



Njaria v Muraya (Suing as the Legal Attorney of Teresiah Wangui Muraya) (Environment and Land Appeal E031 of 2024) [2025] KEELC 4968 (KLR) (24 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4968 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E031 OF 2024**

**EC CHERONO, J
JUNE 24, 2025**

BETWEEN

TERESIA WANGUI NJARIA APPELLANT

AND

ERASTUS MAINA MURAYA RESPONDENT

SUING AS THE LEGAL ATTORNEY OF TERESIAH WANGUI MURAYA

JUDGMENT

1. Vide a memorandum of appeal dated 27/06/2024, the Appellant herein who was the 1st Defendant in the former suit in Bungoma MC ELC Case no. E103 of 2023 appeals to this Honourable Court challenging the ruling by Hon. T.M Olando [Principal Magistrate] delivered on 13/06/2024 allowing an application dated 18/04/2024.
2. The brief background of the case is that the respondent commenced this suit vide a plaint dated 15/09/2023 wherein he averred that the Appellant herein and Teresiah Wangui Muraya[donor] were confidants and the donor entrusted her to purchase various properties for her as she funded the said purchases by sending money through western union. That the donor at all times was under the impression that the said properties were registered in her name only to discover that three of the plots were secretly and fraudulently registered in the Appellant's name to wit L.R. No. Ndivisi/Muchi/2325, 6324 and 6467 with the intend to deprive her of her rightful property. The plaintiff set out particulars of fraud against the Appellant and sought for orders of cancellation of the title and transfer to her and for costs and interests of the suit.
3. The Appellant filed a statement of defence and counter-claim dated 10/11/2023 wherein she denied the Respondents case and stated that she was entrusted with the purchase of only seven properties on behalf of the Respondent and she was ready and willing to deliver titles for the seven [7] properties. She denied the particulars of the alleged fraud and argued that she single handedly purchased the three parcels of land in her name and she does not hold the titles in trust for the Respondent. In her counter-



- claim, she averred that the donee i.e Erastus Maina Muraya has been interfering with her use and occupation of L.R. No. Ndivisi/Muchi/2325, 6324 and 6467 by illegally disrupting the management of rental units erected in the said parcels. She set out particulars of fraud and trespass on the part of the donee in his capacity as the donor's agent. She sought for an order of permanent injunction against the Respondent, mesne profits for trespass, rent unlawfully collected for the months of September and October 2023, interests, special damages and costs of the suit.
4. Before the main suit was heard, the Respondent herein filed an application dated 18/04/2024 seeking the following orders;
 - a. That the service of this application be dispensed with in the first instance.
 - b. That a temporary injunction and restriction do issue restraining the respondent by himself, her agents and or servants from disposing, alienating, encroaching and or interfering with titles to parcels namely L.R. No. Ndivisi/Muchi/2325, 6324 and 6467 pending inter-partes hearing of this application.
 - c. The respondent be ordered to surrender the titles and executed transfer documents of two of the plots i.e L.R. No. Ndivisi/Muchi/2325 and 6324 in favour of the applicant as earlier agreed.
 5. The said application was based on grounds apparent on the face of the application supported by the affidavit of the Respondent sworn on 18/04/2024 wherein it was deposed that when the suit was instituted, the Appellant was willing to surrender the three properties to the Respondent and after various engagements, various items were released and it was also agreed that the surrender of L.R. No. Ndivisi/Muchi/2325 and 6324 would follow. The Appellant is said to have executed transfer forms and attached her identity documents in preparation of the said surrender. However, the release of the documents did not materialize despite various requests.
 6. In opposition to the application, the Appellant filed a replying affidavit sworn on 06/04/2024 where he termed the Respondent's averments in the application as conjectures, hearsays and misstatements fuelled by ulterior motives. She argued that prayers [b] and [c] were premature, ill informed and bad in law. She stated that she is the registered proprietor of the three plots wherein she has sold one plot to a third party while she occupies the other two with her son and that her occupation has been consistent for the last 20 years earning an income from a rental unit of Kshs. 2,500/=. It was her contention that she only acted on behalf of the donor in relation to the succession process of her late husband and that she managed to secure the titles of 7 properties. She denied ever engaging with the Respondent on the surrender of the alleged titles as alleged by the Respondent in the said application. She stated that the status quo at the time was that she and one John Murigi Kangere are in occupation of L.R. No. Ndivisi/Muchi/2325, 6324 and 6467.
 7. In its Ruling delivered on 13th day of June 2024, the trial Magistrate allowed the said application in its entirety.
 8. Aggrieved by the said Ruling/decision, the Appellant preferred the present appeal on the following grounds;
 - a. The learned magistrate in the subordinate court below erred in law and in fact in finding that the plaintiff's application dated 18/04/2024 has merit and thereby allowing it in its entirety.
 - b. The learned magistrate erred in law and in fact by failing to find that the application dated 18/04/2024 was res judicata since an application for an order of temporary injunction had previously been heard and determined by the very learned magistrate on 28/02/2024.



- c. The learned magistrate erred in law and in fact in failing to appreciate that granting prayer no. [c] on the face of the application dated 18/04/2024 amounted to granting a substantive prayer at an interlocutory stage.
 - d. The learned trial magistrate erred in law and in fact in deciding the main cause through an interlocutory application.
 - e. The learned trial magistrate erred in law and in fact in granting interlocutory orders of injunction contrary to the principles set out in the case of *Giella v Cassman Brown* 1969 E.A.
 - f. The learned trial magistrate erred in law and in fact in granting an interlocutory injunction in favour of the respondent in the circumstances of this case.
 - g. The ruling was arrived at in a perfunctory manner occasioning a miscarriage of justice as evident in the following further grounds;
 - i. The learned trial magistrate erred in law and in fact in addressing himself on extraneous issues not bone of the pleadings and evidence hence arriving at erroneous findings.
 - ii. The learned trial magistrate erred in law and in fact in failing to properly evaluate evidence adduced and thereby rendering a ruling that is unsound in principle and not a reflection of the record.
 - iii. The learned magistrate erred in law and in fact by failing to analyse evidence tendered and for failing to give reasons for the decision arrived at on each of the item prayers allowed in the ruling.
 - iv. The learned magistrate erred in law and in fact in relying on hearsay evidence of made by one Erastus Maina Muraya.
 - v. The learned magistrate erred in law and in fact in failing to appreciate that the burden of proof lay squarely on the applicant plaintiff and which burden of proof was not discharged.
 - h. The learned trial magistrate erred in law and in fact in failing to recognize and find that the appellant is prima facie the legal and registered owner of the suit properties i.e. L.R. No. Ndivisi/Muchi/2325, 6324 and 6467 in possession thereof and hence bound to suffer irreparably in the circumstances of the case i.e. violation to the appellants rights to property as per Article 40 of *the Constitution* of Kenya, 2010.
9. The appellant in this appeal seeks an order that the ruling of the trial magistrate delivered on 13/06/2024 be set aside and for the Respondent to bear the costs of the appeal.
 10. When this appeal came for directions, the parties agreed to have it canvassed by way of written submissions. The Appellant filed submissions dated 14/05/2025 while the Respondent filed submissions dated 12/06/2025.
 11. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by the parties and the court record generally and although the Appellant raised eight [8] grounds of appeal, I am of the opinion that the Appeal may be determined conclusively by considering one issue, to wit; whether the trial court properly applied the evidence on record and appropriately guided itself on the principles and applicable laws in making its determination.



12. This being a first appeal, my duty is to re-evaluate the evidence adduced, consider arguments and submissions by parties and the applicable law and make my own conclusions of the issues in controversy. In the case of *Mbogo and Another v. Shah* [1968] EA 93 where the Court stated: "...that this Court will not interfere with the exercise of judicial 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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."
13. The application which gave rise to the impugned judgment was anchored in the provisions of Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules as well as Article 159 of *the Constitution*. Order 40 Rule 1 of the Civil Procedure Rules provide as follows:
- 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.
14. The power given to the court under the above provision is discretionary in nature being an equitable remedy. 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 court to do real and substantial justice to the parties in a suit."
15. The Respondent's application before the lower court was for a temporary injunction against the Appellant pending the hearing and determination of the main suit and for the surrender of titles and executed transfer documents for L.R. No Ndivisi/Muchi/2325 and 6324.
16. The guiding principles upon which a court exercises its discretionary power in an application for interlocutory injunction was enunciated in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, where the court held that the 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 would not be adequately compensated by an award of damages. It was further held that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.
17. 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."

18. What calls for determination in this appeal before me is whether the lower court exercised its discretion properly when it allowed the interlocutory injunction application in favour of the Respondent in its entirety.
19. I have looked at the impugned ruling and I note that although the trial Magistrate did not set out all the conditions for the grant of the interlocutory injunction application before it, it simply considered the first condition that must be satisfied before a temporary injunction is granted. The trial court only considered the issue whether the Respondent had established a prima facie case.
20. As I stated in the preceding paragraphs, the Respondent accused the Appellant of fraudulently causing the registration of L.R. No Ndivisi/Muchi/2325, 6324 and 6325 in her name while the same were allegedly to be registered in the name of Teresia Wangui Muraya. This allegation was vehemently denied by the Appellant who claimed that she was entitled to be registered as proprietor of the said properties as a purchaser. In his application, the Respondent asserted that the parties herein had engaged in some out of court settlement and the Appellant had agreed to surrender the tiles to L.R. No Ndivisi/Muchi/2325 and 6324 and had in fact signed the relevant conveyance documents but later refused to surrender the said documents.
21. The trial court in determining that the Respondent had satisfied the requirement of a prima facie case had this to say;

“...the respondents having not denied that they had purchased the property on behalf of the applicant and the respondent having failed to explain why he signed the transfer forms in favour of the applicant if the applicant was not telling the truth.”

My consideration of the above finding of the trial court is that it misdirected itself, given the evidence on the record. While the trial court stated that the Appellant herein who was the Respondent did not explain the alleged signed transfer documents, the appellant at paragraph 9 of her replying affidavit stated that;

“That in particular response to paragraph 4 of the said supporting affidavit, I wish to state that am shocked at the level of deceit and outright falsehood being peddled by the said Erastus Maina Muraya. I have NEVER EVER executed any transferee documents as alleged... This can only be an act of forgery and/or fraudulent dealings on the part of the Plaintiffs/Applicant to wit this court is being invited to sanitize.”

22. In my considered view, the Appellant expressly denied executing the impugned transfer documents. Practice allows a party to file a further affidavit to respond to new matters raised in an affidavit filed by an opposing party. Despite this procedural opportunity, the Respondent did not file any rebuttal to the Appellant's affidavit evidence, particularly on what this Court considers to be the central issue underpinning the reliefs sought. The absence of a rebuttal leaves the Appellant's denial uncontroverted, and in law, unchallenged affidavit evidence stands as unrefuted and is deemed to be



true unless inherently implausible. I am therefore of the view that in arriving at its determination, the trial Court exercised its discretion erroneously and for that reason, I shall proceed to consider the evidence on record so as to arrive at my own independent decision.

23. On whether the Respondent established a prima facie case with chances of success, It is presumed that a party who holds a title deed to a property is prima-facie evidence that he/she is the owner of such property and has a good title against the world. The title deed in respect of the subject parcels i.e L.R. No Ndivisi/Muchi/2325 and 6324 are registered in the name of the Appellant herein. The Respondents argued that the properties belong to one Teresiah Wangui Muraya and that the Appellant's registration was fraudulent and that the Appellant had agreed to transfer the same but later reneged.
24. From my analysis, it is my considered view that the Applicant, being the holder of a title deed to the suit property is protected under the law in accordance with Section 24 and 26 of the Land Registration Act and ought to be granted an opportunity to defend her title at the full hearing while at this stage the substratum of the case which is the suit land ought to be preserved.
25. Secondly, the Applicant is required to demonstrate that irreparable injury will be occasioned to him if a temporary injunction is not granted. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR the court discussed what is meant by irreparable injury and it stated as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

26. Notably, the Respondent in his application has not demonstrated what loss he would suffer if the said orders are not issued. I therefore find that this limb had not been satisfied.
27. Thirdly, the Respondents had a duty to demonstrate that the balance of convenience tilts in his favour. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [supra], the concept of balance of convenience was defined as follows;

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”

28. Upon careful consideration of the materials placed before me, I am not persuaded that the grant of injunctive relief at this interlocutory stage represents the lower risk. The Respondent's prayer which seeks to restrain the Appellants from “encroaching” upon the suit properties is in substance a request for their removal from the land. Given that the Appellants are the registered proprietors of the subject parcels and thus enjoy prima facie ownership rights, granting such an order at an interlocutory stage would effectively amount to a mandatory injunction being issued before a full hearing on the merits.



Such a course would unduly prejudice the Appellants' proprietary interests and pre-empt the final determination of the dispute. Accordingly, the balance of convenience does not favour the grant of the injunctive relief sought.

29. With regard to the prayer seeking the surrender of the title documents and duly executed transfer instruments in favour of the respondent, I find that the grant of such relief at this interlocutory stage would be premature and legally untenable. It is trite law that interlocutory applications should not determine substantive issues that ought to be resolved at the main hearing. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [supra], the Court emphasized that final orders which have the effect of conclusively determining the rights of parties should not be granted at an interlocutory stage unless the case is exceptionally clear and free from dispute which is not the case here as the Appellant has disputed the genuineness of the purportedly executed transfer documents annexed to the application.
30. It is therefore my finding that the Respondent did not make a case for the orders sought in the application dated 18/04/2024. However, in view of the foregoing and considering the competing interest on the suit property, it is only fair and in the interest of justice that an order of status quo be issued. Consequently, a status quo order shall be issued as defined by the appellant in paragraph 11 of the replying affidavit sworn on 06/05/2024 be maintained. For avoidance of doubt the status quo is hereby issued as follows;
- a. there shall be no transaction whatsoever including but not limited to transferring any proprietary interest of the three parcels of land i.e L.R. No. Ndivisi/Muchi/2325, 6324 and 6467 and Teresia Wangui Nariah and John Murigi Kangere shall remain in possession and occupation pending the full determination of the substantive suit”
31. The upshot of my finding is that this appeal therefore succeeds and the same is consequently allowed in the terms stated above. Costs of this appeal shall be borne by the Respondent. The Deputy Registrar is hereby directed to return the file to the lower court for hearing and determination of the main suit.
32. It is so ordered.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF JUNE, 2025.

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mtunda H/B Mr. Masinde for the Respondent.

Appellant/Advocate-bsent

Bett C/A.

