to conclude the sale transaction dated January 9<sup>th</sup> 2014 in their favour; two, the suit property was in the hands of defendants in breach of their equitable obligations to the appellants; three, a legitimate proprietary interest in the suit property the appellants having



paid all purchase prices; four, no other factor militated against imposition of the trust in view of Machakos P & A No. 1083 of 2012 in the Matter of the late Justus Makau Mbuva having made provision for sale of subject land to appellants.

- c. The Learned Magistrate erred in law and in fact by failing to acknowledge and consider the two other causes of action of the appellants besides constructive trust namely one; recognition of prior sales of assets in Machakos P & A No. 1083 of 2012 and two; the tort of causing loss by unlawful means to find that a prima facie case with a probability of success had been established under these heads as well.
  - d. The Learned Magistrate erred in law by failing to appreciate that in an application for an interlocutory injunction, the applicant only needs to show a fair and bona fide question to raise as to the existence of the right which has been breached.
  - e. The Learned Magistrate erred in law by holding a mini-trial in interlocutory proceedings and declaring definitive findings of fact on the merits of the case hence prejudicing the position of the appellants at trial. For instance definitive findings were made that one; appellants bought land from a party who could not sell and two; appellants did not conduct due diligence before the purchase of land.
  - f. The Learned Magistrate erred in law and in fact by failing to acknowledge and consider that the appellants had sought not one but two substantive prayers the second being a temporary injunction restraining the 1<sup>st</sup> respondent from evicting or removing the appellants from the suit land.
  - g. The Learned Magistrate erred in fact by finding that no land of deceased was dealt with before conclusion of succession proceedings.
  - h. The Learned Magistrate erred in law in not applying *Assanand v. Pettitt* (No. 3) [1978] eKLR to find that in the circumstances of the case below, harm occasioned to the appellants could not adequately be compensated in damages.
    - i. The Learned Magistrate erred in law in not applying *Waithaka v. Industrial and Commercial Development Corporation* [2001] eKLR and *Eli Elmi Abdi v. Nairobi County Government* [2018] eKLR to find that the oppressive, illegal and high handed conduct by the 1<sup>st</sup> respondent including malicious destruction of fencing for which criminal charges had been brought, entitled the grant of orders sought.
    - j. The Learned Magistrate erred in law by misconstruing the factors on the balance of convenience to include a new one namely alleged illegal conduct on the part of the applicant.
13. Consequently, the appellants sought the following prayers;
- a. The appeal is allowed.
  - b. The ruling and order delivered on 14<sup>th</sup> July 2022 be set aside and substituted with an order that the appellants application dated 29<sup>th</sup> March 2022 be allowed as prayed.
  - c. The costs of the appeal be awarded to the appellants.
14. The appeal was disposed by way of written submissions. On record are the appellants' amended submissions filed on 28<sup>th</sup> April 2023 and the 1<sup>st</sup> to 4<sup>th</sup> respondents' submissions filed on 21<sup>st</sup> July 2023.



## **Appellants' submissions**

15. Counsel for the appellants submitted that where there is clear demonstration that the trial court misdirected itself or failed to consider the relevant matters or misapprehended facts, the appellate court ought to set aside any such decision of the lower court. Reliance was placed on the cases of Mulemi v. Angweye & Another [2017] KECA 214 (KLR) and Mbogo & Another v. Shah [1968] EA 98.
16. It was contended for the appellant that the trial court misdirected itself in finding that a constructive trust only arise if the sale is by a registered owner. Counsel referred to the case of Re Estate of Konini Ole Kimantiru (Deceased) [2018] eKLR to argue that the only condition for constructive trust is that the defendant must be under equitable obligation in relation to assets in his hands and the assets in his possession must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff; the plaintiff must show legitimate reason for seeking the remedy and that there ought be no factors that would render import of a constructive trust unjust.
17. Regarding ground 5 of the appeal, counsel argued that the appellants had satisfied the requirements of a prima facie case and that the trial court was wrong to make definite findings on the merit of the case which prejudices the appellants at the trial.
18. In addition, counsel argued grounds 2, 4, 8 – 10 together and submitted that the trial court misdirected itself on the factors laid out in Giella v. Cassman Brown & Company [1973] EA 358 for grant of injunction. Reliance was placed on the case of Mrao Ltd v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and counsel submitted that the petition in the probate case showed that the same took into account assets sold by the heirs of the deceased before confirmation of grant and that the same provides that assets to be treated as “receivables” and “To be recovered back into estate or deducted from assets allocated to applicable beneficiary”. Counsel contended that the property sold to the appellant fell in the second category.
19. Regarding constructive trust, counsel contended that as appellants had performed their obligation, the defendants were equitably obligated to transfer it to the appellants. Counsel also argued that the respondents by their actions had caused loss to the appellants by unlawful means of subverting the confirmed grant, abrogation of responsibility in the suit property, acting with discriminatory and damaging the appellants' fence.
20. Counsel submitted that the harm occasioned to the appellants cannot be adequately compensated in damages as the subject matter would be altered. Reliance was placed in the case of Raphael Mulinge Muthusi & 2 Others v. Mary Ndila Nyolo [2022] eKLR and Assanand v. Pettiff (No. 3) [1978] eKLR to buttress the above position.
21. Counsel took the position that the acts of the respondent were oppressive and illegal and the court should not allow them to pay damages merely because they can. Regarding the balance of convenience, counsel argued that the loss or hardship that would be suffered by the appellants called for grant of orders of injunction.
22. It was further submitted for the appellants that the trial court took into account factors that ought not be considered as the court failed to acknowledge the cause of action based on constructive trust and recognition of prior sale of the deceased assets by heirs before confirmation of grant. It was further argued that the court below misapprehended the facts by finding that the deceased's land had not been dealt with before conclusion of succession proceedings.



## **respondents' submissions**

23. Counsel for the respondents submitted that the notice of motion dated 29<sup>th</sup> March 2022 lack merit and that the learned trial Magistrate properly exercised her discretion in dismissing the application. Counsel argued that the appellants' agreement does not indicate that the vendor is the registered proprietor or give a recital that the same belongs to the estate of the late Justus Makau Mbuva, which makes a fraudulent sale.
24. Counsel argued that the 1<sup>st</sup> respondent had demonstrated ownership of the suit property which is held by administrators in trust for all the beneficiaries. It was also submitted for the respondents that the appellants did not seek for specific performance against the 2<sup>nd</sup> defendant who is alleged to have breached the contract and that as the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are not parties to the contract, the orders sought cannot be enforced against them due to the doctrine of privity.
25. Counsel contended that the appeal was against the exercise of discretion by the trial court. That the trial court considered the conditions set in *Giella v. Cassman Brown* [1973] 358, and that therefore the trial court took into account all relevant matters in finding that there was no constructive trust, as the sale was illegal. Reliance was placed on the case of *United India Insurance Co. Ltd & Others v. East Africa Underwriters (Kenya) Ltd* [1985] eKLR to buttress the argument that an appellate court can only interfere with the trial court's discretion where it is shown that the court misdirected itself in law; misapprehended facts; took into consideration irrelevant matters or failed to take into consideration relevant matters.

## **Analysis and determination**

26. The court has carefully considered the appeal, the record and the parties rival submissions. This appeal is in regard to the exercise of discretion by the trial court. It is now settled that an appellate court will not interfere with the exercise of discretion of the trial court merely on the basis that it would have arrived at a different conclusion. Interference with the exercise of discretion by the trial court, will only occur, if it is clearly demonstrated that the trial court misdirected itself in law, or considered irrelevant matters or failed to consider relevant matters or misapprehended facts, leading to a wrong conclusion.
27. In the case of *Mbogo v. Shah* [1968] EA, the Court of Appeal held as follows;  

I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself 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 and in doing so arrived at a wrong conclusion.
28. The question that ought to be determined herein therefore is whether the trial court properly exercised its discretion in dismissing the appellant's motion dated 29<sup>th</sup> March 2022, wherein they sought orders of temporary injunction to bar the respondents from interfering with the suit property.
29. Conditions for grant of temporary injunctions are well settled. The applicant must demonstrate a prima facie case with chances of success; that if the injunction is not granted, they stand to suffer irreparable loss that may not be compensated in damages, and where the court is in doubt on the nature of the loss, then it ought to determine the dispute on the balance of convenience. (See *Giella v. Cassman Brown* [1973] 358.
30. In the case of *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal held as follows;



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) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are three pillars on which vest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.

31. A prima facie case is one which demonstrates an ostensible violation of a legal right of a person by another to the extent that calls for the defendant to rebut the plaintiff's claim. In the case of *Mrao Ltd v. First American Bank of Kenya Limited* [2003] eKRL, the court described a prima facie case in the following terms;

In civil cases, it is a case in which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

32. Regarding irreparable injury, in the case of *Nguruman Ltd v. Jan Bonde Nielsen* (Supra), the Court of Appeal described an irreparable injury as injury that is grave, actual, substantial and demonstrable. The court further rendered itself as follows;

An injury is irreparable where there is no standard by which their amount can be measured with reasonable adequacy or the injury or harm is of such nature that monetary compensation, of whatever amount will never be adequate remedy.

33. On the other hand, the balance of convenience refers to the scale of the inconvenience caused to the plaintiff if the injunction is not granted as weighed against the inconvenience that would be caused to the defendant if the injunction is granted. (See *Pius Kipchirchir Kogo v. Frank Kimeli Tenai* [2018] eKLR).

34. I therefore proceed to interrogate the question as to whether the appellants demonstrated a prima facie case. In the amended plaint, the appellants pleaded existence of constructive trust alleging that they had discharged their obligations under the contract with the 2<sup>nd</sup> respondent and that the respondents had acknowledged sale transactions that occurred before confirmation of grant, therefore failure to recognize their agreement was discriminatory.

35. Section 82 (b) (ii) of the *Law of Succession Act* provides that no immovable property of a deceased person shall be sold before confirmation of grant. However, in the instant case, the appellant's transaction occurred before confirmation of the grant and I therefore find that the same was unlawful. In addition, the 1<sup>st</sup> respondent produced a title of the suit property in the name of the late Justus Makau Mbuva. Therefore, the 2<sup>nd</sup> respondent not being the registered proprietor or owner of the suit property had no capacity to sell that which did not belong to him.

36. Therefore, does a sale by the second respondent confer ownership of the suit property to the appellants under the doctrine of constructive trust?

37. The Black's Law Dictionary 11<sup>th</sup> Edition defines constructive trust as follows;

An equitable remedy by which a court recognizes that a claimant has a better right to certain property than the person who has legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by fraud, or theft (as with embezzled money) is exchanged for other property to which the wrong doer gains title. The court declares a constructive



trust in favour of the victim of the wrong, who is given a right to the property rather than a claim for damages.

38. Therefore, the doctrine of constructive trust is anchored on equity and for the same to be applied, there must be a wrong doer and a victim of the wrong who is assisted by equity to correct the wrong. In the case of *Twalib Hatayan & Another v. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR, the court held as follows;

A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing....imposition of a constructive is thus meant to guard against unjust enrichment.

39. I therefore ask myself whether at the prima facie level, the appellants are victims of the respondents' wrong doing and whether failure to find the existence of a constructive trust would lead to unjust enrichment on the part of the respondents. In my endeavor to find out the above, I have considered the appellants' sale agreement dated 9<sup>th</sup> January 2014. I am in agreement with observations made by the respondents that the agreements reeks of fraud. This is because, while the same discloses the registration number of the suit property, it is eerily silent on the ownership of the title and does not attempt to indicate any nexus between the vendor and the property being sold. This is strange considering that the agreement was drawn by an advocate and this court finds it unsettling that the above discrepancy escaped the attention of the two appellants and their legal counsel. Capacity to sell is a basic matter that is fundamental to any sale transaction and every purchase is expected to ascertain in its basic form that a person selling any item owns it or has authority to sell it. In this case, it appears that the issue of ownership of the suit property did not bother the appellants and their counsel, which therefore removes the tag of "victim of the respondents' wrong" from the appellants. A reasonable, innocent and bona fide purchaser would ordinarily ascertain ownership of property before purchasing it, which was not the case herein.
40. Besides, apart from the 2<sup>nd</sup> respondent, the other respondents were not party to the agreement and therefore there is no privity of contract which would ultimately impute wrong doing of any nature on their part. At the time of the sale transaction by the appellants, the suit property was registered in the name of the late Justus Makau Mbuva. There is no material placed before me to show that either the deceased or his estate have committed any wrong doing against the appellant that would result in their unjust enrichment and therefore the totality of the above is that I find and hold that the appellants failed at the prima facie level to demonstrate the existence of a constructive trust. That being the case, and as the appellants suit rest on constructive trust, I find and hold that the appellants failed to demonstrate a prima facie case on that ground.
41. On the question of discrimination of the appellant on the basis that other sale transactions done before confirmation of grant were recognized by the respondents, it is clear, that any sale of immovable property of a deceased person before confirmation is unlawful. The fact that the respondents have recognized some of the unlawful transactions by consent of the beneficiaries, does not validate, legitimize and or legalize the unlawful transactions of the appellants. I need not say more on that.
42. Having considered the findings of the trial magistrate, it is clear that she properly applied her mind and rightly exercised her discretion on the test for conditions for grant of temporary injunction and the question of the 2<sup>nd</sup> respondent's capacity to transact on the suit property. I therefore have no reason to interfere with the trial court's exercise of discretion.
43. The upshot is that I find no merit in this appeal. The same is hereby dismissed with costs to the respondents.



44. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10<sup>TH</sup> DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Maingi for appellants

No appearance for respondents

Court assistant – Josephine

