



**Mbatha v Mutei & 2 others (Environment and Land Appeal
48 of 2019) [2024] KEELC 6457 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6457 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 48 OF 2019
A NYUKURI, J
OCTOBER 2, 2024**

BETWEEN

GIDEON MULWA MBATHA APPELLANT

AND

WILLIAM MWEU MUTEI 1ST RESPONDENT

DAVID KILONZO MUTEI 2ND RESPONDENT

SIMON MBUYA MUTEI 3RD RESPONDENT

*(Being an Appeal from the Ruling of Senior Principal Magistrate's
Court at Kangundo by Hon. M. Opanga, SRM delivered on 17th
day of September 2019 in Kangundo ELC Case No. 110 of 2019)*

JUDGMENT

Introduction

1. The appeal before court was filed by Gideon Mulwa Mbatha challenging the ruling of Honourable M. Opanga (SRM) delivered on 17th September 2019 in Kangundo ELC Case Number 110 of 2019 where the trial court declined to grant temporary orders of inhibition sought by the appellant. In the memorandum of appeal dated 7th October 2019, the appellant raised the following two grounds of appeal;
 - a. That the learned magistrate erred in law and in facts by finding that the plaintiff/applicant could pursue his claim for declaration of trust in a succession cause.
 - b. That the learned magistrate erred in law and in facts by failing to establish that the appellant herein had established a prima facie case for granting of an order of inhibition.
2. Consequently, he sought the following orders;



- a. That the appeal be allowed.
 - b. That costs of the appeal be awarded to the appellant.
 - c. Any further relief that this Honourable Court deems fit to grant the appellant.
3. The appeal was canvassed by way of written submissions. The appellant filed his submissions on 24th August 2023 while the 1st and 2nd respondents filed his submissions on 24th November 2023. No submissions were filed by the 3rd respondent.

Appellant's submissions

4. Counsel for the appellant submitted that the appellant is entitled to the orders sought in the appeal. Counsel cited Section 28 (b) of the [Land Registration Act](#) and the cases of Joseph Ojwang' Oundo v. National Environment Management Authority & 8 Others [2015] eKLR and Lydia Nyambura Mbugua v. Diamond Trust Bank Kenya Ltd & Another [2018] eKLR to argue that the trial court has jurisdiction to hear and determine the matter.
5. It was submitted for the appellant that the appellant had the requisite capacity to file the case as he filed suit in his personal capacity. Counsel argued that a claim for land based on trust is provided for under the [Land Registration Act](#) and a Succession Court has no jurisdiction to determine this claim. Reliance was placed on the case of In Re Estate of Julius Wachira (Deceased) [2022] eKLR.

Respondents' submissions

6. Counsel gave a chronology of what happened between 2014 and 2019 in regard to the matter before the trial court as well as in Succession Cause No. 73 of 2016. Counsel therefore argued that the appeal had been overtaken by events as the Case Number ELC 110 of 2019 was dismissed on 15th December 2020 and the appellants' application for review of that decision was dismissed on 14th December 2021.
7. It was further submitted that ELC No. 110 of 2019 was res judicata because the issue of ownership of the suit property was determined before the Land Adjudication Officer in 1976, before the Minister for Lands and Settlement in 1980 and a title of the suit property issued to Mutei Ngemu Katuva.
8. Counsel also submitted that the suit before the trial court was time barred as the registered proprietor Mutei Ngemu Katuva was registered as owner of the suit properties in 1989 yet the suit was filed in 2019, which is 30 years after the cause of action had arisen. The court was referred to provisions of Section 7 of the [Limitation of Actions Act](#).
9. Regarding the motion the subject of the impugned ruling, counsel submitted that the same was incompetent as the 3rd respondent is a deceased person. Counsel further argued that the matter before the trial court was vexatious, frivolous and an abuse of the court process.

Analysis and determination

10. The court has carefully considered the appeal, submissions and the entire record. The appeal is against the decision of the trial court declining to grant an inhibition order. Inhibition orders are discretionary orders and it is trite that this court will not interfere with the exercise of discretion of the court below merely because it could have made a different decision. It must be demonstrated that the court below was clearly wrong having misdirected itself in the exercise of its discretion or it took into account irrelevant matters or failed to take into account relevant matters.



11. In the case of *Mbogo v. Shah* [1968] EA 93 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 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.

12. This being a case for a temporary inhibition, the appellant was obligated to demonstrate a prima facie case with chances of success; demonstrate that if the order is not granted he stood to suffer irreparable injury that cannot be compensated in damages and where the court is in doubt it ought to determine the application on a balance of probabilities.

13. Order 40 Rule 1 of the Civil Procedure Rules grants the court the jurisdiction to grant interlocutory orders where the applicant demonstrates that the disputed property is in danger of being wasted, damaged or alienated by the other party or the defendant threatens to remove or dispose such property in circumstances that will obstruct or delay execution of the decree that may ultimately be made in favour of the plaintiff.

14. In the case of *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* CA No. 77 of 2012 [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 the three pillars on which rest 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.

15. A prima facie case is a case that shows an ostensible violation of the plaintiff's rights demonstrating an arguable case. In the case of *Mrao Ltd v. First American Bank of Kenya Ltd* [2003] eKLR, the Court of Appeal described a prima facie case as follows;

"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.

16. In this case, the court dismissed the appellant's application seeking inhibition orders in regard to Parcel No. Kangundo/Katitu/1152 which is undisputedly registered in the name of Mutei Ngemu who was already deceased at the time of filing suit. Having considered the application, the trial court found that the applicant lacked capacity to make the claim in regard to a deceased person's property and directed him to withdraw the suit and seek for joinder in a succession cause for the said Mutei Ngemu pending before the same court.

17. The decision of withdrawing a suit is entirely up to a party to make, and a court cannot direct a party to withdraw a suit because the decision of whether or not to withdraw a suit remains a party's prerogative. In the same vein, the decision to join or not to join a suit remains a party's choice and a court cannot compel a party to seek joinder unless it is demonstrated that they have a recognizable stake in the matter and their joinder is necessary. In the premises, I find that the order directing the appellant to withdraw



ELC No. 110 of 2019 and apply to join Succession Cause 73 of 2016 amounted to judicial overreach and was made without jurisdiction, had not been sought for and the same is hereby set aside.

18. It is not disputed that the suit property is registered in the name of Mutei Ngemu who is deceased. I have considered the plaint and there is no single complaint made against the respondents. Further, the respondents were not sued as administrators of the deceased's estate. Therefore the appellant's suit does not disclose any cause of action against the respondents. The fact that the suit property is in the name of a deceased person whose administrators have not been sued herein means that the suit before the trial court did not demonstrate a prima facie case for want of capacity on the part of the appellant who was not the administrator of the estate of Mutei Ngemu and who had not sued administrators of his estate, yet sought for land registered in the name of the deceased. Besides, the suit having failed to state any complaint against the respondents demonstrates that it does not demonstrate a prima facie case. I therefore find that the appellant failed to demonstrate a prima facie case against the respondents.
19. In the premises and for the above reasons, I find no merit in this appeal which I dismiss with costs to the respondents.
20. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 2ND DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ndambo for respondents

No appearance for the appellant

Court assistant – Josephine

