Okun v Otwal (Environment and Land Appeal E104 of 2024)
[2025] KEELC 4825 (KLR) (26 June 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND APPEAL E104 OF 2024

SO OKONG'O, J

JUNE 26, 2025

BETWEEN

ALICE AUMA OKUN ..... APPELLANT

AND

GEORGE OTIENO OTWAL ..... RESPONDENT

(Being an appeal from the ruling and orders made on 6th December 2024 by Hon. D.K. Mtai (PM) in Winam Principal Magistrate's Court ELC No. E053 of 2024)

JUDGMENT

Background

1. Through two agreements of sale dated 27th February 2020 and 15th May 2020, the Respondent herein purchased from one, Beatrice Achieng Osulah, all that parcel of land known as Title No. Kisumu/Korando/3976 (hereinafter referred to as "the suit property") at a consideration of Kshs. 4,000,000/-. The suit property was initially registered in the name of Joash Osula Gwako, deceased (hereinafter referred to as "Osula") as the first registered owner thereof on 13th March 1990. Beatrice Achieng Osulah (hereinafter referred to as "Beatrice") was registered as the owner of the suit property in her capacity as the administrator of the estate of Osula on 25th March 2020, having obtained a confirmed Grant of Letters of Administration in respect of the Estate of Osula on 13th March 2020 at Winam Principal Magistrate's Court in Succession Cause No. 38 of 2019. Beatrice transferred the suit property in her name as a beneficiary of the estate of Osula on the same date, namely, 25th March 2020. Beatrice is said to have transferred the suit property to the Respondent on 2nd April 2020 pursuant to the said agreements of sale dated 27th February 2020 and 15th May 2020. The Respondent was issued with a title deed for the suit property on 2nd April 2020, the same date of the transfer.

2. Through a plaint dated 7th November 2024 or thereabouts, the Respondent filed a suit against the Appellant at the Principal Magistrate's Court at Winam, namely, ELC No. E053 of 2024 (hereinafter

referred to as "the lower court case") seeking judgment for; an order for the eviction of the Appellant from the suit property, a permanent injunction restraining the Appellant by herself, or through her employees, servants, representatives and agents or any person acting under her authority from interfering with the suit property by encroaching, entering, cultivating, alienating and/or otherwise disposing or dealing with the suit property, general damages for trespass and costs of the suit.

3. In the plaint, the Respondent averred that he acquired the suit property from the original owners whom he named as Hillary Osula and Geoffrey Osula, who successfully transferred the suit property to his name before he was issued with a title deed therefor. The Respondent averred that after purchasing the suit property, he took possession and fenced the same before using it as a security for a loan that he obtained from NCBA Bank. The Respondent averred that the Appellant illegally and without any colour of right trespassed on the suit property by illegally moving in, establishing and occupying a temporary structure on a portion thereof without his consent. The Respondent averred that his efforts to have the Appellant vacate the suit property had proved futile. The Respondent averred that each time he approached the Appellant to move out of the suit property, the Appellant exhibited hostility towards him. The Respondent averred that the Appellant invaded and/or made forcible entry into the suit property, illegally constructed the temporary structure which she was occupying thereon and had thereby deprived the Respondent of the use and quiet enjoyment of the suit property. The Respondent averred that the Appellant's action of forcibly taking possession of the suit property was unlawful.

4. When the Respondent brought the lower court suit, the Appellant's 39-year-old daughter, one, Jerusa Dada had just died on 22nd October 2024. This death, which was within the knowledge of the Respondent, was not mentioned by the Respondent in the plaint, nor was any relief sought in respect thereof. However, together with the plaint, the Respondent filed a Notice of Motion application dated 7th November 2024 in the lower court seeking a temporary injunction restraining the Appellant by herself or through her employees, agents, servants and /or whomsoever from interring the remains of her deceased daughter Jerusa Dada (hereinafter referred to only as "the deceased" where the context so permits) on the suit property pending the hearing and determination of the lower court suit and an order for the Officer Commanding Maseno Police Station to ensure compliance with the said order.

5. The application was supported by the affidavit of the Respondent sworn on 7th November 2024, in which the Respondent reiterated that he purchased the suit property from the previous owners, Hillary Osula and Geoffrey Osula. The Respondent claimed that he purchased the suit property from the two gentlemen on 18th March 2019. The Respondent averred that after purchasing the suit property, he fenced the same and that the Appellant illegally moved in and occupied a portion of the suit property on which she established a temporary structure without the consent of the Respondent. The Respondent averred that he had learnt of the demise of the Appellant's daughter Jerusa Dada (deceased) and the Appellant's intention to inter the remains of the deceased on the suit property on 8th November 2024.

6. The Respondent averred that the Appellant was a trespasser on the suit property and that her intended action was calculated to defeat the Respondent's title and deny him quiet possession of the suit property. The Respondent urged the court to protect the sanctity of his title and affirm his proprietary interests in the suit property by preventing the Appellant from interring the remains of the deceased on the suit property. The Respondent averred that unless the court intervened and stopped the interment of the deceased on the suit property, the Respondent stood to suffer irreparable damage which would render the application and the suit nugatory. The Respondent annexed to his affidavit in support of the application, a copy of the official search on the title of the suit property.

7. The Respondent's application that was brought under a certificate of urgency was placed before the lower court for directions on 7th November 2024. The lower court certified the application as urgent and issued a temporary injunction on the same day, restraining the Appellant from interring the remains of the deceased on the suit property pending the hearing and determination of the application.

8. The Appellant opposed the application through a replying affidavit sworn on 12th November 2024. The Appellant averred that the application was misconceived and had no basis. The Appellant averred that her daughter, Jerusa Dada (the deceased), died on 22nd October 2024, and since her death, her body had been preserved and kept at Port Florence Hospital Mortuary awaiting burial. The Appellant averred that arrangements had been made by the family to remove the body of the deceased from the mortuary on 15th November 2024 and bury her on 16th November 2024, but the said plans had been disrupted by the filing of the suit and issuance of the ex parte orders of injunction on 7th November 2024.

9. The Appellant averred that she was married in the year 1980 to one Joshua Okun Gwako, who had since died. She stated that her husband was the son of Jacob Okun Gwako and Jerusha Dada who were both deceased. The Appellant averred that upon her marriage she found her father and mother in law living on the suit property and upon their deaths, they were buried on the property. The Appellant averred that her husband was also buried on the suit property. The Appellant averred that her father-in-law had four wives, namely Oduwo, Anjawo, Wang'iya and Jerusha Dada and all of them, as well as other relatives who had died, had been buried on the suit property.

10. The Appellant averred that her husband died on 14th May 1992 and was buried on the suit property. The Appellant averred that she had lived on and was still living on the suit property where she lived with her deceased husband from 1980 until he died in 1992. The Appellant averred that she had an established home on the suit property, which had stood there for several decades as it was established by her father-in-law before she was married. The Appellant averred that the Respondent claimed to have bought the suit property from persons who were not living on the suit property. The Appellant averred that she was not informed of the sale or purchase, even though she was living on the suit property.

12. The Appellant averred that the transaction was conducted in secret with the sole purpose of defrauding her of family land. The Appellant averred that the register of the suit property showed that the suit property was registered in the name of Joash Osula Gwako on 13th March 1990 as the first registered owner. The Appellant averred that Joash Osula Gwako deceased, was her brother-in-law and was the eldest son in her father-in law's family. The Appellant averred that the suit property could only have been registered in the name of Joash Osula Gwako to hold in trust for the rest of the family members, a trust which was evidenced by the fact that it was the Appellant's family which was living on the suit property. The Appellant averred that the family of Joash Osula Gwako were not living on the suit property. The Appellant averred that even if her family did not own the suit property because the same was not ancestral land, the same ought to be registered in her name by operation of the doctrine of adverse possession. The Appellant averred that her family's decades-long stay and exclusive use of the suit property had created an overriding interest therein in her favour, which superseded any claim that the Respondent could have over the same.

13. The Appellant averred that the suit property was littered with graves of her deceased relatives. The Appellant averred that her deceased daughter had known the suit property as her only home and thus deserved to be buried on the property. The Appellant averred that the orders obtained ex parte by the Respondent were obtained through the concealment of material facts. The Appellant averred that had the court been made aware of the true state of affairs set out above, no orders would have been issued. The Appellant averred that the delay in the burial of the deceased would cause untold suffering to her

family. The Appellant averred that mental torture to her children and the financial burden of keeping the body in the mortuary for prolonged period of time would be unbearable.

14. The Appellant averred that the person who allegedly sold the suit property to the Respondent was a grandchild in the larger family and that her grandfather and grandmother were buried on the suit property. The Appellant averred that the seller's father was not living on the suit property. The Appellant averred that the seller acted in bad faith in purporting to sell the suit property without informing her other relatives living on the suit property. The Appellant averred that the Respondent had not established a prima facie case and that no irreparable loss would be occasioned to the Respondent if the burial of the Appellant's deceased daughter took place on the suit property.

15. Together with her replying affidavit, the Appellant filed a Notice of Motion application dated 12th November 2024 seeking an order to set aside the temporary ex parte order issued by the lower court on 7th November 2024 in favour of the Respondent restraining the Appellant from interring the remains of the deceased, Jerusa Dada on the suit property. The Appellant's application, which was supported by the affidavit of the Appellant sworn on 12th November 2024, was brought on the grounds that the said ex parte orders were obtained by the Respondent through misrepresentation and concealment of material facts, the full particulars of which were set out in the supporting affidavit. The Appellant averred that if the court had been made aware of the true state of affairs and facts of the case, the court would not have granted the ex parte orders. The Appellant averred that the Appellant and her family suffered and had continued to suffer loss, damage and hardship as a result of the said ex parte orders.

16. The Respondent filed a further affidavit in support of his application and a replying affidavit in opposition to the Appellant's application, both dated 20th November 2024.

17. In his further affidavit, the Respondent averred that he acquired the suit property from Beatrice Achieng Osulah (Beatrice), who had inherited the property from her late father, Joash Osula Gwako (deceased) (Osula) in Winam Succession Cause No. 38 of 2019. The Respondent averred that when he visited the suit property and inspected the same in 2020, Beatrice pointed to him an abandoned house on the suit property, which she indicated belonged to the Appellant, who was her aunt. The Respondent averred that Beatrice told him that the Appellant was not living in the said house and that the Appellant would relocate to another parcel of land that had been allocated to her by the family. The Respondent averred that the Appellant was aware that the suit property had been sold to the Respondent. The Respondent averred that during his first site visit to the property, the Appellant had indicated that she would vacate the said house, which was lying distraught (sic) on the suit property and would thereafter demolish the same.

18. The Respondent averred that after the transfer of the suit property into his name, he reached out to the Appellant to vacate the suit property but she refused. The Respondent averred that after the death of her daughter, the Appellant threatened to inter her remains on the suit property. The Respondent averred that Beatrice informed him that the Appellant was accommodated on the suit property temporarily to hold it in trust for the beneficiaries of the estate of the late Joash Osula Gwako (Osula). The Respondent averred that the Appellant was to move out and establish her own home according to the Luo customs on her late husband's land known as Title No. Kisumu/Korando/2687, which she had inherited and was registered in her name. The Respondent averred that the suit property was not ancestral land and was solely allocated to the late Joash Osula Gwako(Osula), and there were no graves on the property. In his affidavit in reply to the Appellant's application, the Respondent reiterated the contents of his further affidavit. The Respondent averred that the lifting of the orders of temporary injunction granted in his favour would be prejudicial to him. The Respondent averred that he was the registered owner of the suit property and interring the remains of the deceased on the suit property would render his suit nugatory.

19. The Respondent's application dated 7th November 2024 and the Appellant's application dated 12th November 2024 in the lower court were heard together by way of written submissions. The lower court considered the applications, the responses thereto and the submissions by the advocates for the parties and delivered a ruling on 6th December 2024 allowing the Respondent's application for injunction and dismissing the Appellant's application to set aside the ex parte temporary injunction. The lower court found that the Appellant was in occupation of the suit property and that her claim over the suit property was based on her family's long occupation and use of the suit property which she claimed dated back to 1980 when she was married to her deceased husband who was the son of the previous owner of the suit property. The lower court observed that the Respondent's claim was based on a title deed which indicated that he was the registered owner of the suit property. The court noted that the Respondent had produced in evidence a register for the suit property, a certificate of official search, an agreement of sale, a certificate of confirmation of grant in respect of the estate of the previous owner of the property and a title deed for the suit property. The court noted that these documents supported the Respondent's claim that he purchased the suit property from Beatrice, who had inherited the same from her deceased father, Joash Osula Gwako, who was the first registered owner of the suit property.

20. The lower court found that the Respondent had demonstrated that he had a prima facie case against the Appellant with a probability of success. The court observed that if the deceased was buried on the suit property and the Respondent's claim over the suit property was later found to have merit, the process of exhumation of the body was bound to have serious psychological effect on the Respondent and his family that was likely to cause irreparable damage and loss which an award of damages would not adequately compensate.

21. The lower court issued a temporary order of injunction restraining the Appellant by herself or through her employees, agents, servants and/or whomsoever from interring the remains of the deceased, Jerusa Dada, on the suit property pending the hearing and determination of the lower court suit. The lower court stated that having found merit in the Respondent's application, the Appellant's application automatically stood dismissed.

The Appeal

22. The Appellant was aggrieved by the ruling and orders of the lower court and preferred the present appeal. In her Memorandum of Appeal dated 16th December 2024, the Appellant challenged the lower court's ruling and orders on the following grounds;

    1. Having properly set out the conditions necessary to be met by a party seeking a temporary injunction, the learned trial Magistrate fell into error when he did not subject the Respondent's application to the same test and thus allowed an application that did not meet the set conditions.

    2. The learned trial Magistrate erred in law and in fact by finding and holding that the Respondent had established a prima facie case warranting the grant of an injunctive relief when in fact no such prima face case was established by the Respondent.

    3. The learned trial Magistrate erred in law and fact by failing to appreciate that a title deed or the registration of a person as a title holder in itself is not conclusive evidence of legal ownership of land and that once a title is questioned, then the court must look beyond the title to establish if the same was obtained by the title holder legally, procedurally and without fraud or corrupt practices.

4. The learned trial Magistrate fell into error when he failed to appreciate the facts obtaining before him, and that the shifting nature of the Respondent's explanation as to how he came to own the suit property meant that the Respondent's title could be impugned under Section 26 of the *Land Registration Act*.

5. The learned trial Magistrate erred in fact by finding and holding that the Respondent had established that irreparable loss would be occasioned to the Respondent if the Appellant's deceased daughter was buried on the suit property on the basis that the Respondent and his family would suffer emotional distress if the exhumation of the body became necessary when the Respondent and his family did not live on the suit property and would not need to be present at the exhumation.

6. The learned trial Magistrate fell into error in his appreciation of the evidence tendered before him when he held that the burial of the deceased on the suit property would cause irreparable harm to the Respondent when evidence adduced before the court, including photographic evidence showed that the suit property, tiny as it was, was already littered with several graves of deceased relatives of the Appellant.

7. The learned trial Magistrate erred in both fact and law when he failed to hold the Respondent to his pleadings contrary to the accepted norm that a party must be bound by his pleadings and thus failed to appreciate that the contradictory depositions made by the Respondent on how he acquired the suit property and allegedly took possession thereof were sufficient evidence of a party that was not truthful before the court and thus underserving of the exercise of the court's discretion in his favour.

8. The trial court erred in its appreciation of the application before it by failing to find and hold that the fact that the Appellant had lived on the suit property for over 44 years with her family and that several family members were buried on the suit property meant that the suit property was ancestral land over which by her long possession, an overriding interest had been created in favour of the Appellant that would supersede the Respondent's rights as a title holder.

9. The learned trial Magistrate erred when he failed to realise in his appreciation of the application before him that the balance of convenience in view of the available set of facts and circumstances pointed towards allowing the deceased to be buried and hence dismissing the application by the Respondent.

10. The learned trial Magistrate erred in both law and fact, firstly, by not prioritising the hearing of the Appellant's application dated 12th November 2024 seeking the setting aside of the ex parte interim orders of injunction and secondly, by proceeding to dismiss the said application without giving it any consideration at all.

11. The decision of the trial court was wrong in the circumstances and occasioned a miscarriage of justice.

23. The Appellant prayed that the appeal be allowed and the ruling and orders of the lower court be set aside and replaced with an order dismissing the Respondent's application dated 7th November 2024 and allowing the Appellant's application dated 12th November 2024. The Appellant also prayed for the costs of the appeal and the applications dated 7th November 2024 and 12th November 2024.

24. The Appellant's appeal was heard by way of written submissions.

The Appellant's submissions

25. In her submissions dated 24th March 2025, the Appellant argued grounds 1, 2, 3, 4 and 8 of appeal together, grounds 5 and 6 of appeal together and grounds 7, 9, 10 and 11 of appeal together.

Grounds 1, 2, 3, 4 and 8 of appeal

26. The Appellant submitted that the mind of the learned magistrate was largely influenced by the fact that the Respondent was the registered owner of the suit property. The Appellant submitted that the court was of the view that the Appellant was entitled to an order of injunction because, being the title holder, he had established a prima facie case. The Appellant submitted that this narrow approach to the question of whether a prima facie case had been established was wrong and that the same indeed occasioned a miscarriage of justice. The Appellant submitted that the lower court needed to go beyond the title deed and look at the circumstances disclosed by the Respondent as to how he acquired the suit property, because under Section 26 of the *Land Registration Act*, a title can be challenged and thus is not conclusive proof of ownership.

27. The Appellant submitted that in determining whether or not a prima facie case had been established, or whether the ex parte interim orders needed to be set aside, the lower court needed to address its mind on whether an overriding interest had been created over the land by the Appellant's long stay thereon spanning over four decades. The Appellant submitted further that the lower court needed to examine the question of trust. The Appellant submitted that the Appellant's brother-in-law in whose name the suit property was first registered died without ever claiming the land from the Appellant and her husband. The Appellant submitted that her said brother-in-law also had land elsewhere where he was buried, although his parents and brother were buried on the suit property. The Appellant submitted that these were all evidence of the existence of a trust. In support of these submissions, the Appellant cited Section 30 of the *Land Registration Act* 2012, *Munyu Maina v. Hiram Gathiha Maina (Civil Appeal 239 of 2009*) [2013] KECA 94 [KLR] and Jonah Omoyoma v. Bonface Oure & 2 Others [2021] eKLR. The Appellant submitted that if the lower court had taken a holistic view of the matter and looked at all these issues, it would have concluded that a prima facie case had not been established and it would have thus allowed the Appellant's application for the setting aside of the ex parte injunction.

Grounds 5 and 6 of appeal

28. The Appellant submitted that in accepting the Respondent's contention that the Respondent had demonstrated that irreparable harm could be caused to the Respondent if the burial of the deceased was allowed to take place on the suit property, the learned trial magistrate accepted the proposition that the Respondent would suffer emotional distress in case an exhumation would need to be carried out. The Appellant submitted that the sole subject matter of the application that was before the lower court was the proposed burial of the daughter of the Appellant on the suit property. The Appellant submitted that in determining the question as to whether irreparable damage would be suffered by the Respondent in the event that the burial was allowed to take place, the court simply needed to take into account what effect such a burial would have on the land because the Respondent had brought a claim for land before the court and nothing else.

29. The Appellant submitted that had the learned magistrate taken this view of the matter, he would have come to the inevitable conclusion that a burial on the suit property could not affect the suit land at all. The Appellant submitted that this was because the suit property was already littered with graves, the photographs of which were exhibited before the court. The Appellant submitted that one more grave would have made no difference at all. The Appellant submitted that the Respondent was already

willing to acquire land on which there were several graves of the deceased members of the Appellant's family. The Appellant submitted that this was a clear demonstration that the Respondent was not intimidated by graves. In support of these submissions, the Appellant relied on Paul Gitonga Wanjau v. Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR and Kenya Commercial Finance Co. Ltd v. Afraha Education Society [2001] Vol. 1 EA 86.

Grounds 7,9, 10 and 11of appeal

30. The Appellant submitted that in order to convince the court to grant him an ex parte interim order of injunction, the Respondent made the following allegations in his pleadings; that the Respondent was the registered proprietor of the suit property, that after purchasing the suit property, he proceeded to fence the same (paragraph 2 of the supporting affidavit), that the Appellant then entered and occupied the suit property without the consent of the Respondent (paragraph *3*) and that all efforts to remove the Appellant from the suit property had proved futile.

31. The Appellant submitted that as a result of the overwhelming evidence produced by the Appellant in her replying affidavit in response to the Respondent's application and in the affidavit in support of her own application for setting aside the ex parte orders, the Respondent ran away from his initial assertions and instead claimed that he bought the suit property when the Appellant was already living on it but that he (the Respondent) had been assured that the Appellant would vacate the suit property. The Appellant submitted that it became clear that the allegations that the Respondent had bought the suit property and fenced it off, and that the Appellant had then entered the same and illegally occupied it, were not true at all, and yet those were the allegations that the court considered while granting the orders sought by the Appellant.

32. The Appellant submitted that when an application was made to set aside the ex parte orders issued by the court, the court should have prioritised the hearing of that application as it was an opportunity for the court to confirm that indeed its process was not abused in the process of obtaining the said interim orders. The Appellant submitted that instead of giving priority to the application for setting aside of the interim orders, the lower court ordered that the said application be heard alongside the application for injunction by the Respondent and then failed completely to consider the application once it decided to grant the orders of injunction prayed for by the Respondent. In support of this submission, the Appellant relied on Order 51 Rule 15 of the Civil Procedure Rules and Zebedee Mmata Injera v. Benson Anubi Luhong ; Joanne C.K. Luhongo (Interested Party) [2021] eKLR.

The Respondent's submissions

33. The Respondent filed submissions dated 21st March 2025. The Respondent argued grounds 1, 2, 3 and 4 of appeal together. The Respondent submitted that the issue arising in these grounds of appeal was whether the trial magistrate erred in its finding that the Respondent had established a prima facie case with a probability of success to warrant the grant of the injunctive orders sought. The Respondent cited Order 40 Rules 1 and 2 of the Civil Procedure Rules and Giella v. Cassman Brown & Co. Ltd. [1973]E.A 358 and submitted that in his application dated 7th November 2024, he had demonstrated that he was the registered owner of the suit property, having acquired it from Beatrice Osulah who had inherited the same from his deceased father Joash Osula Gwako through Winam Succession Cause No. 38 of 2019.

34. The Respondent cited the Court of Appeal case of Mrao Ltd. v. First American Bank of Kenya Ltd. [2003] eKLR in which the court defined a prima facie case as follows:

> "... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

35. The Respondent submitted that the evidence he presented to the court showing that he was the registered owner of the suit property was not challenged by the Appellant.

36. The Respondent submitted that he took possession of the suit property in 2020 after purchasing and fencing it. The Respondent submitted that the Appellant had not produced any document in support of her claim, save for the photographs of graves and a house, which she claimed to be evidence of her occupation of the suit property. The Respondent cited Sections 24, 25 and 26 of the *Land Registration Act* 2012 and submitted that, as the proprietor of the suit property, he was entitled to the protection of the law. The Respondent submitted that the trial magistrate did not err in its finding that the Respondent had established a prima facie case with a probability of success to warrant the granting of an order of a temporary injunction. The Respondent submitted that the alleged fraud in the acquisition of the suit property by the Respondent raised by the Appellant could only be determined at the full hearing of the lower court suit.

37. On grounds 5, 6, 7, 8 and 9 of appeal, the Respondent submitted that the issues raised by the Appellant regarding the legality of the acquisition of the suit property by the Respondent were answered by the production of the Certificate of Confirmation of Grant, the sale agreement and the register for the suit property which showed how ownership of the suit property moved from the original proprietor to the Respondent. The Respondent submitted that if the Appellant had any issue regarding the authenticity of the title held by the Respondent, the same could only be determined at the full hearing of the suit. The Respondent submitted that the issue that the Appellant had been living on the suit property for over 44 years could not be determined by the court without evidence. In support of this submission, the Respondent cited Robert Mugo Wa Karanja v. Ecobank (Kenya) Limited & Another [2019] eKLR and Otieno v. Ougo & another (No 2) [1987] KECA 79 [KLR].

38. The Respondent submitted that the learned trial magistrate was right in his finding that if an order of a temporary injunction was not issued, the lower court suit, if successful, would be rendered nugatory. The Respondent submitted that there was also the emotional distress to the Respondent that would ensue if the burial proceeded on the suit property and the Respondent's suit succeeds at the trial, making the exhumation of the body of the deceased necessary. The Respondent submitted that he met the threshold for the grant of the injunctive orders issued by the lower court pending the hearing and determination of the lower court suit. The Respondent urged the court to uphold the decision of the lower court.

Analysis and Determination

39. I have considered the pleadings, the proceedings and the ruling of the lower court. I have also considered the Appellant's grounds of appeal and the submissions by the advocates for the parties made before this court and the authorities cited in support thereof. In my view, the appeal raises only two issues which I need to determine, namely, whether the lower court erred in issuing an order of a temporary injunction in favour of the Respondent against the Appellant on the Respondent's application dated 7th November 2024, and whether the lower court erred in dismissing the Appellant's application dated 12th November 2024 seeking to set aside the ex parte injunction that was issued by the lower court

on 7th November 2024 in favour of the Respondent pending the hearing and determination of the Respondent's application dated 7th November 2024. I will consider the two issues one after the other, starting with the first one.

40. The Respondent's application before the lower court was brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules. Order 40 Rule 1 provides as follows:

> " 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."

41. Order 40 Rule 1 of the Civil Procedure Rules gives the court a discretionary power to grant a temporary injunction to restrain a defendant from wasting, damaging, alienating, selling, removing, or disposing of property in dispute in a suit. In Patriotic Guards Ltd v. James Kipchirchir Sambu [2018] eKLR the court stated as follows:

> " It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by the court to do real and substantial justice to the parties in a suit."

42. In Giella v. Cassman Brown & Co. Ltd.[1973] E.A 358, it was held that an applicant for an interlocutory injunction must show a prima facie case with a probability of success, and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which an award of damages would not adequately compensate. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v. First American Bank of Kenya Limited & 2 Others[2003]eKLR and went further to state as follows:

> " The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...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 threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide 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."

43. In Mbogo v. Shah [1968] E. A. 93, the court stated as follows at page 94:

> " I think it is well settled that this Court will not interfere with the exercise of 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 or 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."

44. What I need to determine is whether the lower court exercised its discretion properly when it granted a temporary injunction in favour of the Respondent. From the material that was before the lower court, I am persuaded that the lower court exercised its discretion wrongly when it issued a temporary injunction restraining the Appellant from interring the remains of her deceased daughter Jerusa Dada on the suit property pending the hearing and determination of the main suit. An injunction is a discretionary remedy. The court can decline to grant the order for good reason even where all the conditions for the grant of the order have been met. While exercising its discretion on whether to grant the order of a temporary injunction or not, the court was to consider whether, from the Respondent's case as pleaded and the evidence placed by the Respondent before the court, the Respondent had established a prima facie case against the Appellant with a probability of success. If the Respondent passed this hurdle, the court was then to consider whether the Respondent would suffer irreparable injury which could not be compensated with damages if the order was not granted. If the Respondent satisfied the two conditions, then the court would grant the order if it was satisfied in the circumstances of the case that it was just and equitable to do so.

45. Did the Respondent establish a prima facie case against the Appellant with a probability of success? While considering this issue, the lower court was bound to consider the whole case, that is, the Respondent's case and the Appellant's response to the same. I agree with the Appellant that the lower court only considered the Respondent's case. The court did not consider the Appellant's response to that case. As rightly pointed out by the Appellant, once the Respondent satisfied the court that he was the registered owner of the suit property, that to the court was sufficient proof of a prima facie case with a probability of success. Even at that stage, the court had a duty to interrogate how the Respondent acquired the suit property and whether the Appellant had any right over the property. It was upon interrogating the Respondent's title and the Appellant's right, if any, to be on the land that the court could say whether a prima facie case with a probability of success had been established or not. The Respondent's case had to be weighed against the case that had been put forward by the Appellant. The Respondent's case as pleaded in his plaint filed together with the application dated 7th November 2024 and on the basis of which he was granted an ex parte temporary injunction on 7th November 2024 by the lower court was that the Respondent was the registered owner of the suit property having acquired the same from two brothers who were the original owners thereof namely, Hillary Osula and Geoffrey Osula. The Respondent claimed that after he acquired the suit property, he took possession thereof and fenced the same. The Respondent claimed that after taking possession and fencing the suit property, the Appellant entered the suit property without his permission and established a temporary structure thereon, which she occupied as her residence. According to paragraphs 8 and 9 of the plaint, the Appellant forcibly invaded the suit property and occupied the same and as such, she was a trespasser thereon who should be evicted from the suit property. The Respondent's affidavit in support of the

application dated 7th November 2024 was on the same terms as the plaint. This was the state of the Respondent's pleadings as at the time the Respondent's application for injunction was argued. The Respondent's plaint was not amended until 19th December 2024 after the delivery of the ruling the subject of this appeal.

46. In her reply to the application, the Appellant stated that she did not enter into the suit property after the Respondent had acquired the same. The Appellant stated that she had occupied the suit property for over 40 years as of right as at the time the Respondent purported to acquire the property. The Appellant's case was that the first registered owner of the suit property, who was her brother-in-law, held the property, which was ancestral land in trust for her and her deceased husband, who was buried on the suit property. The Appellant placed evidence before the court showing that she had occupied the suit property for several years and that many of her relatives, including her husband, her mother-in-law and her father-in-law, were buried on the suit property. The Appellant produced evidence showing her house on the suit property, the grave of her husband, who was buried on the suit property in 1992 and the graves of her other relatives who were buried on the suit property. The Appellant also produced a copy of the register of the suit property, which showed that the first registered owner of the suit property was her brother-in-law, Joshua Osula Gwako. The Appellant contended that Joshua Osula Gwako held the suit property in trust for the Appellant's family which was staying on the land. The Appellant averred that even if the suit property was not ancestral land, she had acquired the property by adverse possession. The Appellant averred further that her several years of occupation of the suit property had created an overriding interest in her favour which superseded the Respondent's claim over the suit property.

47. Upon being served with the Appellant's replying affidavit, the Respondent came up with a completely new case, but without amending his plaint. The Respondent claimed in his further affidavit that he had acquired the suit property from Beatrice Osulah and not from Hillary Osula and Geoffrey Osula. As evidence of the purchase of the suit property from Beatrice Osulah, the Respondent produced a copy of a sale agreement dated 15th May 2020 between him and the said Beatrice Osulah. According to the agreement of sale, the Respondent first purchased from the said Beatrice Osulah a portion of the suit property measuring 0.09Ha. at a price of Kshs. 2,500,000/- through an agreement of sale dated 27th February 2020, and on 15th May 2020, the Respondent purchased the remaining portion of the suit property measuring 0.04 Ha. at a consideration of Kshs. 1,500,000/-. As at the date of the second agreement made on 15th May 2020, there was a total sum of Kshs. 2,650,000/- due and payable by the Respondent to Beatrice Osulah.

48. For the first time, the Respondent disclosed that the Appellant was residing on the suit property when he purchased the suit property and that he had even interacted with her. The Appellant was no longer a trespasser who forcibly entered the suit property after the Respondent had purchased and fenced the same. The Respondent also acknowledged that he was informed that the Appellant's occupation of the suit property was on account of some form of trust.

49. The lower court had a duty to consider whether the Respondent had established a prima facie case based on the Respondent's case as first pleaded and varied after the Appellant's response, the Appellant's response to the case and the law regarding the ownership of land. In its analysis of the Respondent's case and the Appellant's response, the lower court stated as follows:

> "In this case, it is not in dispute that the Defendant is in occupation of the suit land. Her claim of ownership over the suit land is based on her family's long occupation and use of the suit land which she claims dates back to the year 1980 when she was married to her husband who was the son of the previous owner of the land. The Plaintiff's claim is based on a title

deed which indicates that he is registered as the owner of the suit land... Section 26(1) of the *Land Registration Act* provides that:

> "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
>
> (a) ..
>
> (b) on the ground of fraud or misrepresentation to which the person is proved to be a party; or through a corrupt scheme."

50. Whether the Plaintiff acquired the certificate of title illegally, unprocedurally or through fraud, misrepresentation or corruption are issues that can only be determined after full trial. At this stage the Plaintiff is considered as the registered owner of the suit land and enjoys the rights and privileges specified in section 24 of the *Land Registration Act*. From the foregoing, the court is persuaded that the Plaintiff has demonstrated at this stage that he has a prima facie case with a probability of success."

51. Section 26(1) of the *Land Registration Act* 2012, parts of which the lower court attempted to reproduce above, provides as follows:

> " 26.
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

52. It is clear from the lower court's analysis of the Respondent's and the Appellant's cases that as far as the court was concerned, the fact that the Respondent held a certificate of title in respect of the suit property was sufficient proof that he had a prima facie case with a probability of success against the Respondent who had no legal title to the suit property. According to the court, it was not necessary at that stage to interrogate whether such title was acquired illegally, unprocedurally, or through fraud, misrepresentation or a corrupt scheme. I am of the view that this was a misdirection on the part of the

lower court. In *Munyu Maina v. Hiram Gathiha Maina, Civil Appeal No. 239 of 2009*[2013] eKLR, the court stated that:

> "...When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

53. While I agree with the lower court that a trial court need not go into an in-depth inquiry on the issues raised by the parties at the interlocutory stage, for a court to determine whether a plaintiff has established a prima facie case in a dispute over ownership of land, the court must consider and express an opinion on the challenge that has been mounted by the defendant against the plaintiff's title to the land in dispute. If that were not the case, then even a title deed which, on the face of it, is void would entitle a plaintiff to an order of a temporary injunction.

54. In this case, the lower court did not consider the Appellant's claim that the suit property was held by the previous registered owner in trust for her family, which was in actual occupation of the land and that the Respondent purchased the land with the Appellant in possession without inquiring about her status. The Appellant's case was that the purported sale of the land to the Respondent in breach of the said trust was illegal. This, in my view, was a valid challenge to the legality of the Appellant's title, which the lower court could not avoid considering while determining whether or not the Respondent had established a prima facie case with a probability of success. In John Gitiba Buruna & Another v. Jackson Rioba Buruna, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, the court stated as follows:

> "Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered *Land act*, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee."

55. In Isack M'inanga Kiebia v. Isaaya Theuri M'lintari & another [2018] eKLR, the Supreme Court stated as follows on customary trusts:

> "(37) Both exponents of colonial land policy and jurisprudence, either completely disregarded, or did not fully appreciate, the nature, scope, and complexity of African land relations. Land in a traditional African setting, is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit. Several rights of the members could be inferior to, or co-terminus with, or indeed superior to the sum total of the rights of a group. Hence, customary law does not vest "ownership", in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as "ownership." (Bennett 1995:3 and Cocker 1966: 30-33)."

56. In the same case, the court stated further as follows:

> "(52) Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:
>
> 1. The land in question was before registration, family, clan or group land.
> 2. The claimant belongs to such family, clan, or group.
> 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
> 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
> 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.
>
> (53) We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered *Land Act*, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in Obiero v. Opiyo and Esiroyo v. Esiroyo. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.
>
> (54) In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the

ambit of the proviso to Section 28 of the Registered *Land Act*, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered *Land Act*.

(57) With the repeal of the Registered *Land Act* (Cap 300), Parliament enacted the *Land Registration Act* No. 3 of 2012. The provisions of Section 28 of the former, including the proviso thereto, were re-enacted as Section 25 of the latter; while the provisions of Section 30 of Cap 300 were re-enacted as Section 28 of the *Land Registration Act*. However, Parliament introduced two new categories of overriding interests, the first category is what are now called "spousal rights over matrimonial property"; while the second category is what are, rather curiously called "trusts including customary trusts". Even more curious, is the fact that "the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation," as earlier provided for under Section 30 (g) of the Registered *Land Act*, are no longer on the list of overriding interests under Section 28 of the *Land Registration Act*.

(58) What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the "customary trusts" under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land."

57. It is my finding that in failing to consider the Appellant's defence to the Respondent's claim, which was relevant to the subject of its inquiry, the lower court exercised its discretion wrongly. I am of the view that if the lower court had considered the fact that the Appellant had lived on the suit property for over 40 years with her deceased daughter who was 36 years old and that the Respondent had purchased the suit property with the Appellant and her deceased daughter in possession, the court would not have issued an injunction stopping the burial of the Appellant's daughter on the suit property.

58. I also agree with the Appellant that the Respondent did not prove that he stood to suffer irreparable harm if the injunction he had sought was not granted. It was common ground that the Respondent was not living on the suit property. There was also evidence, which in my view was not challenged, showing that the suit property already had several graves. In my view, the Respondent did not demonstrate the irreparable harm he was likely to suffer if the Respondent's deceased daughter was buried on the suit property. If the injunction sought was not granted and the Respondent succeeded in his claim against the Appellant, the body of the deceased could be exhumed. There was no evidence before the court in the form of an affidavit or otherwise that the Respondent and his family were likely to suffer "serious psychological effect" if the body of the Appellant's daughter were to be exhumed after burial. The issue of the lower court suit, if successful, being rendered nugatory if the temporary injunction was not

granted could not arise. This was because as I mentioned earlier, the issue of the death and burial of the Appellant's daughter was not pleaded in the Respondent's plaint and as such was not the subject of the suit. In the absence of evidence that the Respondent was likely to suffer irreparable harm, the Respondent had not met one of the conditions for granting a temporary injunction, and as such was not entitled to the orders that were granted by the lower court.

59. On the issue whether the lower court erred in dismissing the Appellant's application dated 12th November 2024 seeking to set aside, the ex parte temporary injunction that had been granted to the Respondent, my view is as follows: I agree with the Appellant that the allegations that were made in the Appellant's application were serious as they concerned the fair administration of justice. The court should therefore have prioritised the hearing of the application and even if the application was heard together with the Respondent's application dated 7th November 2024, the court should have considered the Appellant's application first and should have proceeded to consider the Respondent's application only if it had found no merit in the Appellant's application. The Appellant's application dated 12th November 2024 was brought on the ground that the ex parte interim orders of injunction granted in favour of the Respondent on 7th November 2024 were obtained by the Respondent through misrepresentation and concealment of material facts. In other words, the Respondent was accused of misleading the court into granting the said orders. These were issues that the court had to consider and determine. If the court found that it had been misled into granting the ex parte orders, the court had a duty to discharge the orders and to refuse to consider further the Respondent's application dated 7th November 2024, which should have been struck out as an abuse of the process of the court. The lower court, therefore, fell into error when it dismissed the Appellant's application without considering it on merit.

60. I am satisfied from the pleadings and the affidavits filed in the lower court, which I have analysed above, that the lower court was misled by the Respondent into granting the ex parte interim orders of injunction on 7th November 2024. The Respondent concealed from the lower court the fact that the Appellant was in possession of the suit property when the Respondent purchased the same. The court was misled into believing that the Appellant forcibly entered the suit property and established her residence thereon after the Respondent had purchased and fenced the suit property. I doubt if the court would have issued the ex parte orders of injunction complained of if the court had been informed that the Respondent purchased the suit property with the Appellant in possession and that the Appellant had occupied the suit property for over 40 years and had even buried her husband and parents-in-law on the property. The ex parte orders having been obtained through misrepresentation and concealment of material facts, the same should have been set aside by the court.

62. In Halima Haji Sarah v. Multiple Haurliers (E.A) Limited & another [2022] eKLR, the court cited Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997 where the Court of Appeal stated as follows:

> " It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and

fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which are material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to consider the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A locus pentitentiae (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed..."

64. In Challis (Suing through the Attorney Isaack Ntongai Samwel) v. *The Attorney General & 4 others (Environment & Land Case 18 of 2021)* [2023] KEELC 17195 [KLR] (5 May 2023) (Ruling) Neutral citation: [2023] KEELC 17195 [KLR], the court stated as follows;

> " 25. The issue of material non-disclosure of facts is pertinent and if the court comes to conclusion that a party is guilty of the same, then such a party cannot benefit from the orders of the court. The court will also not apply its discretion in such party's favour.
>
> 26. In the case of Ruaha Concrete Co. Ltd et al versus Paramount Universal Bank Ltd et al, HCCC No. 430 of 2002, the Court enumerated the fundamental principles of non-disclosure of material facts as follows:
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> a. the Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,

b. The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.

c. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.

d. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application.

e. The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

f. Finally, it is not every omission that the injunction will be automatically discharged."

65. It is my finding that the Respondent was guilty of non-disclosure and concealment of material facts. The Appellant's application dated 12th November 2024 should therefore have been allowed.

Conclusion

66. In conclusion, I find merit in the Appellant's appeal and make the following orders:

1. The ruling and orders made by the lower court on 6th December 2024 allowing the Respondent's application in the lower court dated 7th November 2024 and dismissing the Appellant's application in the lower court dated 12th November 2024 are set aside and substituted with an order dismissing the Respondent's application in the lower court dated 7th November 2024 and allowing the Appellant's application in the lower court dated 12th November 2024 in terms of prayer 3 thereof.

2. The Appellant shall have the costs of the appeal, while the costs of the two applications in the lower court shall be in the cause in the lower court.

DELIVERED AND SIGNED AT KISUMU ON THIS 26TH DAY OF JUNE 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Wanyanga for the Appellant

Ms. Omondi for the Respondent

Ms. J. Omondi-Court Assistant