



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwiandi v Kathuni (Environment and Land Appeal E013 of 2021)  
[2022] KEELC 3291 (KLR) (6 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3291 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND APPEAL E013 OF 2021**

**CK YANO, J**

**JUNE 6, 2022**

**BETWEEN**

**JAMES MUTHUNGU MWIANDI ..... APPELLANT**

**AND**

**PURITY KAWIRA KATHUNI ..... RESPONDENT**

*(Being an appeal from the Ruling and decision of the Chief Magistrate (Hon. J.M Njoroge)  
in Chuka Chief Magistrate's Court Elc No. E015 of 2021 delivered on 06/10/2021))*

**JUDGMENT**

**A. INTRODUCTION**

1. The appellant James Muthungu Mwiandi filed this appeal against the Ruling and decision of the Chief Magistrate (Hon. J.M Njoroge 2021 delivered on 06/10/2021) and set out the following 17 grounds of appeal:
  - i. The learned Chief Magistrate erred in law and fact in holding that from the letter dated 04/01/2021 by the respondent (appellant herein) from I.C Mugo & Co. Advocates he admits the applicant (respondent herein) has been cultivating the land and indeed is in occupation without considering the defence and the replying affidavit filed by the appellant which were never responded to by the respondent.
  - ii. The Learned Chief Magistrate erred in Law and fact in holding that the respondent was in possession and occupation of the suit land and by not granting orders of injunction would amount to eviction whereas in fact, the respondent was neither in occupation nor in possession of the suit land.



- iii. The Learned Chief Magistrate erred in Law and fact in holding that by failing to grant an order of injunction, it would amount to determining the matter which would prejudice the respondent whereas the material evidence placed before him were against granting orders of injunction.
- iv. The Learned Chief Magistrate erred in law and fact in not considering the defence, the replying affidavit and the submissions filed by the appellant before granting the orders of injunction against the appellant.
- v. The Learned Chief Magistrate erred in Law and fact in failing to make a finding that the suit land was registered and in occupation of a third party namely Bernard Raini Thara, a fact that was known to the respondent when she filed Chuka Chief Magistrate's Court ELC No. E015 of 2021 but failed to disclose to the court when she filed the Notice of Motion dated 07/04/2021.
- vi. The Learned Chief Magistrate erred in Law and fact in granting an order of injunction against the appellant without considering that the appellant had already sold Land Parcel No. Karingani/Ndagani/10634 to one Bernard Raini Thara long before the plaintiff filed Chuka Chief Magistrate's court, ELC No. E015 of 2021.
- vii. The Learned Chief Magistrate erred in Law and fact in granting the orders of injunction without considering and taking in account the principles required in granting an order of injunction.
- viii. The Learned Chief Magistrate erred in Law and fact in failing to consider that the agreement for sale of land annexed by the respondent was between one Jevio Njagi Mwiandi and not between the respondent and the appellant and the said agreement was material evidence to be considered before granting order of injunction.
- ix. The Learned Chief Magistrate erred in Law and fact in failing to find that the orders sought by the respondent in the Notice of motion dated 07/04/2021 were incapable of being granted against the appellant in view of the pleadings filed by the respondent.
- x. The Learned Chief Magistrate erred in Law and fact in failing to hold that the respondent had not bought the suit land from the appellant but from one Jevio Njagi Mwiandi who was not a party to this case and as such, it mitigated against granting orders of injunction in favour of the respondent.
- xi. The Learned Chief Magistrate erred in Law and fact in failing to find that the respondent had concealed crucial materials facts at the time of seeking ex – parte orders of injunction and the subsequent orders of injunction granted on 06/10/2021.
- xii. The Learned Chief Magistrate erred in Law and fact in failing to hold that the respondent had wrongfully sued the appellant in Chuka CMC ELC NO. E015 of 2021 and therefore, an order of injunction could suffice against the appellant.
- xiii. The Learned Chief Magistrate erred in law and fact in holding that the Respondent was in possession and occupation of the suit land whereas the



material evidence presented to the court by the appellant clearly showed that the Respondent was not in possession and/or occupation of the suit land.

- xiv. The Learned Chief Magistrate erred in Law and fact in failing to hold that in view of the material evidence presented to court by the appellant there was no material evidence presented to court by the respondent to mitigate a case for granting an order of injunction against the appellant.
  - xv. The Learned Chief Magistrate erred in Law and fact in failing to make a finding that the respondent's Notice of Motion dated 07/04/2021 did not meet the threshold required to grant orders of injunction.
  - xvi. The Learned Chief Magistrate's ruling and decision is one sided and biased against the appellant.
  - xvii. The Learned Chief Magistrate's Ruling and decision is against the law and weight of evidence presented by the appellant and respondent.
2. The appellant prays that the appeal be allowed, the orders of injunction granted by the Chief Magistrate on 07/04/2021 be set aside and dismiss the respondent's application dated 7.4.2021 and the costs be awarded to the appellant.

### **Background Of The Appeal**

3. The gist of the case in a nutshell is that the respondent filed a suit vide a plaint dated 7<sup>th</sup> of April 2021 against the appellant seeking for various orders. In the plaint the respondent averred that she purchased parcel LR No. Karingani/Ndagani/10634 vide Land sale agreement dated July 28, 2009 which payment was completed on November 29, 2011 vide acknowledgement of receipt dated the same date. The respondent averred that she had been in quiet and peaceful possession of the suit property until the 4<sup>th</sup> day of January, 2021 when the appellant through his advocate demanded the respondent to stop and desist from entering into, encroaching into and/or trespassing into the suit property.
4. The respondent further averred that she had credible information to the effect that the appellant was planning to sell and/or dispose off the suit property to a third party, an act which would greatly prejudice the respondent's interests on the suit property which property the respondent alleged she lawfully acquired and had been in exclusive quiet possession ever since. The respondent averred in the plaint that the Appellant was the administrator in Chuka Chief Magistrate's Succession Cause No. 39 of 2018 in which the Grant was confirmed on August 7, 2020 and the respondent was identified and ascertained in the affidavit in support of summons for confirmation of grant as the purchaser of a share thereof and consequently signed the consent form thereof.
5. The Respondent further pleaded that the appellant was granted all the parcels of land including L.R No. Karingani/Ndagani/3726 from which LR No. Karingani/Ndagani/10634 was excised, despite the deceased M'Mwiandi M'Muthara having other dependents, beneficiaries and/ or children.
6. The respondent averred that there was inadvertent delay in the completion of the transfer of the respondent's share which was caused by the surveyor, one phares rugendo, who failed to process the respondent's title even after the Respondent had paid for the services. It is averred in the plaint that the respondent sued the surveyor vide Chuka Chief Magistrate's *Criminal Case No.463 of 2018* a matter which was closed after the surveyor refunded the money.



7. In conclusion the respondent averred that the Appellant either omitted, failed, refused, neglected and/or declined to transfer the suit property to the respondent and was fraudulently acting in a bid to either obtain, sell and or dispose off the suit property to a third party at a higher purchase price hence the callous interference's of the respondent's occupation and utilization of the property by evicting her from the said parcel of land.
8. Simultaneously with filing of the said case, the respondent also filed a Notice of Motion dated 07/04/2021 wherein the respondent prayed for the following orders:-
  - i. That this application be certified as urgent to be heard ex parte and service be dispensed with in the first instance.
  - ii. That pending hearing and determination inter partes of the instant application this court be pleased to issue a temporary injunction restraining the respondent/defendant either by himself, his agents, his representatives, his servants and/or anybody acting at his behest from in any manner evicting and/or restricting the applicant's possession and/or utilization of L.R No. Karingani/Ndagani/10634, selling, trespassing onto, encroaching into, dealing with and/or interfering in any manner whatsoever with parcel of land L.R NO. Karingani/Ndagani/10634.
  - iii. That pending hearing and determination of the suit herein this court be pleased to issue a temporary injunction restraining the respondent/defendant either by himself, his agents, his representatives, his servants and/or anybody acting at his behest from in any manner evicting and/or restricting the Applicant's possession and/or utilization of L.R. No. Karingani/Ndagani/10634, selling, trespassing onto, encroaching into, dealing with and/or interfering in any manner whatsoever with parcel of land L.R No. Karingani/Ndagani/10634.
  - iv. That costs for this Application be provided for.
9. In response to the said application, the appellant filed a replying affidavit sworn by himself on July 2, 2021 in which he averred inter alia that the Respondent herein had filed the suit and application in bad faith and that she had conveniently concealed crucial material facts for purposes of getting ex-parte orders in the case. The appellant denied that the respondent had bought the suit property as stated. That the agreement dated 28.07.2009 was between the Respondent and one Jevio Njagi Mwiandi who was not the registered owner of Land Parcel No. Karingani/Ndagani/3726. The appellant denied entering into any agreement to sell any part of Land Parcel No. Karingani/Ndagani/3726 with the respondent. The appellant further denied instructing M/s. I.C. Mugo & Co. Advocates to write a demand letter to the Respondent. He further denied that the Respondent had ever been in occupation, use and/or possession of Land Parcel No. Karingani/Ndagani/3726 and/or Land Parcel No. Karingani/Ndagani/10634. The appellant stated that he got parcel No. 10634 through Chuka CMC Succession Cause No. 39 of 2018 and the same was registered in his name on 03.11.2020 and later sold to one Bernard Raini Thara who took possession and had been in quiet possession, use and occupation. In a nutshell, the appellant's response was that the respondent had not met the threshold required for the grant of orders of injunction.
10. The learned trial magistrate considered the application and in the ruling dated October 6, 2021 found that the application was merited and allowed the same as prayed. Being dissatisfied with the said ruling, the appellant preferred the appeal herein which was canvassed by way of written submissions.



## The Appellant's Submissions

11. The appellants filed his submissions on February 28, 2022. The appellant has submitted that in the ruling delivered on 06/10/2021 the Learned Magistrate stated that:

“The court observes from the demand letter dated 4/1/2021, by the respondent through IC Mugo & Co. Advocates he admits that the applicant has been cultivating the land and indeed in occupation. The respondent acknowledges there was a sale agreement, and the applicant had failed to pay the balance of Kshs. 51,000/= after a 11 year wait.”
12. The Appellant submits that in the respondent's replying affidavit to the Notice of Motion, the appellant denied having instructed the firm of I.C Mugo & Co. Advocates to write the said letter. The Appellant submits inter alia that it is clear from the said document which is the agreement dated 28/07/2009 is between one Jevio Njagi Mwiandi and the respondent. The appellant submits that the said agreement does not mention the appellant's name as a vendor or as a witness.
13. The appellant further submits that it is worth to note that in the plaint filed by the respondent against the appellant, nowhere does she state that she entered into a sale agreement in respect of Land Parcel No. Karingani/Ndagani/10634 with the appellant. The appellant further states that in his defence the appellant specifically denied the respondent's claim.
14. The appellant submits inter alia that it is worth to note that even after the appellant swore the replying affidavit denying ever entering into a sale agreement dated 28/07/2009 with the respondent and/or instructing I.C Mugo & Co. Advocates to write the letter dated 04/01/2021, the respondent never replied to the same and she never sought leave to file a supplementary affidavit to controvert the appellant's averments.
15. The appellant submits that had the trial court taken in consideration the clear contents of the replying affidavits sworn by the appellant, his statement and defence filed in court and the documents at page 26 to 27 of the Record of Appeal, the learned magistrate would not have made a finding that it is the appellant who had instructed M/S I.C Mugo & Co. Advocates to write the letter dated 04/01/2021.
16. The appellant further submit that the learned Magistrate ought to have considered and taken into account the contents of the respondent's plaint which did not disclose any cause of action against the appellant.
17. The appellant contends that it should be noted that the respondent never tendered any evidence to prove that she was in occupation and/or use of Land Parcel No. Karingani/Ndagani/10634.
18. The appellant submitted that an order of injunction could not be issued in a vacuum and for a court to grant the orders of injunction, the party applying for such an order must be able to demonstrate by his pleadings together with supporting evidence that he or she is entitled to an order of injunction.
19. The appellant submits that this being a land case, it was incumbent upon the respondent to demonstrate to the court that she is entitled to be granted orders of injunction against the appellant. The Appellant further submits that the Learned Magistrate ought to have granted orders of injunction based on factual evidence and not on mere allegations by the respondent.
20. The appellant further submits inter alia that by a look of the plaint vis a vis the documents filed by the respondent in the lower court, it is clear that no prima facie case to warrant granting orders of injunction was established.



21. The appellant submits that it is clear that the respondent concealed crucial material evidence and that it is to be noted that when the respondent appeared in court on 7/4/2021 and obtained an ex parte order of injunction, she ought to have disclosed all material facts within her knowledge even those that were against her. He has relied on the case of *Uburu Highway Development Limited vs Central Bank of Kenya & others*, Civil Application No. 140 of 1995.
22. The Appellant submits that when the respondent appeared in court on 8/4/2021, she withheld from the court the fact that she was not in possession and occupation of the suit property. That she failed to disclose to the court that the suit property was in possession of a third party namely Bernard Raini Thara.
23. Further, the appellant has submitted that the respondent failed to disclose to the court that she had not bought any land from the appellant and that the agreement and the acknowledgement receipt she annexed in her supporting affidavit to the Notice of motion dated 7/4/2021 was not between her and the appellant. The appellant has cited the case of *Edwina Monica Adhiambo Obingo v Habib Bank Ltd* Kisumu High Court civil case Number 161 of 2003.
24. The appellant submits that the learned Magistrate ought to have found that the respondent was not entitled to an order of injunction owing to her conduct and non disclosure of the material facts which were relevant to the court in granting interlocutory orders of injunction.
25. The appellant has also cited the case of *Giella v Cassman Brown & Co Ltd* and submitted that he was aware of the discretion of the court to grant orders of injunction. The appellant further states that an order of injunction cannot be granted if a party can be compensated by damages or costs. The appellant has also cited the case of *Kenya Commercial Finance Co. v Afraba Education Society* (2001)1EA 86 to demonstrate the 3 requirements of granting of an injunction.
26. The Appellant has also submitted that the impugned ruling was one sided and biased and that the Appellant had demonstrated specific areas and crucial material evidence presented by the appellant in opposition of the Notice of Motion dated 07/04/2021 which the learned Chief Magistrate did not consider.
27. The Appellant concludes by submitting that it is clear that the trial Magistrate's ruling dated 06/10/2021 is against the law and weight of evidence presented to the trial court by way of pleadings, affidavits and annexures, documents and statements of the witnesses which the court was bound to look at and consider in entirety.

### **The Respondent's Submissions**

28. The respondent filed her submissions on April 6, 2022.
29. The respondent submits inter alia that the appeal is gross misdirection and completely misses the point on matters pertaining to the essence, import and purpose for seeking and the granting of interim injunctive/restraining orders in a matter like the one between the parties herein.
30. The respondent submits that the ruling and decision rendered by the learned trial magistrate in the Lower court was both correct, desirable and most apt in the circumstances and that any other court rendering itself on the same issues would undoubtedly have availed the same verdict.
31. The respondent submit that the issue in dispute is a parcel of land sold to her which constituted part of the appellant's beneficial interest out of Karingani/ndagani/3726 and which portion was to be excised therefrom.



32. The respondent submits that the appellant denied ever instructing the firm of I.C Mugo & Co. Advocates to write a demand letter. However, the respondent submits the said firm had stated very clearly that it wrote the letter under the instructions of the appellant. The respondent submits that the veracity of the denial can only be verified during hearing of the suit when the authors may be called to testify and be cross examined. The respondent submits that the authors are reputable advocates that can be called to clarify.
33. On the issue of the sale agreement dated 28/07/2009 the respondent submitted that the same is self-explanatory and the purpose and intent is very clear. That unfortunately, it is the intent and purport of that agreement that the appellant is seeking to unlawfully circumvent.
34. The respondent submits that both the agreement and the Acknowledgement receipt dated 29/11/2022 mentioned, are executed by and bear the signatures of among others Jevio Njagi Mwiandi and Mwiandi M'thara. That the said M' Mwiathi Muthara (deceased) is the one in whom the suit land was, prior to transfer, registered. That Jevio Njagi Mwiandi is a son and a beneficiary of the Estate of M' Mwiathi M'thara later deceased.
35. The respondent submits that at the time of entering into the agreement for sale the same was then registered in the name of the late M' Mwiathi M' Thara (Deceased) as Karingani/Ndagani/3726 but which was later transferred and registered as Karingani/Ndagani/10634.
36. The respondent submits inter alia that the Green card from the lands registry poignantly indicates that the subdivision of Parcel No. 3726 was carried out on 2/11/2020 as a consequence of Succession Cause No. 38 of 2015 in the CMC at Chuka which was in respect to the estate of M' Mwiathi M'thara. From which the Respondent had acquitted a portion of land with the consent of the deceased and that all other terms that the Appellant is trying to renege on are very clear.
37. The respondent submits that the information on the Green card was never in the hands and knowledge of the respondent until after she lodged her claim against the Appellant through Chuka Chief Magistrate's Court Elc No. E015 of 2021 and therefore she could not be accused of non-disclosure or withholding information that she did not have.
38. The respondent further submits that she is in exclusive possession and utilization of the portion she is laying claim over.
39. The respondent submits inter alia that without going too deep into the numerous grounds of appeal raised by the appellant, it appears to look like a fishing expedition and submits that the said grounds bear serious untenable misrepresentation of facts that can only be settled after subjecting those divergent positions to a probe and a full hearing.
40. In conclusion the respondent submits that the purpose for interim injunctive orders is sufficiently and clearly provided under order 40 of the *Civil Procedure Law*.

### **Analysis And Determination**

41. I have 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-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were 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 or not the trial magistrate was justified in granting the orders of injunction.



ii. Whether appellant is entitled to the orders of discharge of the injunction.

iii. Who bears the costs?

Whether or not the trial magistrate was justified in granting the orders of injunction

42. The Appeal gravitates around whether the Learned Magistrate was justified in granting a temporary injunction. In the ruling, the Learned magistrate found that the application was supported by grounds and affidavit by Purity Kawira Kathuni, who depones to have purchased the suit land on 28/7/2009. The magistrate further found that the Appellant was an administrator in Chuka CM case No. 39 of 2018 and the grant was confirmed on 7/8/2020.
43. The learned magistrate states that the process of transfer was delayed by the surveyor and that the respondent has been in occupation of the parcel of land and prayed that the appellant be restrained from interference.
44. The Learned Magistrate further found that the appellant had filed a replying affidavit dated 2/7/2021 and deponed that the respondent bought 0.15 acres to be excised from parcel Karingani/Ndagani/3726 from Jevio Njagi Mwiandi, and that the appellant got parcel No.10634 through succession case No.39 of 2018 and which was registered in his name on 3/11/2020, and had sold it to Bernard Raini Thara. That the appellant admits that the respondent had bought a portion of the parcel No.3726 but did not honor the agreement terms.
45. The law on grant of temporary injunction is now settled. It is trite law that he who alleges the existence or non-existence of a fact must prove it. Section 107 of the *Evidence Act*, chapter 80 of the Laws of Kenya provides as much.
46. Time without number it has been restated that the remedy of orders of injunction is an equitable one. Its grant is discretionary in any court. However, the exercise of that discretion should be judicious. This was stated in the case of Kahoho v Secretary General EACJ application No.5 of 2012. Additionally Justice Munyao J. stated as much in *Daniel Kipkemoi Siele v Kapsasian Primary school & 2 others* (2016) eKLR as follows:
- “...the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously. I need not explain what it means by a court being judicious but it suffices to say that in so doing it must take into account all the facts and circumstances of each case and make a decision that is not plainly wrong. It is a delicately balance of the interests of the parties and justice.”
47. The learned trial magistrate stated that at the time the respondent was in occupation and possession and to grant orders of injunction, restraining her would amount to an eviction at the interlocutory stage and that, that would serve to determine the matter without full trial which would be prejudicial to the respondent. This in my view was a well thought out ruling that tried to delicately balance the interest of the parties and that of justice.
- Whether appellant is entitled to the orders of discharge of the injunction.
48. In the impugned ruling, the learned magistrate determined that the respondent being in possession, granting orders of injunction restraining her would amount to an eviction at the interlocutory stage. I would no doubt hold the same view.
49. The appeal is basically seeking to set aside the orders of injunction granted by the Learned Magistrate. Injunctive orders are equitable reliefs granted at the discretion of the court. Further, the court will



warn itself that at that stage, it is not dealing with the disputed facts to finality but only determining whether the applicant was deserving of the injunctive orders. The court will also take into account that injunctive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in dispute have been resolved. A party also seeks injunctive relief when he/she feels that his/her rights have been infringed.

50. The principles upon which an interlocutory injunction may be granted are well settled in the famous case of *Giella v Cassman Brown & Co Ltd* (1973) EA 358. One has to establish a *prima facie* case with a probability of success and 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. If in doubt, the court will decide the matter on a balance of convenience. From the material on record, I find that the trial magistrate rightly addressed his mind to these principles.
51. Interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the suit. The grant of interlocutory injunctions is not meant to occasion prejudice to any party. In this particular case the Appellant would in my view be compensated by way of damages if the court finds that the respondent did not deserve the grant of the injunction.
52. In the case of *Robert Mugo wa Karanja v Ecobank (Kenya) Limited & ano.* (2019) eKLR the court in deciding on an injunction application stated:

“Circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of 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...”
53. In the instant case, if the orders granted are discharged the respondent risks being evicted and therefore it is not in the interest of justice to discharge the orders.
54. Having said that, I find that it would be in the interest of justice to uphold the order of injunction to be in place pending the hearing and determination of the suit. The court finds that the discharge or varying of the injunction orders would not be appropriate at this stage.
55. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The finding and holding of the learned trial magistrate were well founded and I find no basis to interfere with it.
56. In the result, I find no merit in the appellant’s appeal and the same is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 6<sup>TH</sup> DAY OF JUNE, 2022.**

**In the presence of:**

**CA: Ann**

Nyamu Nyaga for Appellant

Ms. Musyimi h/b for Kirimi for Respondent

**C. K. YANO,**

**JUDGE.**

