



**Okech v Dado & 3 others (Environment and Land Appeal
E004 of 2023) [2024] KEELC 5018 (KLR) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5018 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

**BN OLAO, J
JULY 2, 2024**

BETWEEN

MATHEWS TONADO OKECH APPELLANT

AND

JUSTUS NAMENYA DADO 1ST RESPONDENT

HERBERT TINTIN DADO 2ND RESPONDENT

**ANTONY OKOBWA DADO (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF DAVID TADO NYABOLA) 3RD RESPONDENT**

DAVID TADO NYABOLA 4TH RESPONDENT

*(Being an appeal from the ruling of Hon Edna Nyaloti Chief
Magistrate in Busia Chief Magistrate's Court ELC Case No E007 of
2023 dated 31st October 2023 and delivered on 7th November 2023)*

JUDGMENT

1. The dispute between the parties herein over the ownership of the land parcel NO Bukhayo/ Bugengi/1190 (the suit land) is still pending in the Subordinate Court.
2. Herbert Tintin Dado, Justus Namanya Dado and Antony Okobwa Dado (suing as the Administrators of the Estate of David Tado Nyabola and who are the Respondents in this appeal) moved to the Chief Magistrate's Court Busia vide ELC case NO E007 of 2023 seeking against Mathews Tornado Okech (the Appellant herein) and the District Land Registrar Busia various orders with respect to the suit land including that the Appellant be evicted from the suit land, his title thereto be cancelled and he be permanently enjoined therefrom.
3. Simultaneously with the plaint in the Subordinate Court, the Respondents filed a Notice of Motion dated 6th December 2022 and premised under the provisions of Order 40 Rules 1, 2 and 3 of the [Civil](#)



Procedure Rules as well as Section 3A and 63 (c) of the Civil Procedure Act. They sought the main order that pending the hearing and determination of the suit, the Appellant, by his employees, servants, workers and/or agents, be temporarily restrained from carrying out any construction, excavation, demolishing, carrying out any fencing, farming activity, cutting down trees, charging, selling or any activity on the land parcel No Bukhayo/Bugengi/1190.

4. The application was opposed by the Appellant vide his replying affidavit dated 20th February 2023 and by the Land Registrar Busia Mr Winfred Nyaberi vide his replying affidavit dated 8th March 2023.
5. The matter came up for hearing before Hon E. Nyaloti Chief Magistrate Busia who, having considered the application and submissions by counsel, delivered her ruling on 31st October 2023 allowing the application.
6. That ruling prompted this appeal in which the Appellant has raised the following seven (7) grounds of appeal in seeking to have the ruling set aside and instead, an order be made dismissing the application dated 6th December 2022 with costs. These grounds are:
 1. That the learned Honourable Magistrate misdirected herself in fact and in law in failing to appreciate that temporary injunctive orders cannot issue against the Appellant for entry, occupation and disposal of a land title Bukhayo/Bugengi/1190 which title does not exist.
 2. That the learned Honourable Magistrate erred in fact and in law in failing to properly analyse facts of the case before her and the applicable principle of law on issuance of a temporary injunction and hence erroneous conclusion of law.
 3. That the learned Honourable Magistrate erred in fact and in law in issuing a Court order incapable of execution and hence an order of temporary injunction open to abuse.
 4. That the learned Honourable Magistrate erred in law and in fact in introducing a stranger namely one Wilmina Odima not a party to the suit and issuing an order in her favour against the Appellant among others.
 5. That the learned Honourable Magistrate misdirected herself on the applicability of the principles enunciated in the case of *Giella -v- Cassman Brown & Company Ltd* 1973 E.A. 358 and also *Mrao -v- First American Bank Of Kenya Ltd & Others* 2003 KLR 125.
 6. That the Honourable Magistrate erred in fact and in law in allowing the application by the Respondents dated 6th December 2022 without any evidence establishing a prima facie case which would have entitled the Respondents to get temporary injunction contrary to principles laid down in such cases.
 7. That the Honourable Magistrate erred in fact and in law in mixing up issues on seemingly different cases of similar nature before her for determination.
7. On 13th March 2024, this Court directed that the appeal be canvassed by way of written submissions.
8. Those submissions have been filed both by Mr Okutta instructed by the firm of Ouma Okutta & Associates Advocates for the Appellant, Mr Obiero instructed by the firm of Sala And Mudany Advocates for the respondent and by Mr Gilbert Tarus Senior State counsel on behalf of the District Land Registrar who, though cited as an Interested Party, is in fact the 2nd Defendant in the suit. The Appellant is the 1st Defendant in the suit. Counsels are advised to rectify that lapse in their pleadings.
9. I have considered the appeal, the record of appeal and the submissions by counsel.



10. The grant or refusal of an order of temporary injunction is within the discretion of the trial Court to be considered in accordance with the law and available precedents. 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, therefore, 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. These were set out in the case of *Mbogo & Another -v- Shab* 1968 E.A. 93 as follows:

“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.”

The decision has been followed in many cases including in the case of *Kenya Human Rights Commission & Another -v- A-g & 6 Others* C.a. Civil Appeal No 147 Of 2015 (2019 eKLR).

11. Grounds 1 and 3 of the memorandum of appeal can be considered together. The trial magistrate is faulted therein for misdirecting herself in fact and in law by failing to appreciate that a temporary injunction cannot issue against the Appellant with respect to land which does not exist and the injunction order issued was therefore incapable of execution and therefore open to abuse.
12. The application dated 6th December 2022, and which gave rise to the impugned ruling dated 31st October 2023, had been anchored on the provisions of Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules as well as Sections 3A and 63 of the *Civil Procedure Act*. Order 40 Rule 1 of the *Civil Procedure Rules* provides that:

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.” Emphasis added.

It is clear from the above provision that an order of temporary injunction can only be issued to protect land which exists. This is because such an order is meant to preserve the land in dispute pending the hearing and determination of the suit.

13. In paragraphs 5 and 6 of his supporting affidavit dated 6th December 2022, Antony Okobwa Dado the 3rd Respondent herein and who was among the Plaintiffs/Applicants in the said application and suing on behalf of the Estate of his father David Tado Nyabola had deposed as follows:



5:

“That David Tado Nyabola (deceased) is the registered owner of land parcel Bukhayo/Bugengi/1190 measuring approximately 0.81 Ha having bought the same in 1981 (annexed herewith and marked “AOD2” is a copy of the title deed)”

6:

“That the Respondent herein has without any legal right entered into the suit parcel and constructed a temporary structure thereon.”

In opposition to the application, the Appellant herein who was the 1st Defendant deposed in paragraph 7 thus:

7:

“That the suit parcel talked about land parcel Bukhayo/Bugengi/1190 does not exist and hence no order can issue stopping anyone from using it (see copy of register marked as MTO-1).”

Annexed to the replying affidavit was a certified copy of the register to the suit land showing that the title thereto was closed on 9th June 2020 following the creation of the land parcels NO Bukhayo/Bugengi/16754 - 16755. A similar averment was made by the County Land Registrar Busia Mr Winfred Nyaberi representing the District Land Registrar Busia who are the 2nd Defendant in the suit before trial Court. In paragraph 5 of his replying affidavit dated 8th March 2023, Mr Nyaberi has deposed thus:

5:

“That according to copy of the register above, I am aware that the suit land Bukhayo/Bugengi/1190 was subdivided on the 09/06/2020, title closed and new numbers given i.e. 16754 -16755.”

A copy of the register of the suit land, duly certified by the Land Registrar Mr Nyaberi was also annexed.

14. While submitting on the issue of existence of the suit land, the Appellant’s counsel stated as follows in paragraph 11 :

11:

“Your Lordship, to inform itself of the status of the land in question and know who were the proprietors, it was incumbent upon the Applicant (Respondent) to demonstrate existence of such title and the named proprietors. Dangling of a title whose validity has not been confirmed and or authenticated by the Registrar of land is not enough. In this particular case, the Applicant failed to demonstrate the existence of the Title to the land parcel NO Bukhayo/Bugengi/1190. It is therefore correct to submit that a relief seeking to bar by way of temporary injunction of sale, mortgage and disposal of a title whose current status as at time of seeking such relief could not have been available to the Respondent at that stage.”



In his submissions on that issue, counsel for the Respondents stated that:

“It is the Respondents argument was (sic) that their father was the owner of the land parcel NO Bukhayo/Bugengi/1190. They annexed a copy of the title deed in their supporting affidavit that is part of record.”

Indeed the Respondents as Plaintiffs, had annexed in support of their application for injunction in the trial Court, a copy of title deed to the suit land showing that the same had been registered in the name of the deceased David Dado Nyabola on 1st April 1981. However, the Respondents herein did not question the authenticity of the Register to the suit land as certified by the Land Registrar and which clearly showed that the title to the suit land was closed on 9th June 2020 to create the land parcels NO Bukhayo/Bugengi/16754 to 16755. It is clear therefore that as the Respondents were filing their suit in the Subordinate Court on 17th January 2023 simultaneously with their Notice of Motion dated 6th December 2022 seeking an order of temporary injunction to restrain the Appellant, his employees, servants, workers and/or agents from carrying out any activity on the suit land, the said land had in fact ceased to exist some 2½ years earlier. Clearly, an order of temporary injunction, nor any other order for that matter, could properly be issued in respect of a title that had already been closed. The magistrate erred both in law and fact by granting the order of temporary injunction in respect to the suit land.

15. Grounds No 1 and 3 are hereby allowed.
16. Grounds No 2, 5 and 6 can also be considered together as they fault the trial magistrate for misdirecting herself on the law with regard to the principles of temporary injunction and particularly as set out in the cases of *Giella -v- Cassman Brown & Company Ltd* 1973 EA 358 and also *Mrao -v- First American Bank Of Kenya & 2 Others* 2003 KLR 125.
17. In the impugned 25 paragraphs ruling, the trial magistrate devoted paragraphs 1-16 in summarising the application and the submissions by the counsel for the parties. Then she made her determinations in paragraphs 17 - 25 of the ruling. Those determinations are what form the crux of this appeal. I shall therefore reproduce them in extenso for purposes of this judgment:

- “ 17: I have considered the application and main issues for determination are:
- 18: Whether the Applicant has a prima facie case with a probability of success.
- 19: Whether the Applicant has satisfied the conditions for grant of an injunction.
- 20: The conditions for grant of an injunction are provided for under Order 40 rule 1 (a) and (b) of the Civil Procedure Code (sic). The case of *Giella versus Cassman Brown* held that the Applicant must show that he has a prima facie case with a probability of success, that the Applicant will suffer irreparable injury that cannot be compensated with damages and if in doubt the Court will decide the case on a balance of convenience.
- 21: The application raises weighty issues that can only be determined in a full hearing after the Court considers and analyses the evidence from both parties.
- 22: I am satisfied that the Applicant has law with regard to the grant of orders of temporary injunctions is found in Order 40 of the Civil Procedure Rules (not code as she erroneously indicated in the ruling and which is only a slip that did not prejudice any party) and she also properly cited the relevant case law. However, instead of proceeding further to consider the application in



accordance with the relevant law and applicable satisfied the conditions for grant of injunction.

23: The application is allowed.

24: Parties to comply with Order 11 and set down the case for hearing.

25: Mention on 9th November 2023.”

It is clear from the above paragraphs of the impugned ruling that the trial magistrate was alive to the fact that the law with regard to the grant of orders of temporary injunctions is found in Order 40 of the Civil Procedure Rules (not code as she erroneously indicated in the ruling and which is only a slip that did not prejudice any party) and she also properly cited the relevant case law. However, instead of proceeding further to consider the application in accordance with the relevant law and applicable precedents, the trial magistrate went ahead in paragraph 21 of the ruling to hold that:

21:

“The application raises weighty issues that can only be determined in a full hearing after the Court considers and analyses the evidence from both parties.”

The trial magistrate did not, as would have been expected, proceed to identify those “weighty issues” and make her decisions on them. Instead, she went on in paragraphs 22 and 23 of the impugned ruling to hold that:

22:

“I am satisfied that the Applicant has satisfied the conditions for grant of injunction.”

23:

“The application in allowed.”

Having properly identified the case of *Giella -v- Cassman Brown & Co. Ltd* 1973 E.A. 358 and the principles enunciated therein being that the Applicant must show a prima facie case with a probability of success, that he will otherwise suffer irreparable loss which cannot be compensated by an award of damages and, if in doubt, the Court should determine the application on a balance of convenience, the trial magistrate did not make reference to those requirements and in what way, if at all, they had been proved. The Court simply said that the Applicant (the Respondents herein) had “satisfied the condition for grant of an injunction.” That was clearly an error in fact and the law because those conditions which are well set out in numerous precedents were not considered and if they were, the trial magistrate did not state her findings thereon. If she had considered the issues raised by the Appellant and the Land Registrar in their replying affidavits that the suit land did not in fact exist in 2023 the title thereto having been closed on 9th June 2020 to create the land parcels No Bukhayo/Bugengi/16754 and 16755, she would have arrived at the irresistible conclusion that there was no land known as parcel No Bukhayo/Bugengi/1190 being the suit land upon which an order of temporary injunction could have been issued on 31st October 2023 when the impugned ruling was delivered. This Court must therefore interfere with the order of injunction issued by the trial magistrate.

18. The trial magistrate similarly erred in fact and in law when she made the finding at paragraph 21 of the impugned ruling that the weighty issues raised could “only be determined in a full hearing after the Court considers and analyses the evidence from both parties”. What was before the trial magistrate was an application seeking the substantive remedy of an order of temporary injunction pending the hearing



of the main suit. The application may have raised “weighty issues”. However, those issues had to be considered in that ruling. They could not wait “a full hearing after the Court considers and analyses the evidence from both parties” as stated in paragraph 21 of the impugned ruling. The evidence needed for the determination of the application was in the rival affidavits and annexures thereto considered together with the submissions by counsel. No reference was made to them and the application was allowed even without considering those weighty issues and in the process, the trial magistrate arrived at an erroneous decision because, no prima facie case could have been established by the Respondents when the suit land, and which was the substratum of the application, had ceased to exist. An order of temporary injunction was not merited in the circumstances.

19. Grounds No 2, 5 and 6 are also allowed.
20. In ground no 4, the trial magistrate is faulted for introducing a stranger namely one Wilmina Odima to the suit. That complaint is justified although the introduction of the said Wilmina Odima did not prejudice any of the parties. Neither the Appellant nor the Respondents impleaded the said Wilmina Odima into the pleadings. It is not therefore clear how the said Wilmina Odima was named in the impugned ruling as a Plaintiff. However, her inclusion as one of the parties was really of no significance as no mention was made of her role in the application and neither was any reference made of her in the ruling. I regard that as a typographical error of no consequence save to add a caution that the trial Court must ensure that the pleadings confine themselves to the parties and what they have placed before the Court for its consideration.
21. Finally, in ground 7 of the memorandum of appeal, the Appellant has raised the complaint that the trial magistrate erred in fact and in law by mixing up issues on seemingly different cases before her. I have perused the impugned ruling and other than the inclusion of the name of Wilmina Odima as a Plaintiff, and which I have already discussed above and dismissed as a mere typographical error with no significance in the ruling, I have not seen any mixing up of issues from another case into the ruling the subject of this appeal. That ground of appeal is devoid of merit.
22. Having considered the appeal, I am satisfied that the trial magistrate erred both in fact and in law in the manner in which she exercised her discretion in granting the Respondents the order of temporary injunction. The trial Court misdirected itself by failing to realise that the suit land was no longer in existence and therefore, no order of temporary injunction could be issued with respect to the same. The trial Court also misdirected itself in not addressing itself to the principles which guide a Court while considering such an application. If it had done so, it would have been clear that in the absence of the suit land, no prima facie case was established and that alone was sufficient to dismiss the application. This is because, the principles that guide the Court considering an application for temporary injunction are to be considered sequentially. And once a prima facie case was not established, then that would be the end of the application because, as was held in the case of *Nguruman Ltd -v- Jan Bonde Nielsen & 2 Others* 2014 eKLR;

“If *prima facie* is not established, then irreparable injury and balance of convenience need no consideration.”
23. The up-shot of all the above is that this appeal is allowed. This Court makes the following disposal orders:
 1. The ruling delivered on 31st October 2023 injuncting the Appellant by his employees, servants, workers, agents from utilizing the land parcel No Bukhayo/Bugengi/1190 pending the hearing of the suit is set aside and substituting with an order dismissing the Respondents’ Notice of Motion dated 6th December 2022.



2. The Respondents shall meet the Appellant's costs.

BOAZ N. OLAO

JUDGE

2ND JULY 2024

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 2ND DAY OF JULY 2024 BY WAY OF ELECTRONIC MAIL.

