



**Otieno v Onyango & 5 others (Civil Appeal E022 of 2024)
[2025] KEELC 5085 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 5085 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
CIVIL APPEAL E022 OF 2024
FO NYAGAKA, J
JUNE 19, 2025**

BETWEEN

MARY ANYANGO OTIENO APPELLANT

AND

GRADUS OKOKO ONYANGO 1ST RESPONDENT

RICHARD OUMA KOYWER 2ND RESPONDENT

TAIFA GS LIMITED 3RD RESPONDENT

THE LAND SURVEYOR HOMABAY SURVEY OFFICE 4TH RESPONDENT

THE LAND REGISTRAR 5TH RESPONDENT

THE HON ATTORNEY GENERAL 6TH RESPONDENT

(Being an appeal from the ruling and order of Hon. J. S. Wesonga PM delivered on the 31st May 2024 in the Principal Magistrate's Court at Homabay in ELC Case No. E010 of 2024, Mary Anyango Otieno v Gradus Okoko Onyango & 5 Others)

JUDGMENT

1. The appellant moved the trial court vide an application dated 4th March 2024 seeking a temporary injunction against the 3rd respondent from occupying and/or developing land parcel number Gem/Kotieno/Kowuor/1129 pending determination of the suit.
2. The 2nd respondent opposed the application by replying affidavit dated 2nd April 2024 in which he asserted that the suit parcel was a resultant subdivision of land parcel number Gem/Kowuor/Kotieno/372 that led to land parcels Gem/Kotieno/Kowuor/1128 & Gem/Kotieno/Kowuor/1129; that he had acquired the suit parcel from the deceased and that the suit parcel was registered in his name in 1994 and subsequently he disposed off the suit parcel to the 3rd respondent.



3. The 3rd respondent also opposed the appellant's application stating that he was the registered proprietor of the suit parcel having acquired it as a bona fide purchaser for value from the 2nd respondent.
4. The matter proceeded for trial and by a ruling delivered on 31/5/2024 the trial court dismissed the appellant's application.
5. Being dissatisfied with the said ruling/order, the appellant lodged this appeal vide the Memorandum of Appeal dated 31/5/2024 and raised five (5) grounds of appeal as follows: -
 - a. The Honourable Subordinate Court misdirected herself on the Application of principals for granting injunction.
 - b. The trial subordinate court ignored the fact that there are documents indicating that there was indeed swapping of the two parcels of land without participation of the Appellant.
 - c. The subordinate court ignored that the 3rd respondent is undertaking permanent development on the portion of land claimed by the Appellant.
 - d. The learned trial magistrate had failed to appreciate the loss and inconvenience that the actions of the 3rd respondent would occasion to the Appellant should the main suit be allowed.
 - e. The trial magistrate demonstrated that she has made up her mind on the direction and the outcome of the main suit.
6. The appeal was disposed of by written submissions. As at the time of writing this judgement, the appellant's submissions were still not on record. However, since submissions are a marketing language for parties to convince the court to decide in their favour the absence of the appellant's will not prejudice the determination of the merits of her case.
7. It was submitted on behalf of the 1st and 2nd respondents that the appellant never met the pre-requisites for grant of an interlocutory injunction and thus the trial court correctly dismissed her claim.
8. The 3rd respondent similarly submitted that the appellant failed to satisfy the pre-requisites for grant of an interlocutory injunction; that it was a bonafide purchaser having carried out the requisite due diligence and that the appellant had not approached the court with clean hands as she and her relatives had forcibly entered and trespassed on the suit land which it owns and proceeded to cause destruction thus was disqualified from seeking an equitable relief.
9. The Appellant's case before the trial court was that she was the administratrix of the estate of her deceased brother Okoth Adwar alias Carilus Okoth Adwar who died intestate and left behind the suit parcel registered in his name.
10. That the suit parcel is located on the lower side of Rangwe Oyugis road on the right side but that she was surprised to find the 3rd respondent developing the land and learnt that the 3rd respondent acquired the land from the 2nd respondent.
11. The appellant further advanced the case that she learnt that 2nd and 3rd respondent had swapped the suit parcel with parcel number Gem/Kotieno/Kowuor/1128 with the authority of the 1st respondent and thus the 3rd respondent ought to be stopped from any further developments on the suit property.
12. The 2nd respondent's case was that the suit parcel was a resultant subdivision of land parcel number Gem/Kowuor/Kotieno/372 that led to land parcels Gem/Kotieno/Kowuor/1128 & Gem/Kotieno/



Kowuor/1129; that he had acquired the suit parcel from the deceased and that the suit parcel was registered in his name in 1994 and subsequently he disposed off the suit parcel to the 3rd respondent.

13. On his part the 3rd respondent put forth the case that he was the registered proprietor of the suit parcel having acquired it as a bona fide purchaser for value from the 2nd respondent.

Analysis And Determination

14. I have considered the evidence tendered before the trial court and the submissions made before me. Having perused the grounds of appeal pleaded by the appellant, the only issue for determination is whether the trial court erred in declining to grant the appellant the temporary injunction sought.

15. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial afresh and come to its own independent findings and conclusions. See *Selles & Anor v Associated Motor Boat Co Ltd & Others* [1968] EA 123, if the matter proceeded to trial. And if the appeal arises from an interlocutory application where the trial court exercised its discretion, the role of the appellate court is well set out in the *Mbogo & Another v Shah* [1969] EA., 93 decision and the subsequent ones as I give one or two below. The Appellate court should not interfere with the discretion of the trial court unless the trial court misdirected himself or failed to take into account matters he ought to have taken into account and thereby arrived at a plainly wrong conclusion, or his decision was one wherein the judicial officer was just a joker by giving a fanciful rather than a carefully reasoned or analysed one.

16. In *Mbogo & Another v Shah* (1969) EA 93, it was held, *inter alia*, that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”

17. Also, more recently, the Supreme Court of Kenya, in [*Apungu Arthur Kibira v Independent Electoral and Commission Boundaries & 3 Others*](#) [2019] eKLR, held, at paragraph 39 of the judgment,:

“We reiterate that in an appeal from a decision based on an exercise of discretionary power, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir* (2010) NZSC 112; (2011) 2 NLRI (Kacem) where it was held para 32]:

“In this context a general appeal is to be distinguished from an appeal against the decision made in exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter:

- (i) error of law or principle;
- (2) taking account of irrelevant considerations;
- (3) failing to take account of a relevant consideration; or
- (4) the decision is plainly wrong.”



18. Thus, the principles upon which a court exercises its discretion in applications for a temporary injunction are now settled. In *Giella v Cassman Brown & Co. Ltd.* [1973] EA 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer an irreparable injury that cannot be adequately compensated by an award of damages. 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.
19. As stated above, for an applicant for a temporary injunction to succeed, he must demonstrate that she has a prima facie case against the respondent and that she stands to suffer irreparable harm unless the injunction is granted.
20. In the case of *Mbogo v Shah* [1968] EA 93 with regard to when an appellate court can disturb the exercise of discretion of a lower court. It was said that the appellate court ought not to interfere with the exercise of such discretion unless the appellate court is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and occasioned injustice.
21. In the instant case the Appellant claims that the 2nd and 3rd respondents swapped titles resulting in the 3rd respondent acquiring the suit parcel which he continues to develop to her detriment.
22. I note that the suit parcel is registered in the name of the 3rd respondent whose uncontroverted evidence in the affidavit is that he acquired it as a bona fide purchaser from the 2nd respondent. This testimony is corroborated by that of the 2nd respondent who gave an history of how the transaction over the suit parcel evolved. Where there is evidence of such a nature which is uncontroverted it leaves establishes the chain of legal ownership to the exclusion of any other claimant and firmly lays the foundation for the court to hold that the registered owner's title is not impeachable. This leads this Court to look at the legal basis for such a finding.
23. It is trite that a Certificate of title is conclusive evidence of ownership unless the contrary is proven through calling of evidence. The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#), 2012. Section 24(a) provides:
 - “ 24. Subject to this Act(a)The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
24. Section 25(1) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. In the instant case it is not in doubt that the 3rd respondent is the registered owner of LR Number Gem/Kotieno/Kowuor/1129.
25. Further, Section 26 (1) of the same [Act](#) provides that,
 - “(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.”

26. Thus, where one holds a title and an adverse party challenges its genuineness, the basis of a successful challenge is stipulated in the provision above. Herein, the Respondent has title in his name and is in possession of the land. That is the starting point in analyzing whether the Court considered all facts before refusing the injunction.

27. The court in the case of *Edwin Kamau Muriu v Barclays Bank of Kenya Ltd* Nairobi HCCC No. 1118 of 2002, held that:-

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria”

28. Based on the above, the question that begs an answer is whether the Appellant had satisfied the criteria established for grant of a temporary injunction. To answer this question, the Court has analyzed the evidence available and found that the 3rd respondent is the registered proprietor over the suit land. In fact, this issue is not in dispute. As a proprietor of a suit property, the owner enjoys the rights of a proprietor as provided by Sections 24 and 25 of the *Land Registration Act*.

29. While the appellant claims that the 3rd respondent continues to carry out development on the suit property and thus sought interlocutory orders, this Court finds and holds that this Order if granted on the interim, would have the effect of limiting the absolute rights of the registered owner of land contrary to the provisions of Article 40 of the *Constitution*. The Onus was on the appellant to show and prove to the Court that she has some interest in the suit land as its proprietor or that the said parcel was in danger of misuse, disposal and/or alienation which she failed to do. Put differently, it was upon the appellant to show that he had other material or evidence that is of such a weight as to challenge the owner’s rights both prior to and at the determination stage as the one which the trial magistrate was at. The Appellant failed to establish a prima facie case for the grant of the injunction.

30. In the case of *Kenya Commercial Finance Company Limited v Afraba Education Society & Others*, Civil Appeal No 142 of 1999 (2001) IEA86 the Court held that: -

“The judge should address himself sequentially on the conditions for granting of an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title’s dispute and therefore has not demonstrated that it has a prima facie case with probability of success, no interlocutory injunction would be available”

31. The second limb for determination in the grant of a temporary injunction is whether the appellant had established that they would suffer irreparable loss which cannot be adequately compensated by an award of damages.



32. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal held that:

“If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

33. The said Court went on to state that:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

34. In the instant Appeal, even if the appellant had established a prima facie case, which she had not, the Court is of the considered view that any loss suffered by the appellant could be compensated by way of damages.

35. Guided by the definition of irreparable damage in the *Nguruman Limited case* cited above, the Court finds that the appellant has failed to establish the element of irreparable damage necessary for the granting of a temporary injunction.

36. Therefore, on the balance of convenience, the Court is not in doubt that the appellant has also failed and did fail to make a case for irreparable loss in any case the appellant can be adequately compensated by way of damages if the trial Court finds in her favour after the substantive hearing.

37. The upshot of the above is that the appellant has failed on a balance of probability to establish all the elements necessary for the grant of a temporary injunction as outlined in the case of *Giella v Cassman Brown (supra)*.

38. Consequently, this Court finds and holds that Appellant’s Appeal brought vide the Memorandum of Appeal dated 31/5/2024 is not merited. The Appeal is dismissed entirely.

39. Costs are awarded to the Respondents.

40. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 19TH DAY OF JUNE 2025.

HON. DR. IUR NYAGAKA,



JUDGE.

In the presence of,

Nyauke Advocate for the Appellant.

Mutugi Advocate for the 3rd Respondent

Ms. Kimberly Advocate for the Respondent

