



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. 59 OF 2019**

**JOHN MWANGI KAMAU.....APPELLANT**

**VERSUS**

**DAVID MWAURA NDURUHU.....RESPONDENT**

*(Being an Appeal from the ruling of Honourable B. N. IRETI Principal Magistrate delivered on 10<sup>th</sup> November, 2017 in Thika CMCC No. 59 of 2017)*

**JUDGEMENT**

The Appellant herein **John Mwangi Kamau**, was the Defendant/ Respondent in **Civil Suit No. 59 of 2017**, at **Thika Chief Magistrate's Court**. The Respondent herein **David Mwaura Nduruhi** was the Plaintiff/ Applicant in the above stated suit. The Plaintiff/(Respondent) had via a Notice of Motion Application dated **30<sup>th</sup> January 2017**, sought for the following orders against the Defendant (Appellant) herein:-

- a) THAT pending the hearing and determination of this suit this Honourable Court be pleased to restrain the Defendants their servants, agents Chador Auctioneers from distressing for rent, proclaiming attaching evicting or in any way howsoever from interfering with the Plaintiffs quiet enjoyment and peaceful occupation of Plot No. 4953/34/IV within Thika Municipality (the suit premises).*
- b) THAT the Respondent be condemned to pay the costs of the Application*
- c) That the costs of the Application be provided for.*

The Application was premised on the grounds that the Defendant (Appellant) had caused **Chador Auctioneers**, its agents to illegally levy distress on the Plaintiff's (Respondent) property and thus caused his goods to be distressed for a purportedly levying of unpaid rent totaling to **Kshs. 1,200,000/=**. That the Plaintiff has always been in possession, having bought the suit property from **Peter Kabaru Muiruri** and **Jane Wambui Kabaru** in **February 2009**. Further that the Defendants actions are unlawful and meant to intimidate the Plaintiff. Further that the hardship that would be caused if the Court does not protect the Plaintiff is disproportionate to the interest the Respondents are seeking to secure in the illegal distress. That unless the Application is allowed, the Applicant would suffer irreparable damages as the Auctioneer was likely to sell the goods. Further that the Auctioneers were in the process of evicting the Plaintiff.

The Application was supported by the Affidavit of **David Mwaura Nduruhi**, who reiterated the contents of the grounds in support of the Application. It was his contention that he has never been the Defendant's/Applicant's tenant as he runs his business on the suit property. He averred that the levying of distress was unwarranted and unlawful and that it would be equitable if the Court grants the Orders sought.

The Application was opposed by the Defendant (Appellant) who filed a Replying Affidavit sworn on **20<sup>th</sup> February 2017**, and averred that the suit property was part of the Estate of **John Muiruri Kabaru (Deceased)**. He averred that upon Confirmation of the Grant, in **Succession Cause No. 2046 of 2009**, the suit property was distributed wherein **Teresiah Waangui Kariuki** was to get 50 % and the balance was to be shared equally amongst **Francisca Nyambura**, **Ann Waithera Muiruri** and **Teresiah Nyambura Kariuki**. He further averred that the alleged vendor, **Peter Kabaru Muiruri** passed in the year **2009**, before conclusion of the Succession matter. He further averred that the alleged sale did not include the Administrators of the Estate of the late **John Muiruri Kabaru**, who was the registered owner of the suit property. He further averred that the Plaintiff (Respondent) has not provided evidence that he paid for the suit property and that the Contract is valid.

He alleged that on **7<sup>th</sup> June 2013**, he bought the suit property from the beneficiaries for **Kshs.55,000,000/=** and upon completion of payment, the suit property was registered in his name and a Certificate of title issued. He further averred that the Plaintiff (Respondent) has never been a bonafide purchaser of the suit property and has remained a tenant. He averred that upon being registered as the owner, he informed the tenants of the monthly rent and the Plaintiff (Respondent) never objected to the same. It was his contention that had the Plaintiff been the Landlord, he would be collecting monthly rent from all the tenants. Further that he sought **vacant possession** to enable him construct an ultra-modern building and he therefore gave **Notice** to all tenants. That despite being served, the Plaintiff (Respondent) did not

file any Reference at the **Busines Premises Rent Restriction Tribunal (BPRT)**. That he was granted eviction orders against the tenants who failed to vacate the premises. He also averred that he has engaged the services of a contractor and that he is incurring hefty penalties and that the Plaintiff (Respondent) has **only** filed the instant suit to evade payment of rent. It was his contention that the Application is irregular and it is in the interest of justice that the Application is dismissed.

The Plaintiff (Respondent) filed a Supplementary Affidavit sworn on **16<sup>th</sup> March 2017**, and denied being a tenant of the Defendant (Appellant) and reiterated that he was the owner of the suit property and had enjoyed quiet possession since 2009. It was his contention that the **distress** levied on his land was illegal and that if the Defendant(Appellant) bought the suit property in **2013**, he would have moved the Court for vacant possession. He further averred that he had filed a suit being **ELC 17 OF 2014 David Mwaura Nduruhu versus Jane Wambui Kabaru & Teresiah Nyambura Kariuki**, where he was seeking for **Specific Performance** over the suit property. He denied ever receiving any document/letter from the Defendant(Appellant) indicating that he was a tenant, and further averred that when the Defendant (Appellant) received **ex parte** orders against him, he thereafter moved the Tribunal for stay orders.

The Application was canvassed by way of written submissions and thereafter the trial Magistrate delivered his determination on **10<sup>th</sup> November 2017**, and allowed the Plaintiff's (Respondent's) Application and held that:-

***"I find that the Plaintiff/ Applicant has met the conditions set out in the celebrated case of Giella...Vs...Cassman Brown & Co LTD (1973) as he has shown to have bought the suit premise and has been in quiet enjoyment ever since. He has also shown that part payment of the purchase price was paid to the vendor in 2009.I the premises I find the Applicant having merit, the same is allowed as prayed with costs to the Respondent."***

The Appellant was aggrieved by the decision and by a Memorandum of Appeal dated **2<sup>nd</sup> October 2019**, the Appellant herein brought this Appeal and sought for orders that;

- a. THAT the Ruling delivered by the Principal Magistrate B.N IRERI on 10<sup>th</sup> November 2017, be set aside.***
- b. THAT the Appeal against the said Ruling be allowed and the Respondent be condemned to pay costs of the proceedings in this Court be provided.***
- c. THAT any other relief as the Honourable Court may deem fit and just to grant in the circumstance of this Appeal.***

The Appeal is based on the grounds that;

- 1. The Learned Magistrate erred in law and in fact in not finding that the Respondent had not met the threshold for issuance of restraining orders as laid down in the famous case of GIELLA ...Vs...CASSMAN BROWN.***
- 2. The Learned Magistrate erred in fact and law by issuing restraining orders against the Appellant herein over plot No. 4953/34/1Y, within Thika Municipality.***
- 3. The learned Magistrate erred in Law and in Fact in failing to consider the submissions and weighty evidence proffered by the Appellant herein during the hearing of the Application.***
- 4. The learned Magistrate erred in law and infact in failing to note that indeed the Respondent herein did not proof ownership of the property despite the claim that he had bought the property from one of the beneficiaries of the Estate of the deceased owner John Muriuki Kaburu.***
- 5. The Learned Magistrate erred in law and in fact in determining the matter which he had no jurisdiction making the proceedings a nullity.***
- 6. The learned magistrate erred in law in making a finding that the sale agreement produced by the Respondent herein was sufficient whereas both parties produced their respective sale agreements but only the Appellant has the certificate of title to the suit property.***
- 7. The Learned Magistrate erred in law in not making a finding that the Respondents herein bought the property from the beneficiary whilst there was no grant of letters of Administration neither was there confirmed grant which is a violation of the law of succession in Kenya.***
- 8. The Learned Magistrate erred in Law in not making a finding that the Respondent herein was the only illegal tenant left on the property whereas all the tenants had left the property as required.***

The Appeal was canvassed by way of written submissions.

Counsel for the Appellant, **Njoroge Kugwa & Company advocates**, submitted that the trial magistrate erred both in law and in fact in issuing the restraining orders against the appellant herein whereas the Respondent had not met the threshold for grant of injunctive orders as was set in the case of **Giella vs Cassman Brown & Co. Ltd 1973 E.A.** It was the appellant's submissions that the only evidence adduced by the Respondent at the lower court to show his interest over the suit property is the **sale agreement** between himself and **Peter Kabaru Muiruri**, one of the beneficiaries of the **Estate of John Muiruri Kabaru**, which sale agreement was executed on **20<sup>th</sup> February 2009**, before the said Estate had been administered and devolved. Further that the trial Magistrate failed to take into consideration the weight of the

averments made by the Appellant in his **Replying Affidavit**, in opposition to the said Notice of Motion. It was also submitted that the appellant had a **Certificate of title** in his favour over the suit property, whereas the Respondent only produced a sale agreement which was signed before the **Succession Cause** had been concluded and the vendor was not the administrator of the said estate.

Therefore, the Respondent failed to establish that he had a **prima-facie** case with probability of success at the trial. Further that the Respondent did not prove that he could suffer irreparable loss which cannot be compensated by an award of damages as the alleged purchase price he paid is ascertainable. That the Respondent cannot claim ownership of the suit property because he is a tenant who is in default of rent of over **Kshs.2,000,000/=** which continues to accrue. Further since the Respondent alleged that he bought the suit property for **Kshs.10,500,000/=** this amount is ascertainable and quantifiable and is thus recoverable.

It was also submitted that the learned Magistrate erred in law and in fact by not considering the amount of evidence adduced in support and opposition to the Notice of Motion at the lower court. That the only evidence by the Respondent was the **sale agreement** between himself and the alleged beneficiary of the Estate of **John Muiruri Kabaru**, whose status in regard to the Estate is unknown. Whereas the sale agreement was made in **2009** and the Estate was devolved in the year **2011** and the said vendor was not beneficiary of the suit property. Further that the Appellant bought the suit property in the year **2013**, from the beneficiaries who obtained the said property vide **Succession Cause No. 2046 of 2009**, Nairobi. The Appellant submitted that he is in possession of the original title to the suit property and that the suit property is now registered in his name.

The Appellant further submitted that the learned Magistrate had no **pecuniary Jurisdiction** to deal with the matter and issue the impugned orders. That the suit property was valued at the **Kshs.55 million** and not **10,000,000/=** as alluded by the Respondent. Thus the Learned Magistrate did not have Pecuniary Jurisdiction and matter was out of his purview. It was also submitted that Jurisdiction is everything and without it, the Court has no power to move even one step.

It was the Appellant's further submissions that the Learned Magistrate erred in fact and in law by not finding that the Respondent was trying to enforce an illegal contract and that the Respondent is the only tenant left on the property whereas all the others have vacated after being served with Notices to vacate. Therefore, the Respondent did not deserve the orders made and the orders themselves are a nullity and they were issued by a Court without Jurisdiction. The Appellant urged the Court to set aside the said orders issued by the learned Magistrates and further dismiss the said application with costs.

On his part, the Respondent urged the Court to dismiss the instant appeal. He submitted that he purchased the suit property from **Peter Kabaru Muiruri** and **Jane Wangui Kabaru** on **20<sup>th</sup> February 2009** and has always been in quiet possession. He further submitted that he has never been a tenant of the Appellant and the issue of this tenancy is yet to be determined by the Business Premises Rent Tribunal (BPRT).

It was his submissions that he met the threshold for grant of Interlocutory Injunctive Order as stated in the case of **Giella Vs Cassman Brown**. He relied on the case **Nguruman Ltd vs Jan Bonde Nielsen & 2 others (2017) eKLR** where the Court held:-

***“There are three pillars on which rest the foundation of any order injunction, interlocutory on permanent. It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially .....*”**

It was his further submissions that the genesis of the application for interlocutory injunction in the subordinate Court was due to the Appellant illegal levying of distress on the Respondent's goods and threatening to evict him from his premises. Further that the learned Magistrate granting the interlocutory injunction appreciated that the said illegal action would cause the Respondent irreparable harm by way of commercial losses, which would not be compensated by an award of damages. He relied on the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & Another (1990)eKLR** where the Court held:-

***“To succeed in an Application for Injunction, an Applicant must not only make full and frank disclosure of all relevant facts to the just determination of the Application but must also show he has a right, legal on equitable which require protection by injunction.”***

The Respondent further submitted that he established that he had interest in the suit premises having paid the purchase price to the Vendor and having been in quiet possession of the suit premises since 2009. Therefore, the learned Magistrate was correct in his analysis of fact and law and cannot be faulted.

Further that the Magistrate exercised his discretion judiciously before granting the interlocutory orders. He relied on the case of **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** where the court

held:-

***“It has been stated time and again that although the court has jurisdiction to grant an injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases .... We would also add that, save in the clearest of case, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross examination of witnesses must not be sacrificed or substituted by a summary hearing.”***

It was his further submissions that since the Respondent presented a sale agreement, that was sufficient to show that he had an interest over the suit premises, that warranted protection by the Court pending the hearing and determination of the suit.

On the issue of jurisdiction, the Respondent submitted that the same was not raised at the Subordinate Court during the hearing of the application and it cannot be raised now. Further, since the Respondent bought the suit property for **Kshs.11,000,000/=**, then he had filed the suit in the appropriate court and the learned Magistrate had no obligation to look further.

Again since there were competing claims, the suit could not be conclusively determined at the interlocutory stage. The Respondent urged the court to dismiss the instant appeal with costs and the Ruling delivered on **10<sup>th</sup> November 2017** in **CMCC NO. 59 OF 2017** be upheld.

This Court has considered the Appeal herein, the Record of Appeal in totality and the rival submissions. As the Court embarks on determination of the instant Appeal, it will take into account that the impugned Ruling that was delivered by the learned Magistrate on **10<sup>th</sup> November 2017**, involved exercise of Judicial discretion. The Court will further take into account that it will not interfere with the discretion of the lower court unless it is satisfied that the lower Court did misdirect itself both in law and facts. See the case of **Mbogo & Another vs Shah (1968 EA 93**, where the Court held that:-

**“..... this court will not interfere with the exercise of discretion by an inferior Court, unless it is satisfied that its discretion is clearly wrong because it has misdirected itself or because it has acted on matter which it should not have acted on because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”**

Further, in consideration of this Appeal, the Court will be alive to the fact that an injunction is an equitable relief granted at the discretion of the Court. See the case of **Charter House Investments Ltd vs. Simon K. Sang and other, Civil Appeal No. 315 of 2004** where the Court held:-

**“Injunction is an equitable and discretionary remedy given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of temporary injunction by Court of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the Applicant. It is a matter of sound judicial discretion in the exercise of which the Court balance the conveniences of the parties and the possible injuries to them and to third parties.”**

Thus, the court will only interfere with the discretion of the learned Magistrate’s Judicial discretion if it is satisfied that he did not exercise the said discretion judiciously. Without inventing the wheel, the threshold for the grant of interlocutory order is the one that was set out in the case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**. These principles are:

**“first the applicant must show a prima facie-case with probability of success; second an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and thirdly, if the Court is in doubt, it will decide the application on the balance of convenience. See the case of Ngurumani Ltd vs Jan Bonde Nielson & 2 others (2014) eKLR.”**

Taking into account the above principles, the Court will then evaluate the available evidence on record to determine whether the learned Magistrate properly applied the above test for grant of Interlocutory Orders. In arriving at his decision, the trial Magistrate evaluated the evidence and held as follows:-

**“I find that the Applicant and the Respondent both claim to be proprietors of the suit premises, both of them having purchased the same from different individuals. The Applicant purchase the land from one Peter Kaburu Muiruri who passed away in 2009. The Defendant argues that he had no capacity to sell the land as the succession case to the Estate of the deceased John Muriuki Kaburu had not been filed.”**

**This in my considered view is an issue which cannot be adequately be considered in an application. It will call for full evidence to be adduced by calling of witnesses.**

**The Respondent claims to have purchased the land from the beneficiaries of the Estate of the deceased John Muriuki Kaburu. I also find that the Court may have to call the said named vendor to determine whether indeed the agreement lead to the alleged sale was properly executed by all the alleged parties. The Plaintiff avers that he purchased the suit property in 2009 and annexed a sale agreement and he further states that he has been in quiet enjoyment of the suit property ever since. This is not disputed by the Defendant/Respondent who argues that the vendor did not have capacity to sell the said suit land to the Plaintiff/Applicant herein ..... I find that the Plaintiff/Applicant has met the conditions set out in the celebrated case of Giella vs Cassman Brown Co. Ltd. (1973) as he has shown to have brought the said premises and has been in quiet enjoyment ever since.”**

It is not in doubt that in granting an interlocutory relief which is a discretionary remedy, the Court is guided by the basis of evidence and sound legal principles. See the case of **Njenga vs Njenga 119911 KLR 401**.

The Court take cognizance of the fact that it is not the duty of the Court while considering Interim application for injunction to make final determination based on conflicting affidavit evidence.

Now turning to the grounds of Appeal, the Court finds that the first issue for consideration is whether the trial Magistrate properly held that the Respondent herein met the threshold for grant of injunctive relief.

The Respondent had alleged that he purchased the suit property from one **Peter Kaburu Muiruri** in **2009**. He attached a sale agreement to that effect, signed on **20<sup>th</sup> February 2009**. In the sale agreement, it was clearly stated that the vendor, **Peter Kaburu Muiruri** was one of

the beneficiaries of the Estate of **John Muiruri Kabaru**. It was not stated that the vendor was the Administrator of the Estate. The Appellant on his part alleged that he purchased the suit property from the beneficiaries of the Estate of **John Muriuki Kabaru** in **Succession Cause No. 2046 of 2009**. From the annexures in the Appellant's Replying Affidavit to the Notice of Motion at the lower Court, **Letters of Administration** over the said Estate were issued on **14<sup>th</sup> June 2010** to **Teresia Nyambura Kariuki** and **Philomena Njoki Muiruri**, as Administrators of the Estate of **John Muiruri Kabaru alias Kabaru Muiruri**. This therefore meant that by the time the sale agreement that the Respondent herein was relying on was drawn, the estate had no administrator and the said Vendor **Peter Kabaru Muiruri** was not the administrator of the said estate. Did he have the capacity to sell?

Further from the Confirmed Grant issued on **6<sup>th</sup> September 2011**, the suit property Thika Municipality No. **4953/IV/34**, was devolved to **Teresa Wangui Kimiri, Francisca Nyambura, Ann Waithera** and **Teresia Nyambura Kariuki**. The above beneficiaries later sold the suit property to the Appellant herein vide a sale agreement dated **7<sup>th</sup> June 2013**. The suit property was allegedly purchased at **Kshs.55,000,000/=**. Further, there is a Certificate of title annexed to the Appellant's Replying Affidavit sworn on **20<sup>th</sup> February 2017**. The said Certificate of title shows the suit land was transferred to **John Mwangi Kamau** on **4<sup>th</sup> July 2016**. This fact was not disputed by the Respondent at the lower court.

Though the trial Magistrate held that the Respondent had show that he was in possession of a sale agreement executed in **2009**, that was before the estate had been administered and before the suit property had been distributed as per the **Succession Cause No. 2046 of 2009**.

The Appellant is in possession of a **Certificate of title** and he availed the trail of his acquisition of the same. Therefore, it was evident that the sale agreement which is not confirmation of ownership of a property could not be held at higher position than a Certificate of title whose root could be traced and is not disputed. Even without going to the final or definitive determination of the case, **Section 26(1)** of the **Land Registration Act** is very clear on ownership of property and the Certificate of title.

*“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.”*

Further **Section 24(a)** of the said **Land Registration Act** empowers a proprietor of such land to enjoy all the rights appurtenant to the said ownership. It states as follows:-

*“Interest conferred by registration Subject to this Act—*

*(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;*

These rights can only be curtailed or defeated by operation of law as provided by **Section 25 (a)** of the same Act.

*“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

Therefore, from the available evidence before the learned Magistrate, it is evident that the Respondent did not establish a prima-facie case with probability of success.

On whether the Respondent who was the Applicant at the lower Court, would suffer irreparable loss which cannot be compensated by an award of damages, it is evident that **he** had been served with a **Notice** by the Appellant to the effect that the Appellant was the new owner of the suit property. He did not respond to the said Notice. He did not file a Reference to the Business Premises Rent Tribunal. He only moved to Court when the Appellant obtained Orders from Business Premises Rent Tribunal and later tried to enforce them through the court process. Then the Respondent filed **Thika CMCC No. 59 of 2017**, and sought for injunctive orders. The Respondent alleged that he purchased the suit property for about **Kshs.10,500,000/=**. That amount is ascertainable and quantifiable and can be recoverable or compensated by way of damages. It cannot be said that the Respondent will suffer irreparable loss which cannot be recoverable by way of damages.

The third limb was if the Court is in doubt to decide on a balance of convenience. It is evident that the Appellant herein is the registered owner of the suit property. He did produce evidence to show the trail of his acquisition of the suit property, and thus the root of his title is traceable. The Respondent only relied on a sale agreement which was signed before the estate of **John Muiruri Kabaru** had been administered and distributed. Even without making final determination of the disputed facts herein, the Court finds that the balance of convenience tilts in favour of the title holder who is the Appellant herein.

Having analyzed the available evidence and the principles set out for grant of injunctive orders, the court finds that the Respondent herein did not meet the threshold for grant of injunctive orders as set out in the case of **Giella vs Cassman Brown (supra)**.

On the **grounds No. 3 and 4** of the Memo of Appeal, the Appellant submitted that the Learned Magistrate erred in law and in fact by not

considering the amount of evidence given by the Appellant but gave weight to the sale agreement dated 2009. It is clear from the findings in the case of **Njenga vs Njenga (supra)**, the court held that the injunctive relief being a discretionary remedy is granted on the basis of evidence and sound legal principles. It is very clear that both the Appellant and Respondent availed their documents of ownerships of the suit property. The Respondent produced a sale agreement which was executed by one of the beneficiaries before the Estate of **John Muiruri Kabaru** had been administered and distributed. The appellant produced a sale agreement executed by the beneficiaries of the estate of the said **John Muiruri Kabaru** after the suit property was devolved to them after the Confirmation of Grant. This fact is not disputed by the Respondent. Further there is a transfer of ownership of the suit property in favour of the Appellant issued on **4<sup>th</sup> July 2016**, and the Respondent has also not disputed the same. However, the trial Magistrate found and held that the Respondent had shown that he purchased the suit property in **2009**, via the annexed sale agreement. Further the learned Magistrate did not expound why he chose not to rely on the recent purchase by the Appellant after Confirmation of Grant, but relied heavily on a sale agreement of **2009**, before the Estate of **John Muiruri Kabaru** had been distributed.

It is therefore evident that the trial Magistrate erred in law and in fact by not considering the amount of evidence given by the Appellant and his submissions and gave weighty consideration to the sale agreement produced by the Respondent. Therefore, for the above reasons, the learned Magistrate did not exercise his discretion properly before granting the interim orders.

Consequently, this court has no option but to interfere with the exercise of discretion by the lower court in grant of injunctive relief that had been sought by the Respondent herein.

On **ground No. 5** that the trial Court did not have pecuniary jurisdiction to issue the orders sought, the Court finds that the Respondent has argued that the said issue of Jurisdiction was not raised at the lower court at first instance and cannot be raised now. However, it is trite that Jurisdiction goes to the root of the case and can be raised at whatever stage of the trial even on Appeal. See the case of **Kenya Ports Authority ...Vs... Modern Holdings [E.A] Limited [2017] eKLR** where the Court of Appeal held that;-

*We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:*

*“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself*

*- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”*

It is evident that when the Appellant filed his Replying Affidavit, one of the annexures was the sale agreement which showed the suit property was allegedly sold at **Kshs.55,000,000/=** to the Appellant. Clearly, the trial Magistrate did not have pecuniary jurisdiction to deal with a suit property of such value. Therefore, the trial court had no jurisdiction to issue orders where it had no pecuniary jurisdiction. Orders issued by a Court without Jurisdiction are a nullity. The Appeal ought to succeed on that ground alone.

On **grounds No. 6, 7, & 8**, the Court finds that the trial Magistrate could not delve into the substantive issues of the trial and he was not supposed to make a definitive findings based on the affidavit evidence. If th trial Magistrate was called to make findings on these competing claims then, he would have conclusively determined the matter at the Interlocutory stage.

However, the Appellant has on the balance shown evidence of having purchased the suit property from the beneficiaries of the suit property as per the **Confirmed Grant** annexed to the pleadings. He has a title to the suit property and he gave **Notice** to the Respondent to the effect that he was now the new owner of the suit property.

This Court finds that the trial Magistrate wrongly exercised his discretion by issuance of the Interlocutory Orders of injunction. Further, the order itself is a nullity as it was issued by a Court without pecuniary Jurisdiction and therefore the discretion was not exercised Judiciously.

For the above reasons, this Court finds that the learned trial Magistrate erred in granting injunctive and restraining orders vide the Ruling delivered on **10<sup>th</sup> November 2017**.

Accordingly, this court allows the Appeal and hereby entirely set aside the said Ruling delivered on **10<sup>th</sup> November 2017**, by the subordinate Court in **Thika CMCC No. 59 of 2017**, and all consequential orders thereof.

Further the court dismisses the said **Notice of Motion Application** dated **30<sup>th</sup> January 2017**, filed at the lower Court in **Thika CMCC No.59 of 2017** with costs to the Appellant, as the Respondent failed to meet the threshold for grant of injunctive orders. The Respondent will bear the costs of this Appeal.

It is so ordered.

**Dated, signed and Delivered at Thika this 1<sup>st</sup> day of October 2020**

**L. GACHERU**

**JUDGE**

**1/10/2020**

**Court Assistant - Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgement** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference- Microsoft teams Platform**

**None appearance for the Appellant (though aware of the judgment date)**

**None appearance for the Respondent**

**L. GACHERU**

**JUDGE**

**1/10/2020**