



**Njagi v Njagi (Environment and Land Appeal E011 of 2021)  
[2022] KEELC 68 (KLR) (9 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 68 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND APPEAL E011 OF 2021  
CK YANO, J  
MAY 9, 2022  
FORMERLY CHUKA CM'S. CASE NO. E044 OF 2021**

**BETWEEN**

**EPHAPARUS NJAGI ..... APPELLANT**

**AND**

**LUCY MUKWANJERU NJAGI ..... RESPONDENT**

*(An appeal from the Ruling of the Chief Magistrate's Court at Chuka before  
Hon. J.M Njoroge delivered on 8th October, 2021 in CM.ELC No.E044 OF 2021)*

**JUDGMENT**

**A. Introduction**

1. The appellant Ephaparus Njagi filed this appeal against the decision and ruling of Hon J. M Njoroge delivered on the October 8, 2021 and set out the following 7 grounds of appeal:
  - i. That the learned trial magistrate erred in law and fact by relying on extraneous considerations and inferences and/or misapprehended the law in arriving at an erroneous decision against and without considering the facts and evidence on record.
  - ii. That by relying on extraneous considerations and inferences the learned magistrate erred in law and fact because by relying on such inferences the same had high chances of misleading the court to arrive at wrong findings, determination and/ or decision.
  - iii. The learned Magistrate misdirected himself into using wrong principals of the law in arriving at an erroneous decision when there was clear evidence tendered by the Appellant in support of his case.



- iv. The Learned Trial Magistrate erred in Law and in fact and misdirected himself by not considering and taking into account the Appellant's averment in his replying affidavit and the evidence thereof.
  - v. The learned trial Magistrate erred in Law and fact by failing and/ or altogether neglecting to consider, factor and allow the applicability of the Estoppel principle based on the availed evidence hence arriving at a wrong decision against the Appellant.
  - vi. The Learned trial magistrate erred in law and fact by failing to find that equity and the balance of convenience and logic weighed in favor of the Appellant and which omission led to a wrong decision
  - vii. The Learned Trial Magistrate erred in law and fact by failing to appreciate and find that the Appellant's acts were actuated by and/or that the Appellant was acting in good- faith and in the best interest of both the Respondent and their children.
2. The appellant prays for the appeal to be allowed and the ruling of the learned magistrate delivered on 8<sup>th</sup> October, 2021 in the Chief Magistrate's Court at Chuka ELC No. E044 of 2021 allowing the Respondent's application be set aside and/or vacated.

### **Background of the Appeal**

3. Vide a Notice of Motion filed under certificate of urgency dated 7<sup>th</sup> September, 2021, the Respondent sought inter alia, that an inhibition be registered against LR. Muthambi/Igamurathi/2009 to prevent any dealing on the said property whatsoever pending the hearing and final determination of the suit or till further orders of the court. The grounds upon which the application was premised are that the Appellant was selling the only matrimonial property secretly; that already a buyer had been identified; that there was reliable information that the appellant had received a deposit for the sale, and that the appellant was an unmitigated drunkard. The said application was opposed by the appellant through a replying affidavit dated 23<sup>rd</sup> September, 2021.
4. The Appellant denied selling the said parcel of land but averred that due to his failing health, he had started the process of subdividing the land and had adequately provided for both the Respondent and all the children to ensure each one of them lives in peace and independently in the event he passed on. The Appellant further averred that the caution registered by the Respondent against the land was hampering the process of transferring titles to both the Respondent and the children. That further registration of an inhibition while there is in place a caution that the appellant seeks to have lawfully removed would be unreasonable and against the interests of both the Respondent and the children to whom he wished to transfer parts of the parcels of land for their individual benefits. The Appellant averred that if he had to sell any portion of the parcel of land, it would be for the purpose of raising requisite funds to cater and pay for all the costs attendant for the transfer of all the titles.
5. The subordinate court considered the said application and allowed the same as prayed with no orders as to costs. The appellant was dissatisfied with the said decision and filed the present appeal. The appeal was canvassed by way of written submissions.

### **The Appellant's Submissions**

6. The Appellant submitted inter alia, that the learned trial magistrate either disregarded, omitted, failed and/or altogether neglected to consider the very weighty averments and evidence tendered by the Appellant in both his Replying Affidavit and the submissions thereby rendering an erroneous ruling. That the allegations and averments of the Respondent against the Appellant in the said application



were just mere statements that were not supported by any evidence and therefore were of no probative value.

7. The Appellant submitted that allowing the application would pose undue hardship against him, adding that anything that he did with the suit property was at all times in good faith, above board and with the involvement of the Respondent herein and in the best interest of the whole family. The Appellant submitted that while making the decision, the trial court did not consider the fact that the matter might take long before it is fully heard and determined. The Appellant further submitted that he had disclosed the exact shares allocated to the Respondent and the children contrary to the court's finding to the contrary. That by granting the orders in the manner sought deprives the Appellant of all rights to the suit property, including rights of user. That the order is fatally unsound and without merit. The Appellant further submitted that the Respondent had not made out a prima facie case with a probability of success, adding that the balance of convenience was in his favour considering the reason for the subdivision of the property. The Appellant urged the court to allow the appeal as prayed.

### **Respondent's Submissions**

8. It was the Respondent's submissions that the appeal lacks merit, is frivolous and ought to be dismissed for the reason that the order of an inhibition was over a matrimonial property which was in danger of being sold by the appellant without recourse to the Respondent who is the Appellant's wife. That the trial magistrate made an order to preserve the status quo which was the most appropriate order in the circumstances of this case. The Respondent further submitted that an inhibition order is not an injunctive order as submitted by the appellant, adding that an inhibition does not prevent the use of the land by the Appellant. That both the Appellant and the Respondent live on the said land, and given the status of the land in question. That is matrimonial property and given the overriding interest of a spouse in respect of matrimonial property as provided for by section 28 of the [Land Registration Act 2012](#), there would have been no logical order that the learned magistrate would have made other than that given in the ruling dated 8<sup>th</sup> October, 2021. That allowing the land to be sold at the interlocutory stage would render the hearing of the main suit nugatory. The Respondent urged the court to dismiss the appeal. The Respondent's counsel relied on the case of [Wanjiru Muiruri Nduati v Erastus Ndungu Thungu](#) [2018] eKLR to demonstrate the importance of spousal consent in the sale of matrimonial property.

### **Analysis and Determination**

9. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned magistrate was justified on the basis of the evidence presented and the law. The issues for determination in this appeal as I can deduce from the grounds of appeal are;
  - i. Whether the trial magistrate wrongly exercised his discretion in allowing the application for orders of inhibition to issue.
  - ii. Whether the appeal is merited or not.
10. The appellant has submitted that the trial magistrate either disregarded, omitted, failed and/or neglected to consider the very weighty averments and evidence tendered by the appellant in both the Replying Affidavit and submissions, and that he relied on extraneous considerations and inferences in arriving at his decision. The ruling dated 8<sup>th</sup> October, 2021 was in respect of the application dated September 7, 2021 in which the Respondent sought an order of inhibition to be registered against



Land Parcel No. Muthambi/igamurathi/2009 to prevent any dealings on the property pending the hearing and final determination of the suit or until further orders of the court.

11. The Appellant is the registered owner of the suit property. The Respondent's case was that she is the wife of the Appellant having been married under Meru Customary Law in the year 1978. It is the Respondent's contention that the suit property is matrimonial property and if sold, the Respondent and the children would be rendered destitute and landless. In his replying affidavit in response to the application, the Appellant stated that he was the sole proprietor of the said property. The Appellant further added that he had started the sub-division process in which he had provided for all the children and the Respondent. The Appellant also hinted that he may offer for sale a certain share to offset the transfer process. In his ruling, the trial magistrate was of the view that at that stage it was necessary to put in place protective orders against the title of the said land pending the hearing and determination of the suit.
12. The application that was considered by the trial court was for an order of inhibition. Section 68(1) of the [Land Registration Act](#) provides as follows:

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge.”
13. In the case of [Dorcas Muthoni & 2 others v Michael Ireri Ngari](#) (2016) eKLR B. N. Olao J observed as follows:

“An order of inhibition issued under section 68 of the [Land Registration Act](#) is similar to an order of prohibitory injunction which bars the owner of the property under dispute from registering any transaction over the said property until further orders or until the suit in which the property is a subject is disposed off. The court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.”
14. Similarly, in the case of [Japhet Kaimenyi M’Ndatbo v M’Ndatbo M’Mbwiria](#) (2012) eKLR the conditions necessary for the grant of an order of inhibition were stated as follows:
  - a) That the suit property is at risk of being disposed of or alienated or transferred to the detriment of the applicant, unless preservative orders of inhibition are issued.
  - b) That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
  - c) That the applicant has an arguable case.”
15. The application before the trial court was for prohibitive orders which are equitable reliefs granted at the discretion of the court. Further, the court will warn itself that at this stage, it is not dealing with the disputed facts to finality but only determining whether the applicant is deserving of inhibitive orders which as above stated are prohibitory injunction. The court will also take into account that the prohibitive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in this suit are resolved. A party also seeks prohibitive orders when he/she feels that his/her rights have been infringed.



16. The court in upholding the principle of the lower risk of injustice in the case of *Films Rover International & others v Cannon Films Sales Ltd* (1986) 3 All ER 772 stated as follows:

“It is my view that the injustice that would be caused to the Defendants/Respondents if the Plaintiffs/Applicants were granted the prayer inhibition and later failed at the trial outweighs the injustice that would be cause to the Plaintiffs/Applicants if the prayer for inhibition was dismissed and they succeed in proving their case. Basing the two competing interests, the cause of justice will best be served if the order of inhibition is granted.”

17. I have perused the proceedings in this case. From the pleadings and the submissions, there is an admission by the appellant himself that the land in dispute has been subdivided and that the appellant is intend on selling a portion thereof. The Respondent was apprehensive that the appellant will sell what the Respondent regards as their matrimonial property to a third party while the case is still pending. It has been shown that there was real risk of the appellant dealing with the suit land in a manner that may be prejudicial to the Respondent and that may defeat the interest of justice. It is may considered position that the Respondent had satisfactorily shown that an order of inhibition was necessary in this case as rightly granted by the trial court. In my view, the learned trial magistrate exercised his discretion judicially and therefore reached at a right conclusion. It is my considered view that based on the evidence that was adduced before the trial court, the learned magistrate was justified in arriving at the decision he made. The findings and holding by the learned trial magistrate were well founded and I find no basis to interfere with the same.

18. In the result, I find no merit in the appellant’s appeal and the same is hereby dismissed. Considering the relationship of the parties who are husband and wife, I order that each party bear their own costs.

19. It is so ordered.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF MAY, 2022**

**IN THE PRESENCE OF:**

CA: MARTHA

Mutani for the Respondent

Ms. Kijaru h/b for Kirimi for Appellant

**C. K. YANO,**

**JUDGE.**

