



**Munjo Investment Limited v Gathecha t/a Mungaru Enterprises & another (Environment and Land Appeal 001 of 2022) [2023] KEELC 680 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 680 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL 001 OF 2022  
LN GACHERU, J  
FEBRUARY 9, 2023**

**BETWEEN**

**MUNJO INVESTMENT LIMITED ..... APPELLANT**

**AND**

**GEORGE MURITU GATHECHA T/A MUNGARU ENTERPRISES .... 1<sup>ST</sup>  
RESPONDENT**

**HENRY NYAGA -TERRITORIAL COMMANDER, SAMUEL WANGAI  
KANGARA -FARM MANAGER & STARLIN KILISWA - PROPERTY  
MANAGER (SUED AS OFFICIALS OF THE SALVATION  
ARMY) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Ruling of the Chief Magistrate's Court at Murang'a ELC  
No. 30 of 2018 (ELC No. 6 of 2019) by P.N Maina CM dated 16th December, 2021)*

**JUDGMENT**

1. In its Ruling of December 16, 2020, which is the subject matter of this Appeal, the trial Court declined to grant an application for injunction by the Appellant. The Appeal is grounded on FIVE grounds which are stated on the face of the Memorandum of Appeal dated December 20, 2021.

The brief facts founding the instant Appeal are; -

That the Appellant instituted a suit against the Respondents and contemporaneously filed a Notice of Motion Application dated February 27, 2019, seeking injunctive orders against the Respondents. The Application was grounded on the facts that the Appellant entered into a Lease agreement with the 1<sup>st</sup> Defendant. That it was a term of the lease that the Appellant was to use the subject matter of the lease for mining purposes either for a period of fifteen years or when the stones therein were exhausted. He contended that the 2<sup>nd</sup> Respondent without any color of right gained ingress into the suit property



- and commenced mining thereon which acts amounted to trespass. The application for injunction was dismissed necessitating the instant Appeal.
2. The trial Court in declining to allow the said application for injunction reflected on the principles to be considered when refusing or granting an injunction, which principles were laid out in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2014) eKLR*, to wit a prima facie case, with probability of success at the trial, irreparable injury and balance of convenience.
  3. The trial Court found that the Appellant had not demonstrated a prima facie case within the meaning of it as was defined in *Mrao Ltd vs First American Bank of Kenya and 2 Others {2003}*. Further the Court held that the Appellant had failed to establish that his lease was still enforceable and could thus not prove the sanctity of his possession and occupation of the suit land. Guided by the pronouncement in Nguruman Case, the trial Court found that the Appellant having failed to establish a prima facie case, there was no need for the Court to establish the two remaining principles for grant of an injunction.
  4. The Appeal was canvassed by way of written submissions. The Appellant never filed his submissions and as per the Courts record, he never attended Court after directions for hearing of the Appeal were issued on the June 30, 2022.
  5. The 2<sup>nd</sup> Respondent filed some detailed submissions on the November 3, 2022, and raised five issues for determination by this Court. He challenged the competence of the Appeal in terms of form and substance. He submitted that the Appeal was not properly lodged in Court as it does not have an official stamp. That the Appellant Contravened Order 42 Rule 13(4) of the *Civil Procedure Rules*, to the extent that the Appellant failed to file all the pleadings and documents filed by the 2<sup>nd</sup> Respondent.
  6. That the Appeal was fatally defective for want of compliance with the above Order of the Civil Procedure Rules and that the officials of the 2<sup>nd</sup> Respondent who have been sued have since left office and an Appeal against them cannot be sustained.
  7. It is the 2<sup>nd</sup> Respondent's submissions that it is the proprietor of the suit land and has occupied the same since pre-independence and the Appellant's actions of pursuing the instant Appeal is meant to dispose off their property. In submitting that the trial Court rightly dismissed the application for injunction, the 2<sup>nd</sup> Respondent relied on the cases of *Locabail Internantional Finance Limited vs Agroexpert and others{1986} 1 A.KER 90*, where the trial Court opined that mandatory injunction cannot be granted on interlocutory stage unless under special circumstances. *Deoray vs State of Maharashtra & Others* where the Court pointed out the rare cases where a Court may grant interim relief which may result in granting of final relief.
  8. Further, the 2<sup>nd</sup> Respondent submitted that the trial Court did not error in its ruling and also submitted that as at the time of the Ruling, there was nothing to injunct, as the Appellant had already been evicted in April, 2018. He added that 2<sup>nd</sup> Respondent is the registered proprietor of the suit property and at no point had they either leased it to the Appellant or were notified of any purported sub-lease.
  9. In submitting that the Court exercised its discretion judiciously, the 2<sup>nd</sup> Respondent relied on the cases of *Francis Odhiambo Omondi t/a Omondi & Company Advocates vs National Bank of Kenya Limited & 2 Others{2018}* and *East African Development Bank vs Hyundai Motors Kenya Limited {2006}* where the Courts found that the trial Courts had exercised their discretions accordingly. It was the 2<sup>nd</sup> Respondent's further submissions that the Appellant is undeserving of the orders sought as he did not satisfy the conditions for the grant of an order for injunction. He relied on a litany of cases to buttress his case. In the end, he urged this Court to dismiss the instant Appeal with costs to the 2<sup>nd</sup> Respondent.



9. Having considered all the pleadings in totality, the Court finds that; -

' the 2<sup>nd</sup> Respondent contends that the Appeal is fatally defective for non-compliance with Order 42 Rule 13(4) of the Civil Procedure Rules which enunciates the documents contained in a Record of Appeal. This Court did on the May 30, 2022, admit the Record of Appeal, and it cannot therefore take a turn and find it to be fatally defective. This submission ought to have been done before admission of Record of Appeal.'

10. The duty of the first Appellate Court was explained in the case of *Selle vs Associated Motor Boat Co {1968} EA 123*, and is well captured by Section 78 of the [Civil Procedure Act](#) which espouses the role of a first appellate Court as to: 're-evaluate, re-assess and re-analyze the extracts of the record and draw its own conclusions.'

11. This provision was buttressed by the Court of Appeal in the case of [Peter M Kariuki v Attorney General \[2014\] eKLR](#), where it was held that:

'We have also, as we are duty bound to do as a first appellate Court, reconsider the evidence adduced before the trial Court and re-value it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.'

11. Similarly, in the case of [Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates \[2013\] eKLR](#), the Court rightly held: -

' This being a first Appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'

12. Therefore, the Court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial Court, analyse the same, evaluate it and arrive at an independent conclusion. This Court cannot simply interfere with the discretionary powers of the trial Court which powers are donated to the trial Court by the [Constitution](#) and Statute.

13. Before this Court can interfere with such discretion, the Court must be satisfied that the learned Magistrate misdirected himself in some matter and as a result arrived at a wrong decision or that he misapprehended the law or failed to take into account some relevant matter. Madan, JA (as he then was) captured the principle more succinctly in the case of *United India Insurance Co Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898*, where he held as follows:

' The Court of Appeal will not interfere with the discretionary decision of the judge Appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.'



14. The foregoing was reiterated in the celebrated case of *Mbogo vs Shah (1968) EA at Page 93*, where the Court held that:-

' I think it is well settled that this Court will not interfere with the exercise of its 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 on 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.'

15. Having been well guided above, and having carefully read and considered the Record of Appeal, the Grounds of Appeal, the written submissions by the 2<sup>nd</sup> Respondent and the Ruling by the trial Court, this Court finds the issue for determination is whether the Appeal is merited?

**i. Whether the instant Appeal is merited?**

16. What flows from the limited pleadings and the copy of proceedings is that the Appellant filed a suit against the Respondents in Murang'a ELC No 6 of 2019, subsequently, the matter was transferred to the lower Court and issued with case no CMCC ELC No 30 of 2019. Though no copy of a Plaint was availed to this Court, it is safe for this Court to conclude that the Appellant filed the Notice of Motion Application alongside the Plaint. Undoubtedly, the instant Appeal emanates from a ruling of the trial Court dismissing an application that had sought temporary injunctive orders filed by the Appellant herein.
17. The law on granting of interlocutory injunction is set out under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010, which provides: -

' 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 [Rev 2012] Civil Procedure CAP 21 [Subsidiary] C17 – 165;
- 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.'

18. The conditions for consideration further in granting an injunction are now well settled in the case of *Giella vs Cassman Brown & Company Limited (1973) EA 358*, where the Court expressed itself on the condition's that a party must satisfy for the Court to grant an interlocutory injunction: -

' First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.'



19. Further, the test for grant of an interlocutory injunction were echoed in the *American Cyanamid Co vs Ethicom Limited (1975) A AER 504* where three elements were noted to be of great importance namely:
1. There must be a serious/fair issue to be tried,
  2. Damages are not an adequate remedy,
  3. The balance of convenience lies in favour of granting or refusing the application.
20. The Circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the Court is in such situation enjoined to grant a temporary injunction to restrain such acts.
21. Therefore, in granting an application for an interlocutory injunction, the Court has to satisfy itself that the Applicant has a prima facie case and if not granted the orders sought, the Applicant will suffer irreparable damage which cannot be compensated by way of damages. The trial Court did not grant the injunction on the strength that the Appellant had failed to demonstrate that it had a prima facie case. Whether the trial Court erred or not, can be deduced from the ruling and the findings thereof.
22. A prima facie case was defined in *Mrao Ltd vs First American Bank of Kenya and 2 others, (2003) KLR 125* which was cited with approval in *Moses C Mubia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR*, where the Court of Appeal defined a prima facie case as:
- 'A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later
23. In the instant case, the Appellant contends that the 1<sup>st</sup> Defendant(Respondent) sub-leased the property referenced as LR No 10531, to them vide a lease agreement made on the March 1, 2014. As per the lease agreement, the same was to run for a period of 10 years or until such time when the stones were exhausted. The Appellant attached a purported lease agreement between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent over the same piece of land.
24. What this Court gathers from the otherwise patchy pleadings and the ruling of the trial Court is that the 2<sup>nd</sup> Respondent is the registered proprietor of the suit property, which lease was to run for a period of 99 years. This Court is well guided by the finding of the trial Court in its ruling that the purported lease and sub-lease were never registered. Therefore, there is no relationship between the Appellant and the 2<sup>nd</sup> Respondent as at the time of the suit.
24. It is trite law that a Certificate of title is conclusive evidence of ownership, unless the contrary is proven through calling of evidence. The rights of a registered owner of property are clearly set out under Sections 24, 25 and 26 of the *Land Registration Act, 2012*. Section 24(a) which provides:
24. Subject to this Act
- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.'



25. Section 25(1) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. In the instant case, it is not in doubt that the 2<sup>nd</sup> Respondent is the registered owner of LR No 10531. Therefore, the Appellant was bound to demonstrate that he had any overriding and/ or beneficial interest over the suit property that ought to have been protected by the trial Court.
26. It was the Appellant contention in the application that the 2<sup>nd</sup> Respondent had trespassed into the suit property and threatened to evict him, causing him financial losses. He maintained that he was the owner of the suit land by dint of a sub-lease agreement with the 1<sup>st</sup> Defendant(Respondent). The 2<sup>nd</sup> Respondent now submits that being a duly registered proprietor of the suit property, it had exclusive rights over the suit property. Additionally, as at the time of the Application for injunctions, the Appellant had already been displaced and the injunction orders sought were overtaken by events. This was not controverted.
27. The trial Court in concluding that the Appellant had not established a prima facie case held 'save for stating that he enjoyed a sub-lease, Plaintiff in his application has clearly failed to establish that the lease on which his sub-lease is premised on is still in force and enforceable. It therefore follows that he has failed to establish that his sub-lease is enforceable. Finally, he has also failed to establish that he is in actual possession & occupation of the suit land and hence the orders sought herein are executable. It would therefore be safe to find that the Plaintiff cannot be regarded as the bona fide sub-lease of the suit land. He has failed to proof the sanctity of his possession and occupation of the suit land and hence that he has a prima facie case'
28. As this Court has already stated hereinabove, the 2<sup>nd</sup> Respondent was the registered proprietor of the suit land. Thus, it enjoyed the rights of a proprietor as provided by Sections 24 and 25 of the [Land Registration Act](#). Further, the said certificate of title can only be challenged under Section 26(1) (a) & (b) of the said Act. The Appellant was thus duty bound to demonstrate his entitlement over the suit property. The Appellant's sub-lease agreement was for a period of ten (10) years, which meant therefore that he needed to have it registered.
29. In [Mega Garment Limited –v- Mistry Jadva Parbat & Co\(EPZ\) Limited \(2016\)eKLR](#), the Court of Appeal discussed the status of an unregistered lease and stated as follows:
- 'The time-honoured decision of this Court in Bachelors Bakery Ltd –v- Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law hold true in this case.'
30. Due to lack of registration, the Appellant was thus bound to demonstrate that there was a valid contract that was validly existing and which required the trial Court to protect. The orders sought if granted on the interim, would have the effect of limiting the absolute rights of the registered owner of land contrary to the provisions of Article 40 of the [Constitution](#). The Onus was on the Appellant to show and prove to the Court that the suit land was in danger of misuse, disposal and/or alienation, thus interfering with the sub-stratum of an existing and ongoing contract. Importantly, the trial Court noted that the Appellant's occupation and possession was interrupted.



31. Save for attaching the lease and sub-lease agreements, the Appellant did not demonstrate his occupation and possession of the suit property which the 2<sup>nd</sup> Respondent objected to. The mere act of attaching the lease and sub-lease agreements did not demonstrate occupation and possession. This Court lends the 2<sup>nd</sup> Respondents some belief that the Appellant was as at the time of filing the application out of the suit property. As rightly held by the trial Court, the Appellant failed to establish a prima facie case.
32. Based on the foregoing, it follows therefore that the Applicant on a balance of probability did not prove the existence of prima facie case to warrant the grant of injunction. Guided by the case of Nguruman supra, where the Court held that; 'If prima facie case is not established, then irreparable injury and balance of convenience need no consideration', the trial Court needed not determine other principles. Therefore, the trial Court did not misdirect itself.
33. This was an interim application and what the trial Court was expected to do was to well set out in the case of *Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No 1118 of 2002*, where the Court held that:-
- 'In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria'
34. Having perused the Record of Appeal, this Court finds that the trial Court safely arrived at its decision based on the evidence on record. It finds that the Appellant did not adduce any evidence to support his possession over the suit property. It is not true that the trial Court based its findings on the balance of convenience. As replicated hereinabove the trial Court determined the first principle for grant of injunction, prima facie case, and it in the end held that 'The first principle for granting an injunction has not been established in the pleadings and I need not look any further' Therefore, Ground 1 of the Appeal is thus not sustainable.
35. Based on the above, the question that begs an answer is whether the Appellant has satisfied the criteria established for grant of a temporary injunction.
36. Even so the case of *Kenya Commercial Finance Company Limited Versus Afraba Education Society & Others, Civil Appeal No 142 of 1999 (2001) IEA86*, the Court held that:-
- 'The judge should address himself sequentially on the conditions for granting of an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title's dispute and therefore has not demonstrated that it has a prima facie case with probability of success, no interlocutory injunction would be available'
37. Even if the Appellant had established a prima facie case, which this Court has already established that it did not, it was bound to demonstrate that he would suffer irreparable loss that no amount of damages would be adequate to compensate. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others supra*, the Court of Appeal held that:
- 'If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong



the applicant's claim may appear at that stage The existence of a prima facie case does not permit 'leap-frogging' by the applicant to injunction directly without crossing the other hurdles in between.'

38. The said Court went on to state that:

'On the second factor, that the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prim facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.'

39. Instantly, this Court finds no difficulty in concluding that the Appellant did not adduce any shred of evidence to demonstrate the loss he was likely to suffer. Further, this Court has not been convinced that there was any document availed to the trial Court demonstrating the Appellant's financial obligations as alleged. In *Mureithi Vs City Council of Nairobi, Civil Appeal No 5 of 1979(1981) KLR 322*, the Court held that:-

'However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them'.

40. It was not enough for the Appellant to simply dangle the agreements whereas his occupation and possession was under challenged. He was required to go beyond and demonstrate the foregoing. Irrefutably, the balance of convenience tilted towards not granting an injunction.

41. Having analysed the findings of the trial Court as above, this Court finds and holds that the Appellant failed on a balance of probability to establish all the elements necessary for the grant of a temporary injunction as outlined in the case of *Giella vs. Cassman Brown* (supra).

42. Consequently, this Court proceeds to find and hold that the trial Court exercised its discretion judiciously and within the confines of the law. The upshot of the foregoing is that the instant Appeal as stated in the Memorandum of Appeal dated December 20, 2021, is found not merited and the Appeal herein is dismissed entirely with costs to the 2<sup>nd</sup> Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**L. GACHERU**

**JUDGE**

**Delivered virtually in the presence of;**

Applicant – Absent

Absent for the 1<sup>st</sup> Respondent



Ms. Aguti H/B for Mr. Wabuge for 2<sup>nd</sup> Respondent

Joel Njonjo – Court Assistant

**L. GACHERU**

**JUDGE**

**9/2/2023**

