



REPUBLIC OF KENYA



**Odundo v Weda & another (Environment and Land Appeal E032 of 2021)
[2023] KEELC 21485 (KLR) (14 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E032 OF 2021
CA OCHIENG, J
NOVEMBER 14, 2023**

BETWEEN

JANE ACHIENG ODUNDO APPELLANT

AND

STEVE HARRISON WEDA 1ST RESPONDENT

ELIZABETH MUTILE MUNYAMBU 2ND RESPONDENT

*(Being an Appeal from the Ruling of Mavoko Chief Magistrate's Court in Civil
Suit No. E003 of 2021 delivered on 14th July, 2021 by Hon. H. Onkwani (PM))*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 23rd July, 2021 the Appellant appealed against the Ruling of Hon. H. Onkwani, Principal Magistrate made on the 14th July, 2021 in Mavoko CMCC No. E003 of 2021 between Steve Harrison Weda and Elizabeth Mutile Munyambu versus Jane Achieng Odundo. The genesis of this Appeal is the Ruling by Hon. H. Onkwani, Principal Magistrate where she allowed the Respondents' Application for injunction dated the 18th January, 2021 restraining the Appellant from Mavoko Town Block 3/6252 or Plot No. 500/272 Phase IV Waswa Investment Limited hereinafter referred to as the 'suit land'. The Appellant being dissatisfied with the whole of the said Ruling filed a Memorandum of Appeal dated the 23rd July, 2021, which contains the following grounds:-
 1. The learned trial Magistrate erred in law and fact in allowing the Respondent's Application as prayed.



2. The learned trial Magistrate erred in law and in fact in failing to consider that Plot No. 500/272 Phase IV Waswa Investment Limited and Mavoko Town Block 3/6252 is one and the same ground.
3. The learned trial Magistrate erred in law and in fact in failing to consider that the Appellant had been in quiet and actual possession of the suit land since the year 1996 and that possessory title ranks higher than paper title.
4. The learned trial Magistrate erred in law and fact in by allowing the Respondent's application without considering that the Appellant had erected both semi-permanent and permanent structures on the suit property before the Respondents allegedly purchased the suit property on 10th October, 2010.
5. The trial Magistrate erred in law and in fact in failing to address issues raised by the Appellant in her Application dated 15th February, 2021 despite giving directions on both Applications.
6. The learned trial Magistrate erred in law and in fact by basing her findings on irrelevant issues not supported by evidence adduced or applicable, as clearly captured in her Ruling.
7. The learned trial Magistrate erred in law and in fact by granting orders amounting to eviction of the Appellant from the suit property at an interlocutory stage.
8. The learned trial Magistrate erred in law and fact by arriving at a decision against the weight of evidence adduced.
9. The learned trial Magistrate erred in Law and in fact in denying the Appellant her fundamental right to fair hearing by unreasonably, unfairly and injudiciously depriving the Appellant the right to quiet possession of her property before hearing of the suit on merits.

The Appellant prayed for:-

- a. The Appeal be allowed with costs.
- b. The Ruling of the Honourable Principal Magistrate be set aside and this Court do issue other appropriate orders as it may deem fit.

2. The Appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

3. The Appellant in her submissions provided the background of the dispute herein and contended that she is the one in actual possession of the suit land. She argued that both the Respondents and herself confirmed in their respective Affidavits vide annexures that she was constructing on the suit land. She stated that her plight was ignored yet the Respondents' purchased the suit land when she was already thereon. She averred that the orders granted by the trial Magistrate amounted to constructive eviction at an interlocutory stage. She reiterated that the trial Magistrate made final findings on evidential matters at an interlocutory stage based on affidavit evidence without hearing parties substantively and subjecting such evidence to trite judicial standards. She reiterated that the trial Magistrate erred by allowing the Respondents' Application against the weight of evidence presented. Further, that she was never accorded a right to fair hearing in respect to the Application dated the 15th February, 2021 in the lower court. To support her averments, she relied on the following decisions: *Vivo Energy Kenya Limited V Maloba Petrol Station Limited & 3 Others* (2015) eKLR; *Giella v Cassman Brown* (1973)



The Respondents' submissions

4. The Respondents in their submissions insist that impugned orders of injunction were properly issued by the Lower Court in line with the principles established in the case of *Giella v Cassman Brown & Co. Ltd* Further, that the orders issued were at the discretion of the trial Magistrate. They contend that the main issue in dispute is the rightful owner of Mavoko Town Block 3/6252 and they tendered evidence to prove they are the proprietors of the said land. Further, that the Appellant had just commenced construction thereon contrary to her assertion that she had been thereon from 1996. They claim despite injunctive orders being issued, the Appellant proceeded to hurriedly construct a permanent house on the suit land to defeat their proprietary interests. They insist that in their application dated the 18th January, 2021, they were able to demonstrate being proprietors of the suit land having been issued with their title on 25th November, 2020. Further, that they acquired the suit land from Christine Akinyi Akello vide a Sale Agreement dated the 12th October, 2020. They aver that there was no evidence that Waswa Development Society sold Plot No. 500/272 to the Appellant. Further, there was no nexus showed between Plot No. 500/272 Waswa Estate Phase IV Lukenya Ranch and Land Reference Number Mavoko Town Block 3/6252. They argue that the injunctive orders did not amount to an eviction as the Appellant does not reside on suit land but only commenced construction thereon. To buttress their averments, they relied on the following decisions: *Mbogo & Another v Shah* (1968) EA 93; *Carl Ronning v Societe Naval Chargeurs Delmas Vieljeux* (The Francois Vieljeux) (1984) eKLR and *Charter House Investments Ltd v Simon K. Sang & Others* Civil Appeal No. 315 of 2004.

Analysis and Determination

5. I have considered the many grounds set out in the Memorandum of Appeal, Record of Appeal including the rivalling submissions and the following are the issues for determination: Whether the Respondents were entitled to orders of injunction restraining the Appellant from the suit land, pending outcome of the lower court case. Whether the Appeal is merited.
6. This being a first Appeal from the Magistrate's court, I am guided by principle established in the case of *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123 where it stated that the duty of the first Appellate court is to reconsider the evidence presented, evaluate it and arrive at its own conclusion.
7. It is not in dispute that the Respondents are the registered proprietors of the suit land and have a Certificate of Title to that effect. It is further not in dispute that the Appellant was in occupation of the suit land and had commenced constructing thereon.
8. I note the Respondents in the Lower Court vide a Complaint dated the 18th January, 2021, sought the following Orders against the Appellant:-
 - a. A permanent order of injunction restraining the Defendants by herself, her servants, agents, workmen, licensees or any other person acting on their own behalf from howsoever entering, trespassing, constructing, erecting any structures, remaining thereon, disposing, alienating, dealing or otherwise howsoever from interfering with the our quiet enjoyment, possession and occupation of the parcel of land known as Land Reference Number Mavoko Town Block 3/6252 situated within Mavoko Sub-County in Machakos County.
 - b. An order of vacant possession and/or eviction of the Defendant.



- c. General damages for trespass.
 - d. Costs of this suit.
 - e. Any other or further relief that the Honourable Court may deem fit to grant.
9. The Appellant had filed a Defence including a Cross Action where she sought the following Orders:-
- a. A declaration that the Plaintiff's has proprietary rights on the parcel of land known as Waswa Estate Phase IV Lukenya Ranch Plot No. 500/272 Machakos County (now referred to by the 1st and 2nd Defendants in their pleadings as LR No. Mavoko Town Block 3/6252) and that her claim takes priority to that of the 1st and 2nd Defendants.
 - b. An order compelling the 5th Defendant to process the title deed in respect of Waswa Estate Phase IV Lukenya Ranch Plot No. 500/272 Machakos County (now referred to by the 1st and 2nd Defendants in their pleadings as LR No. Mavoko Town Block 3 /6252) Machakos County in favour of the Plaintiff herein.
 - c. A permanent injunction against the Defendants by themselves, their agents, servants or any other person under their authority from interfering with the Plaintiff's property and developments on Waswa Estate Phase IV Lukenya Ranch Plot No. 500/272 Machakos County (now referred to by the 1st and 2nd Defendants in their pleadings as LR No. Mavoko Town Block 3 /6252).
 - d. An order revoking/or cancelling the 1st and 2nd Defendants' title to the suit property, being an allocation of Waswa Estate Phase IV Lukenya Ranch Plot No. 500/272 Machakos County (now referred to by the 1st and 2nd Defendants in their pleadings as LR No. Mavoko Town Block 3/6252) as well as entries No. 1, 2, 3, 4 and 5 of the Green Card thereof.
 - e. Costs of the suit plus interest.
 - f. Any other relief the Honourable Court deems just to grant.
10. The Respondents in the lower court contemporaneously with the Plaintiff, had filed a Notice of Motion Application dated the 18th January, 2021 seeking orders of injunction restraining the Appellant from interfering with the suit land. The Learned Magistrate after considering submissions from the parties allowed the Application vide her Ruling dated 14th July, 2021, by making the following orders:-
1. That pending the hearing and determination of the suit, a temporary order of injunction does issue restraining the Defendant by himself or his agents from entering, trespassing, constructing, erecting any structures, remaining thereon, disposing, alienating, dealing or otherwise interfering with the Plaintiff's quiet possession, enjoyment, possession, ownership and occupation of the parcel of and known as Mavoko Town/block 3/6552 situated within Mavoko Sub County in Machakos County.
 2. That the Officer Commanding Joska Police Station to ensure compliance with the above orders.
 3. Costs of this Application be provided for.
11. The Appellant being dissatisfied with the temporary orders issued on 20th January, 2021, sought for their review or setting aside vide her Application dated the 15th February, 2021 wherein she confirmed that a Decree had been issued in Mavoko CM ELC No. 7 of 2020 wherein Christine Akello was a



Defendant, and it involved Plot No. 500/272 Waswa Estate Phase IV, Lukenya Ranch, confirming her ownership of the said land but the trial Magistrate disregarded this.

12. In line with the principles as established in the case of *Giella v Cassman Brown & Company* (1973) EA 358 as well as the description of a prima facie case as stated in the case of *Mrao Ltd v First American Bank of Kenya & 2 Others* (2003) KLR 125, I will proceed to determine whether the trial Magistrate was correct in granting the Respondents orders of interlocutory injunction pending the outcome of the lower court suit. I note the Respondents claimed ownership of the suit land and produced their Certificate of Title to that effect. They admitted in their Affidavit that they purchased the suit land from one Christine Akello. Further, that the Appellant was on the suit land and constructing thereon. In the Application dated the 15th February, 2021, I note the Appellant annexed a copy of the Decree where she was confirmed as owner of the suit land.

13. I wish to reproduce an excerpt from the impugned Ruling where the trial Magistrate made the following orders in an interlocutory application:

From the evidence on record, I find that:

1. The Plaintiff has a title to the said property whereas the Defendant states that they have an allotment letter.
2. The Plaintiff availed the mother title being Mavoko Town Block 3/1965, application for change of user, application for consent to the land control board to subdivide and the subdivision map.
3. The case referred to ELC 7/2020 where a Decree was issued and in force, the parties are different from this current suit.
4. The suit property in ELC 7/2020 is Number 500/272 and the current suit the property in dispute is Number 3/6252.
5. As per the evidence adduced the Defendant has started constructing on the property in dispute.”

14. In the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR the Court of Appeal observed that:-

Vivo Kenya’s first complaint, which we think is substantial and permeates all the grounds of appeal argued before us, is that the learned Judge purported to determine with finality some very contested issues between the parties on the basis of affidavit evidence at an interlocutory stage, so that the purpose of hearing the suit is no longer readily apparent. By all standards the ruling is unusually long for a ruling in an interlocutory application where the primary issue is whether the applicant has made out a prima facie case with a probability (not certainty) of success.”

15. In *Habib Bank AG Zurich v. Eugene Marion Yakub*, CA No. 43 of 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:-

Probability of success means the court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”



16. The same caution was repeated in *National Bank of Kenya v. Duncan Owour Shakali & Another*, CA No. 9 of 1997 when Omolo JA stated:-

The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

17. Yet again in *Agip (K) Ltd V. Vora* [2000] 2 EA 285 ,at page 291, while reversing a grant of an order of injunction by the High Court, this Court stated:-

With reference to ground 19 of the appeal, it is as well to remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition, a prima facie case with a probability of success have been made out to justify the grant of an injunction. In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute. He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit.”(Emphasis added).

18. More recently in *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* CA No. 77 of 2012 this Court echoed the same sentiments in the following terms:-

We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”...Having carefully considered the ruling of the learned Judge, we are satisfied that the learned Judge erred by making several definitive and final conclusions without the advantage of hearing and seeing witnesses who have been subjected to cross-examination, the time tested device of testing the truth or falsity of evidence.” Emphasis Mine

19. Based on the facts before me while associating myself with the decisions quoted and applying them to the circumstances at hand, I opine that the trial Magistrate erred by making final orders on injunction at an interlocutory stage since the Appellant was already constructing on the suit land noting that she presented to court the fact that she has been embroiled in a dispute with one Christine Akello who had sold to the Respondents’ the suit land. To my mind, I find that since there were certain glaring anomalies including the fact that there had been a previous court case involving the suit land and vendor who sold to the Respondents, this was not a clear cut case of granting express orders of injunction as the Respondents could have still been compensated by way of damages. It would have been proper for the trial Magistrate to perhaps maintain an order of status quo until the issue of the exact location including ownership of the disputed parcels had been determined after viva voce evidence was adduced and veracity of the evidence tested. I further find that since there was an



Application for review dated the 15th February, 2021, the trial Magistrate failed to accord the Appellant a right to fair hearing in respect to the said Application dated the 15th February, 2021. Further, I find that since there was a Cross Action, it would have been pertinent for the trial Magistrate to consider the root of the Respondents' title as well as testing the veracity of the affidavit evidence with *viva voce* evidence before making the impugned orders.

20. In the circumstances, I find that the Respondents were not entitled to orders of injunction restraining the Appellant from the suit land, as this actually amounted to eviction.
21. In the foregoing, I find the Appeal merited and will allow it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH DAY OF NOVEMBER, 2023.

CHRISTINE OCHIENG

JUDGE

