



**Lemusiro & 2 others v Mateur (Suing as the Legal Representative of the Estate of the Late Mateur Sondai) (Civil Appeal E041 of 2023) [2023] KEHC 21154 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21154 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL E041 OF 2023  
SN MUTUKU, J  
JULY 25, 2023**

**BETWEEN**

**MOTORON LEMUSIRO ..... 1<sup>ST</sup> APPELLANT  
TIMARO LEMUSIRO ..... 2<sup>ND</sup> APPELLANT  
JOHN SIPOI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**MICHAEL LEI MATEUR (SUING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF THE LATE MATEUR SONDAI) ..... RESPONDENT**

*(An appeal from the Ruling of the Hon R.A Oganyo (C.M) at Kajiado delivered on 12th July, 2023 in CMCC No. 174 of 2023 Michael Lei Mateur (suing as the Legal Representative of the estate of the late Mateur Sondai -vs- Motoron Lemusiro, Timaro Lemusiro, John Sipoi)*

**JUDGMENT**

**Background.**

1. The Memorandum of Appeal in this matter is dated 17<sup>th</sup> July, 2023. It was filed on the same date together with a Notice of Motion filed under Certificate of Urgency bearing the same date. I certified the matter as urgent and directed that the same be served on the Respondent the same day together with a mention notice for the following day, 18<sup>th</sup> July 2023.
2. When the matter came up for mention on 18<sup>th</sup> July, 2023, the Respondent confirmed that he had been served with all the documents and that he had filed a Replying Affidavit, Grounds of Opposition and a Preliminary Objection on points of law, all dated 18<sup>th</sup> July, 2023.
3. Given the urgency of the matter and to shorten the time, the parties decided to compromise the Notice of Motion, the Replying Affidavit, Grounds of Opposition, and the Preliminary Objection in favour



of fast-tracking this Appeal. The matter was adjourned to 19<sup>th</sup> July 2023 to allow the Appellant time to prepare, file and serve a record of appeal.

4. On 19<sup>th</sup> July, 2023, Mr. Kanchori, learned counsel for the Appellants, confirmed that he had filed a record of appeal. He also applied to withdraw the Notice of Motion dated 17<sup>th</sup> July 2023 in favour of arguing the main appeal. Mr. Nzaku, learned counsel for the Respondent, likewise applied to withdraw the Grounds of Opposition, the Replying Affidavit and the Preliminary Objection, all dated 18<sup>th</sup> July 2023. Both counsel were allowed to withdraw their respective pleadings and the court directed that they proceed to submit in respect of the appeal.

### **Memorandum of Appeal**

5. This appeal arises from the orders granted by the lower court (Hon. R.A Oganyo, CM) in Kajiado CMCC No. E174 of 2023 in an interlocutory application (Notice of Motion) dated 11<sup>th</sup> July 2023. In that application, the Respondent in this Appeal was the Plaintiff/Applicant, and the Appellants are the Defendants/Respondents. The application sought the following orders.
  - i. That this Application be certified urgent and be heard ex parte in the first instance and service thereof be dispensed with.
  - ii. That this Honourable Court be pleased to order the burial of the late Ole Lemusiro Sirinyi scheduled for Thursday, 13<sup>th</sup> July, 2023 on L.R No. Kajiado/Ololoitikoshi/Kitengela/2003 be stopped pending the hearing and determination of this Application.
  - iii. That this Honourable Court be pleased to order the burial of the late Ole Lemusiro Sirinyi scheduled for Thursday, 13<sup>th</sup> July, 2023 on L.R No. Kajiado/Ololoitikoshi/Kitengela/2003 be stopped pending the hearing and determination of the suit filed herein.
  - iv. That the OCS, Tuata Police Station, does assist in execution of the orders of the Court.
  - v. That the Respondents be condemned to pay costs of this Application.
6. The matter was certified urgent by the trial court on 11<sup>th</sup> July 2023 and the Applicant was directed to serve the Respondents and attend court the following day on the 12<sup>th</sup> July 2023 for inter partes hearing. On 12<sup>th</sup> July 2023, the Respondents did not attend court despite service. The court took submissions of the Applicant and issued the following order:

“Application is considered, and court is convinced that there is a prima facie case warranting prayers 2 and 3 to be granted pending the hearing of the suit herein, costs in the cause.”

7. The following order was extracted from that short ruling:

“This Matter coming up for inter partes hearing of an application dated 11<sup>th</sup> July 2023 brought under certificate of urgency by the firm of Nzaku & Nzaku advocates for the Plaintiff/Applicant on 12<sup>th</sup> July 2023 Before Hon. R.A Oganyo, CM,

Having Heard Ms Gitonga advocate holding brief for Nzaku advocate for the Plaintiff/Applicant and Having Considered the Application as well as the Supporting Affidavit and the affidavit of service sworn by Thursday 13<sup>th</sup> July 2023 Evanson Mwangi Mugo.

It is hereby ordered:



1. That the burial of the late Ole Lemusiro Sirinyi scheduled for on LR. No. Kajiado/Ololoitikoshi/Kitengela.2003 be and is hereby stopped pending hearing and determination of this application.
  2. That the burial of the late Ole Lemusiro Sirinyi scheduled for Thursday 13<sup>th</sup> July 2023 on LR. No. Kajiado/Ololoitikoshi/Kitengela.2003 be and is hereby stopped pending hearing and determination of this suit.
  3. That the costs be in the cause.”
8. It is the above orders that have aggrieved the Appellants herein and that has necessitated the filing of this Appeal. Through the Memorandum of Appeal dated 17<sup>th</sup> July 2023 and filed on the even date, the Appellants have raised the following grounds:
- i. That the Learned trial Magistrate erred in Law and fact by making a finding that the Respondent Michael Lei Mateur herein proved his case.
  - ii. That the Learned Magistrate erred in law and fact by issuing orders based on irrelevant considerations which were not related to burial of the deceased.
  - iii. That the Learned Magistrate erred in law and fact by completely ignoring the fact that the deceased is the registered owner of L.R No. Kajiado/Ololoitikoshi/Kitengela/2003.
  - iv. That the learned trial magistrate erred in law and fact by issuing final orders ex parte at the interim stage of an application and before the determination of the main suit.
  - v. That the learned Magistrate erred in law and fact by failing to consider that the Respondent was referring to ELC suit No. E 30 of 2021 which suit was filed in court over 32 years after the deceased was the registered as the legal owner of L.R No. Kajiado/Ololoitikoshi/Kitengela/2003.
  - vi. That the learned Magistrate erred in law and fact by issuing orders based on non-disclosure of material facts. The deceased is the registered owner of L.R No. Kajiado/Ololoitikoshi/Kitengela/2003, the deceased and his family have been in possession to the third generation and have used the land for over 32 years and the deceased is to be interred on a small portion of land.
  - vii. That the learned Magistrate erred in law and fact by failing to put into consideration the fact that the Application in Kajiado CMCC No 174 of 2023 was an afterthought intended at causing untold agony, psychological torture as a result of death of a father and husband and at the same time being stopped from burying him and financial hardship to the Appellants herein.
  - viii. That the learned Magistrate erred in law and fact by determining in Kajiado CMCC No 174 of 2023 to finality while the Appellants had not been duly served hence infringing on the Appellants right to fair hearing.

### **Appellant’s Submissions**

9. Mr. Kanchori, learned counsel for the Appellant, argued that their main contention before this court, is that of burial of the deceased and not ownership of L.R No. Kajiado/Ololoitikoshi/Kitengela/2003; that the said land is registered in the name of the deceased and that he should therefore be buried there; that the lower court did not consider that the deceased was the registered owner of that land and that the orders given by the magistrate were final.



10. It was the Appellants' case that the deceased had owned the land since 1989; that the dispute of ownership of land was brought in 2021 through ELC No. E 30 of 2021 about 32 years later; that all that the Appellants seek is to give the deceased a decent burial according to the Maasai culture; that this is an emotional matter and that the continued delay to bury the deceased's body is against the Maasai customs.
11. Mr. Kanchori admitted that the Appellants were served with the Notice of Motion dated 11<sup>th</sup> July 2023, however, the service of the order was received on the eve of the burial after they had made the burial preparations. He submitted that this court is clothed with the requisite jurisdiction to hear and determine the issue of burial and not ownership of land. He urged that the orders of the lower court be set aside.

### **Respondent's Submissions**

12. Mr. Nzaku, learned counsel for the Respondent, argued that the Respondent has no objection as pertains to the burial of the deceased, which is the subject of the appeal; that the Respondent is objecting to the deceased being buried on L.R No. Kajiado/Ololoitikoshi/Kitengela/2003 for the reason that Respondent is challenging that title *vide* an ELC Suit No. E30 of 2021.
13. It was submitted that it is the Respondent's case that the Respondent also resides on the same land and that the Respondent's home is approximately 300 meters from that of the deceased; that should the body be buried on the said land, the same may be exhumed should the ELC case succeed. He further submitted that there are stay orders issued by the ELC on 12/10/2022 against interference with the disputed land and that the stay orders were issued in the presence of the advocate for the deceased. Counsel argued that it is paramount to preserve the subject matter as burial on the contested land will be prejudicial to the Respondent.
14. On the issue of service of the Notice of Motion to the Appellants, counsel submitted that this issue was being brought up for the first time in this appeal, and has not been challenged elsewhere and that there was an Affidavit of service filed as proof that service had been effected on the Appellants.

### **Analysis and Determination**

15. I have read the memorandum of appeal and the submissions of both counsel. To my mind the following grounds of appeal ought to be considered together:
  - i. That the Learned trial Magistrate erred in Law and fact by making a finding that the Respondent Michael Lei Mateur herein proved his case.
  - ii. That the learned trial magistrate erred in law and fact by issuing final orders *ex parte* at the interim stage of an application and before the determination of the main suit.
  - iii. That the learned Magistrate erred in law and fact by determining in Kajiado CMCC NO 174 of 2023 to finality while the Appellants had not been duly served hence infringing on the Appellants right to fair hearing.
16. These grounds of appeal are listed in the Memorandum of Appeal as grounds numbers 1, 4 and 8. I will determine these grounds of the appeal together.
17. The remaining grounds of appeal listed below will be determined together:
  - i. That the Learned Magistrate erred in law and fact by issuing orders based on irrelevant considerations which were not related to burial of the deceased.



- ii. That the Learned Magistrate erred in law and fact by completely ignoring the fact that the deceased is the registered owner of L.R No. Kajiado/Ololoitikoshi/Kitengela/2003.
  - iii. That the learned Magistrate erred in law and fact by failing to consider that the Respondent was referring to ELC suit No. E 30 of 2021 which suit was filed in court over 32 years after the deceased was the registered as the legal owner of L.R No. Kajiado/Ololoitikoshi/Kitengela/2003.
  - iv. That the learned Magistrate erred in law and fact by issuing orders based on non-disclosure of material facts. The deceased is the registered owner of L.R No. Kajiado/Ololoitikoshi/Kitengela/2003, the deceased and his family have been in possession to the third generation and have used the land for over 32 years and the deceased is to be interred on a small portion of land.
  - v. That the learned Magistrate erred in law and fact by failing to put into consideration the fact that the Application in Kajiado CMCC No 174 of 2023 was an afterthought intended at causing untold agony, psychological torture as a result of death of a father and husband and at the same time being stopped from burying him and financial hardship to the Appellants herein.
18. The above grounds under paragraph 17, are listed as grounds of appeal numbers 2, 3, 5, 6, and 7. It is clear from reading of the grounds of appeal, the submissions, the pleadings in the lower court and the orders issued, that the matter in the lower court did proceed in the absence of the Respondents/ Appellants who had been served and failed to attend court. The trial court was persuaded, through the affidavit of service dated 11<sup>th</sup> July 2023 and filed on the same date, that service was proper and proceeded to take submissions of the Applicant's counsel.
  19. The trial court did not hear the parties inter partes and therefore I find no evidence in the proceedings before the lower court<sup>6</sup> that the trial magistrate issued orders based on irrelevant considerations which were not related to the burial of the deceased. No evidence has been adduced to point out the irrelevant considerations on which the trial magistrate may have based her orders.
  20. Likewise, the trial magistrate cannot be said to have completely ignored the fact that the deceased was the registered owner of the disputed land as alleged in ground 3 of the appeal. I did not find evidence pointing to the trial magistrate acting as alleged. The same reasoning applies to the remaining grounds under this category, being grounds of appeal numbers 5, 6 and 7.
  21. In respect to the above grounds, the appellants have failed to persuade this court as to why they are faulting the trial magistrate on the issues raised in grounds 2, 3, 5, 6 and 7 of the appeal.
  22. I now turn to the remaining grounds of appeal whether the learned trial magistrate erred in law and fact in issuing final orders at the interlocutory stage as alleged in ground 4. This ground of appeal has a bearing on grounds one (1) and eight (8) of the appeal.
  23. I am alive to the fact that I must exercise caution in determining this appeal because there is pending before the ELC case No. 30 of 2021 and that this matter is still pending before the Chief Magistrate's Court.
  24. I have read the record of appeal. I have noted that the Respondents herein through their Notice of Motion dated 11<sup>th</sup> July, 2023 sought orders to stop the burial of the Ole Lemusiro Sirinyi (the deceased) on the suit property pending hearing and determination of both the Application and the suit filed, being the Complaint dated 11<sup>th</sup> July 2023 and filed on the same date. In that Complaint, the main prayer is an



order restraining the Defendant from burying Ole Lemusiro Sirinyi (the deceased) on the disputed land.

25. Order 40 rule 1 and 2 of the Civil Procedure Rules, one of provisions of the law on which the Notice of Motion dated 11<sup>th</sup> July 2023 is anchored on, provides as follows:

Order 40 (1) 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
- (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 orders.

Order 40 (2) (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

26. The principles governing issuance of injunctions, whether temporary or permanent, are well articulated in our laws. There are numerous authorities to the effect that an applicant must demonstrate a prima facie case with a probability of success; that he will suffer irreparable injury which would not adequately be compensated by an award of damages and where the court is in doubt, balance of convenience is considered. (see *Giella v. Cassman Brown & Co., Ltd.* [1973] E.A. 358 at p. 360 and *E.A. Industries v Trufoods* [1972] E.A. 420.)”
27. The trial court was convinced that a prima facie case had been made out by the Applicant to persuade the court to grant the restraining orders sought.
28. I have considered this matter. It is trite that the granting of an interim injunction is an exercise of judicial discretion. An appellate court will not readily interfere with the exercise of discretion by the trial court unless it is satisfied that the discretion has not been exercised judicially. This was aptly stated by the court in *United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd* [1985] E.A. 898, as follows:

“The Court of Appeal will not interfere with a 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 the 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.”

29. The issue I need to determine is whether the orders of the trial magistrate are final as argued by the Appellants. The orders sought in the Notice of Motion dated 11<sup>th</sup> July 2023 were meant to stop the burial of the deceased in the disputed land first pending the hearing and determination of that application and secondly, pending the hearing and determination of the suit. The Plaint dated 11<sup>th</sup> July 2023 also seeks, as the main prayer, an order to restrain the Defendants from burying the deceased on the disputed land.
30. My understanding of the two prayers, as contained in the Notice of Motion and in the Plaint, is that both are the same. However, the order sought in the Notice of Motion is in the interim, pending the hearing and determination of the suit, while the order sought in the Plaint is final. The prayer in the Plaint, once granted, will have sealed the fate of the burial of the deceased on the disputed land unless an appeal overturns that order.
31. The orders granted by the trial court, and subject of this appeal, are not final, in my considered view. I have considered this matter with utmost care and considered the urgency demonstrated. I detect no error on the part of the trial magistrate in granting the two orders. The wording of order (c) of the Notice of Motion is clear that it is issued pending the hearing of the suit. It is not a final order but an interim one pending the determination of the main suit. It only takes care of the urgency of the matter in my view. Had the trial magistrate granted prayer (b) alone, then it would have meant that parties would have gone back to her to argue the application in respect to the remaining prayers thereby lengthening the process.
32. I am alive to the legal principle that courts should not grant interim relief which amounts to final relief without recording reasons for so doing. In an Indian case of *Ashok Kumar Bajpai v Dr. (Smt) Ranjama Baijai*, AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17 of the decision the Indian Court expressed as follows:

“...It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party.”
33. Further, in *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR and *Stephen Kipkebut t/a Riverside Lodge and Rooms v Naftali Ogola* [2009] eKLR, court was of the reasoning that a major relief ought not to be granted at an interlocutory stage unless there are special circumstances for doing so. As stated in this Judgment, my view is that the trial court did not make final orders in the Ruling appealed.
34. This is an emotional case, and the Appellants are desirous of giving their departed kin a decent burial as soon as possible. Having found no error on the part of the trial court and given the urgency in this matter, parties ought to focus on the main suit to enable the trial court to finally determine the matter. I therefore decline to allow this appeal for the reasons I have given with the effect that the Memorandum of Appeal dated 17<sup>th</sup> July 2023 is hereby dismissed.
35. I direct parties herein to return to the trial court, file all the necessary pleadings and documents and attend the trial court on 26<sup>th</sup> July 2023 for directions on the main suit before that court.



36. Each party shall bear own costs of this appeal.

37. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 25TH DAY OF JULY 2023.**

**S. N. MUTUKU**

**JUDGE**

