



REPUBLIC OF KENYA



KENYA LAW
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**Muthui & 10 others v Wainaina (Environment and Land Appeal
E033 of 2023) [2025] KEELC 4698 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4698 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E033 OF 2023**

DO OHUNGO, J

JUNE 25, 2025

BETWEEN

GEORGE KIMNUGY MUTHUI 1ST APPELLANT
JOHN OBOTE KABUNDIEKA 2ND APPELLANT
MARGARET MUGASIA KABUNO 3RD APPELLANT
ALFAYO WANYONYI 4TH APPELLANT
ALBERT ONTITA 5TH APPELLANT
STANLEY MUGO 6TH APPELLANT
JOHN KAMAU KIARIE 7TH APPELLANT
EMILY WAFULA 8TH APPELLANT
BOAZ MILIMU 9TH APPELLANT
RUTH NAFULA 10TH APPELLANT
RUTH WANJIRO 11TH APPELLANT

AND

SHADRACK WAINAINA RESPONDENT

*(Being an appeal from the ruling and order of the Principal
Magistrate's Court at Butali (Hon. R S Kipngeno, Principal Magistrate)
delivered on 20th June 2023 in Butali MCELC No. E061 of 2021)*



JUDGMENT

1. The background of this appeal is that the Respondent moved the Subordinate Court through Plaintiff dated 17th November 2021 in which he averred that he was the registered proprietor of the parcel of land known as Kakamega/Sango/2XX2 (the suit property) and that the Appellants had occupied the suit property illegally. He therefore prayed for judgment against the Appellants for their eviction and mesne profits.
2. The Appellants reacted to the plaintiff by filing Notice of Motion dated 8th September 2022, through which they sought striking out of the plaintiff and in the alternative, stay of proceedings pending hearing and determination of Eldoret Court of Appeal Civil Appeal No. 47 of 2019. The application was heard and determined through ruling delivered on 17th November 2022. It was dismissed with costs. The Appellants appealed against the ruling through ELCA No. E022 of 2023 (Kakamega), which appeal was dismissed with costs through judgment delivered on 19th June 2024.
3. On his part, the Respondent filed Notice of Motion dated 12th May 2023, through which he sought from the Subordinate Court an injunction to restrain the Appellants, their agents, family members and other persons acting under their instructions from demarcating, wasting, fencing, alienating, sharing out, distributing or dealing with the suit property pending hearing and determination of the suit. He further prayed for an order maintaining status quo and that the First Appellant be ordered to remove a barbed wire fence erected on the suit property.
4. Upon hearing Notice of Motion dated 12th May 2023, Hon. R S Kipngeno (Principal Magistrate) delivered ruling on 20th June 2023 and held as follows:
 4. I have considered the entire record of proceedings including the annexed documents herein. The matter involves land devolving upon succession. The matter was settled vide the Kitale HC Succession Cause No. 246 of 2004, and the concerned beneficiaries have processed their title deeds. This Court's Ruling dated 17/11/22 on pertinent points refers. The 1st Respondent being aggrieved by the said Judgment preferred an appeal vide the Eldoret Court of Appeal Civil Appeal No.47 of 2019. As noted at Para 8 of my Ruling aforesaid, the 1st Defendant appears determined to frustrate the process of distribution by selling portions of the land to unsuspecting 3rd parties. Indeed the 1st Defendant boasts of being in possession and having planted crops on the land thereby confirming clearly that the Plaintiff has never been in possession of his own land despite having a valid title deed.
 5. In the circumstances, I order and direct that the parties should maintain the Status quo in such a way as to enable each party holding a valid title deed should immediately be put on possession pending the hearing and determination of the Appeal at the Court of Appeal. The continued sale of portions of the land in question is dangerous to both the buyers and sellers whatever the outcome of the appeal case.
5. Dissatisfied with the ruling dated 20th June 2023, the yet again approached this Court, through Memorandum of Appeal dated 29th June 2023 and filed on the same date. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:



1. THAT the Learned Magistrate erred in law and fact in granting an order that had not been sought by the respondent in clear breach of the settled tenet that relief not pleaded will not be granted.
2. THAT the Learned Magistrate erred in law and fact in granting relief in the nature of a mandatory injunction at the interlocutory stage while the threshold for the same had not been met.
3. THAT the Learned Magistrate erred in law and fact in failing to address the application within the settled tenets for the consideration of an application for an interlocutory injunction.
4. THAT the Learned Magistrate erred in law and fact in granting an interlocutory injunction while a permanent injunction had not been pleaded in the plaint.
6. Based on those grounds, the Appellants prayed that the appeal be allowed and that the ruling and order of the Subordinate Court be set aside and be substituted with an order dismissing Notice of Motion dated 12th May 2023 with costs. The Appellants further prayed for costs of the appeal and interest.
7. The appeal was canvassed through written submissions. The Appellants submitted that the application was without merit since the Respondent did not expressly seek a permanent injunction in his plaint and that the application was in the circumstances a departure from the pleadings. They relied on the cases of Josephine Chebet Ruto v Stanley K. Chepkwony & Another [2017] eKLR and Sospeter Nyakundi Nyangau & another v Ecobank Kenya Limited & 2 others [2022] eKLR in support of that contention.
8. The Appellants further argued that the application did not satisfy the test in *Giella –vs- Cassman Brown & Co Ltd* [1973] EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR in that he neither established his case nor a prima facie case. That the Respondent acquired title while the Appellants were in occupation hence his title was subject to overriding interest in terms of Section 30 (g) of the Registered *Land Act* (repealed). The Appellants also argued that the order that “each party holding a valid title deed should immediately be put on (sic) possession pending the hearing and determination of the Appeal at the Court of Appeal” was in effect an eviction order against them and was issued whimsically, without jurisdiction and without the threshold for issuance of a mandatory injunction being met. The Appellants therefore urged this Court to allow the appeal.
9. In reply, the Respondent argued that the Subordinate Court did not err in granting an order of status quo since the order was meant to preserve the subject matter. He relied on the cases of *Fatuma Abdi Jillo v Kuro Lengesen & another* [2021] eKLR and *Elly Jepkoech Limo v Susan Wangoi Kibe & another* [2020] eKLR and argued that the order of status quo herein was specific in its terms. In conclusion, the Respondent urged the Court to dismiss the appeal.
10. This being a first appeal, the mandate of this Court is as succinctly stated by the Court of Appeal in *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR:

This being a first appeal, we are reminded of our primary role as a first appellate court, namely to re-evaluate, re- assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
11. I further bear in mind that an appellate court should not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong due to misdirection 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 with the result that it arrived at a



wrong conclusion. See *Mombasa Cement Limited v Kitsao & 34 others* (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment).

12. I have carefully considered the grounds of appeal and the parties' respective submissions. The issue that arises for determination is whether the order of status quo ought to have issued.
13. In entertaining the suit and the application, the Subordinate Court was exercising its environment and land jurisdiction pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act* and Section 9(a) of the *Magistrates' Courts Act*. The application sought an interlocutory injunction. While dealing with an application for an interlocutory injunction, paragraph 32 of the Practice Directions on Proceedings in The Environment and Land Courts, and on Proceedings Relating to The Environment and The Use and Occupation of, and Title to Land and Proceedings in Other Courts" published by the Chief Justice through Gazette Notice No. 5178 comes into play. The paragraph provides as follows:

During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.
14. A plain reading of the paragraph leaves no doubt that the Court has both jurisdiction and discretion while considering any interlocutory application, to make an order of status quo pending the hearing and determination of the suit. The learned Magistrate exercised discretion within the law in making the order.
15. The Appellants do not dispute that the Respondent is the registered proprietor of the suit property. The rights of a registered proprietor of land are well articulated at Article 40 of *the Constitution* and Sections 24 and 26 of the *Land Registration Act*. The Court is obligated to accept the registered proprietor's certificate of title as prima facie evidence of proprietorship unless the provisos under Section 26 (1) (a) or (b) of the *Land Registration Act* are established upon hearing and determination of the suit. Whereas the Appellants claimed that the Appellant's title was subject to overriding interest in their favour, that is an issue to be resolved at trial.
16. The Appellants have not made any case to warrant interfering with the learned Magistrate's exercise of discretion. I find no merit in this appeal, and I therefore dismiss it with costs to the Respondent. Parties are advised to expeditiously prosecute the main suit pending before the Subordinate Court so as to get to the root of the dispute.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 25TH DAY OF JUNE 2025.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Appellants

Ms Munihi for the Respondent

Court Assistant: B Kerubo

