

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ELCL APPEAL NO. E002 OF 2025

MUSALIA MUDAVADI..... APPELLANT/APPLICANT

VERSUS

NASIBU HOLDINGS LTD1ST RESPONDENT

(Being an appeal against the Ruling and Orders of Hon. Agonda (PM) given on 28th January 2025 in Vihiga MCELC No. E055 OF 2024)

JUDGEMENT

Background

A brief background of the appeal herein as can be gathered from the record of appeal filed and dated 28th May 2025 is that the appellant is the 1st Defendant in an ongoing suit namely; VIHIGA SPMC ELC CASE NO. E055 of 2024 in which the appellant together with 3 others are sued by the Respondent over a parcel of land known as NORTH MARAGOLI/BUGINA/1005 (the suit land herein). The respondent seeks various orders against the appellant inclusive of a declaration that the land belongs to it and that it is entitled to exclusive and unimpeded right of possession and occupation thereof, a declaration that the appellant is not entitled to remain on the suit property and that registration of the suit land in the name of the appellant on 3rd July 2024 was un-procedural, illegal and should be declared null and void.

Together with the plaint the Respondent filed an application under certificate of urgency vide the Notice of Motion dated 23rd September 2024.

The record shows that when the application was placed before the trial court on 24th September 2024 for directions on disposal thereof, the trial court issued a temporary injunction compelling the appellant and the other defendants to grant immediate possession of the suit land to the plaintiff (respondent herein) pending hearing and determination of the application. The court then gave a date for hearing of the application.

The record shows that in response to the plaintiff's (respondent's) application date 23rd September 2024, the appellant filed a Replying Affidavit sworn by Nelson Chagenya on 14th October 2024 outlining the history of the appellant's acquisition of title and possession of the suit land.

In addition, the appellant also filed his own application dated 2nd October 2024 under certificate of urgency seeking for orders that; pending the hearing and determination of the application inter partes, the ex parte orders of Hon. J. A. Agonda PM issued on 24th September 2024 be set aside, an order of injunction be issued restraining the plaintiff/respondent by itself, its directors, shareholders, employees, servants, agents or anyone acting on its behalf from accessing, entering onto any part or trespassing, tilling, constructing, sub-dividing or in any other manner interfering with the 1st Defendant's/appellant's land known as NORTH MARAGOLI/BUGINA/1005, an order be issued directing the officer Commanding Station (OCS) of Mudete police station to enter upon the 1st defendant's/appellant's land known as NORTH MARAGOLI/BUGINA/1005 and remove all structures constructed thereon by the plaintiff/Respondent agents, an order be issued directing the Agricultural extension officer for Sabatia sub-county to enter onto L.R North Maragoli/Bugina/1005 and assess and quantify the damage caused to the growing crops on the land by the plaintiff's /respondent's agents and file a report in court, pending the hearing and determination of the application an

order of injunction be issued restraining the plaintiff/respondent by itself, its directors, shareholders, employees servants, agents or anyone acting on its behalf from accessing entering onto any part of interfering with the 1st defendants/applicant's land known as NORTH MARAGOLI/BUGINA/1005 and that the plaintiff/respondent be condemned to pay the costs of this application.

The record shows further that the respondent's reply to the appellant's application dated 2nd October 2024 was vide the Replying Affidavit sworn by Oliver Kehodo Osengo on 28th October 2024 wherein he deposed, inter alia, that the respondent vide its application dated 23/9/2024 disclosed all material facts concerning its ownership of the suit property and that it demonstrated to the court the callous, illegal and high-handed manner in which the respondent used brute force to illegally wrestle possession of the suit property from the respondent. That the suit challenged the validity of the appellant's title. That the court did not determine the suit at the interlocutory state.

That the respondent's application for joinder in VIHIGA PMC SUCC CAUSE NO. 399 OF 2023 had no bearing on the temporary relief granted by the trial court. That it was the appellant who uprooted and razed the crops growing on the land including a chain link fence that had been erected by the respondent. That the appellant had not planted any maize on the suit land. That the respondent had been in occupation of the suit land since the year 2012. That the respondent did not obtain the injunctive orders through any misrepresentations as alleged. That it was in the interest of justice that the orders sought by the appellant be denied.

The record shows that the two applications were heard together by way of written submissions. That the court subsequently delivered its ruling dated 28th January 2025 in respect of both applications vide which it found that the respondent's

application had merit and granted the orders sought. The court found that the appellant's application lacked merit and dismissed it.

The appeal

Aggrieved by the ruling dated 28th January 2025, the appellant preferred the present appeal vide the memorandum of Appeal dated 30th January 2025.

The appellant seeks for orders that: -

- a) The appeal be allowed,
- b) The orders issued by Hon. Agonda PM subsequently to the ruling dated 28th January 2025 be set aside.
- c) An order be issued directing that the status quo ante filing of VIHIGA MCLE NO. E055 OF 2024 be maintained to wit; that the appellant being the registered owner of L.R No. N. Maragoli/Bugina/1005 remains in actual possession and ownership of the suit property pending the hearing and determination of the case in the lower court.
- d) Case VIHIGA MCLE E055 of 2024 be remitted to another Magistrate for hearing and determination other than Hon. Agonda PM who issued the impugned orders
- e) The respondent be ordered to pay the costs of the appeal
- f) Any other relief that the honourable court may deem fit to grant.

Analysis and determination

The grounds of appeal as contained in the Memorandum of Appeal dated 30th January 2025 are that: -

- a) the Hon Magistrate exercised her discretion injudiciously when she granted the respondent immediate possession of the appellant's land being L.R NO.

N. MARAGOLI/BUGINA/1005 through a mandatory injunction without proof of demonstrated special circumstances.

- b) the Hon, Magistrate misdirected herself when she gave no regard to the principles of grant of mandatory injunction at the interlocutory stage and thus improperly exercised her discretion injudiciously by granting substantive order at the interlocutory stage of the proceedings.
- c) the Hon, Magistrate exercised her discretion injudiciously and misdirected herself by disregarding the appellant's evidence³ which clearly showed that she was the registered owner of the suit land.
- d) the Hon. Magistrate exercised her discretion injudiciously when she disregarded the appellant's application which demonstrated that the respondent had obtained orders through Misrepresentation of facts to the court.
- e) the Hon Magistrate exercised her discretion injudiciously when she totally disregarded the appellants' submissions and apex courts case law speaking on the issues that were in contention in the application that led to the impugned ruling.

Submissions

The appeal was heard by way of written submissions.

It was submitted on behalf of the appellant in this appeal that the trial court did not exercise its discretion judiciously in granting the orders sought in the application dated 23rd September 2024.

That the trial court made errors of law and principle, failed to take into account relevant considerations and arrived at a decision that was plainly wrong. That consequently the appellant was evicted from his land through an interlocutory order and has been subsequently restrained from accessing his land. That the

respondent had not met the requirement for the grant of an injunction as set out in the case of Giella -vs Casman brown (1973) EA 358. That the trial court ignored the evidence that showed that the respondent's title to the suit land had been cancelled by a court of competent jurisdiction. Counsel submitted further that the Respondent did not meet the conditions for grant of an order of inhibition under section 68 of Land Registration Act.

That the trial court ignored the authorities that speak against the use of police officers in enforcement of court orders. Counsel referred the court to the case of John Ndungu Mwaura & 20 Others Vs Municipal Council of Nakuru (2019) eKLR where it was held partly that unless there are special circumstances such as threat to life or property which cannot be secured by enforcing the court orders through the usual procedure such as citing contemnors for punishment, civil proceedings should be kept purely civil. And that particularly injunctive orders which have ample provisions for enforcement under the Civil Procedure Act and Rules.

On behalf of the respondent it was submitted that it was undisputed that the respondent had been in lawful, continuous occupation of the property for over 13 years and that the appellant only came into possession after unlawfully ejecting the respondent without a court order.

That the brazen act of illegality was corrected by the trial court which rightfully restored the respondent to possession and that through this appeal the appellant seek to perpetuate his illegality and benefit from his own wrong. Counsel urged this court to uphold the trial court's ruling and dismiss the appeal.

The appellant raised the grounds that the appeal should be dismissed on ground that;

- i) Leave to appeal was not granted,
- ii) The appellant has failed to establish legal basis for this court to interfere with the exercise of the trial court's jurisdiction.

Counsel submitted that since the ruling appealed against was also in respect of a prayer for inhibition under s. 68 of the Land Registration Act, which section is not listed in Order 43 of the Civil Procedure Rules, the appellant needed to have sought leave to appeal. That failure to obtain leave was fatal. Counsel relied on the case of National Land Commission -vs- Tom Ojienda & Associates, national Bank of Kenya & Another (Garnishee) Civil Appeal E247 of 2022 (2023) 1537(KLR) 8th December 2023 (Judgment) where it was held inter alia that failure to obtain leave before moving to court deprives the court of the jurisdiction to entertain the appeal.

Counsel submitted that the trial court exercised its discretion properly in allowing the application. That the appellant's claim to possession of the suit property is based on blunt illegal ejection of the respondent from the suit land. That the appellant did not have lawful title or legal right to the land and therefore could not purport to eject the respondent from the land. That the law on eviction from private property is outlined under Section 152E of the Land Act 2012. Counsel relied on the case of Atik Mohammed Omar Atik & 3 others vs Joseph Katana & Another (2019) eKLR where it was held in Respect of Section 152E of the Land Act, 2012 that the first step in an eviction is for the lawful owner to serve a Notice of eviction in accordance with the law.

Counsel submitted that article 40 of the Constitution does not protect illegally acquired property. That the appellant has failed to demonstrate any misdirection or error warranting interference.

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Issues for determination

Having carefully considered the applications and the respective responses, the ruling dated 28/1/2025, the grounds of appeal, the written submissions and the record of appeal generally I find that the following are the issues that emerge for determination;

- a) Whether or not the trial court erred in allowing the respondent's application dated 23rd September 2024,
- b) Whether the appeal herein has merit,
- c) Costs of the appeal.

Analysis and determination

This being a first appeal, this court is obligated to re-analyse the evidence/material placed before the trial court and draw its own conclusions. In *Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123* it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated

“an appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

Guided accordingly, the court proceeds to determine the issues herein as follows;

Whether or not the trial court erred in allowing the respondent's application dated 23rd September 2024.

The respondent's application dated 23rd September 2024 sought for 2 substantive orders namely; an order of temporary injunction and an inhibition. These were prayers 6 & 7 of the application. Prayer 8 sought for an order directing the police to provide security and to ensure compliance with the orders while prayer 10 sought for costs of the application.

The grounds of the application were that the applicant (respondent herein) had been the registered owner of the suit land since 2012 and had been in continuous occupation of the land for a period of over 12 years conducting agricultural activities thereon. That on 31st July 2024 the appellant through the 4th Defendant forcefully and violently took over possession of the suit property, demolished the dwelling and absoption facilities on the suit property and stole all the building materials, tools and utensils and forcibly ejected the respondent's staff and occupied the suit property.

That the transfer of the land to the appellants was illegal, unprocedural and fraudulent. That there can never be eviction without a court order or notice. That there was imminent risk that if the appellant was not stopped the respondent would continue to be deprived of the use and enjoyment of its property and would thereby suffer irreparable loss and damage.

That the applicant had applied to register a restriction on the suit property on 29th July 2024 upon which the Land Registrar directed that a decision of the court be sought to restrain any transaction on the property. That it was in the interest of justice that the orders sought be granted.

The application was opposed vide the grounds in the Replying Affidavit sworn on 14th October 2024 where it was deposed that the respondent was not the current registered owner of the suit land as the ownership of the respondent had been cancelled by an order of court in Vihiga PM Succ Cause No. 399 of 2023 for reasons that the title was a product of a fraudulent Grant of Letters of Administration obtained by one Henry Walter Magaga who had sold the land to the plaintiff (respondent).

That it was the appellant who had ploughed the land and put it under agricultural crop. That the appellant as registered owner of the suit land was entitled to enjoyment and protection of his rights over the suit land. That the appellant was condemned unheard by the court granting the land to the plaintiff (respondent). That the respondent had withheld to inform the trial court that he had applied to be joined as a party in VIHIGA PM SUCC Cause No. 399 o 2023 which matter was pending ruling on 22/10/2024.

The record shows that the trial court considered the following in allowing the application; -

Firstly, that the plaintiff (respondent herein) was the registered owner of the suit land as per the title deed issued on 2nd April, 2012 having purchased the suit property from Henry Walter Magaga on 2nd March 2012. That the respondent produced documentary evidence of the sale agreement between it and Henry Walter Magaga.

Secondly, the plaintiff's (Respondent's) conduct and noted that the plaintiff's/ applicant's conduct is of one who should enjoy the discretionary orders of the court.

The court also considered article 40 of the Constitution and the fact that the appellant also had title to the suit land and found that the plaintiff's (respondent's) title deed was issued before that of the appellant. The court observed that that was an issue to be determined after calling evidence. That the only people who could shed light on who the genuine owner of the suit land was, are the vendor who sold the property to the plaintiff and the Land Registrar. That the land Registrar Vihiga would shed light on whether the two sets of title deeds were issued by their offices and whether the double allocation was through fraud or mistake.

The court found that the plaintiff (Respondent) had been able to establish a prima facie case with a probability of success.

The court also noted that it believed that the appellant only recently encroached onto the suit land by constructing a perimeter wall, that the plaintiff (respondent) had been in possession of the suit property and that the 1st defendant's (appellant's) actions would occasion irreparable loss on its part which could not be compensated by an award of damages.

The court also found that the balance of convenience tilted in favour of maintaining the status quo.

It is clear from the ruling that the trial court did not take into account the appellant's response to the application. The court observed that the defendant's (appellant's) advocate did not file Replying Affidavit.

This was erroneous as there was the Replying Affidavit sworn by Nelson Chagenya, the 4th Defendant in the suit on behalf of the appellant and the other defendants.

The Replying Affidavit, demonstrated that as at the time of filing the suit, the suit land was registered in the name of the appellant who was in occupation. This was demonstrated by the copy of the title deed and certificate of official search attached to the said affidavit. It also demonstrated that the plaintiff (respondent herein) who indeed had previously been a registered owner of the land had lost the said registration through litigation and a resultant court order in a Succession Cause. This was demonstrated through a copy of a court order attached to the said Affidavit and marked MC- 3. The said court order dated 23/11/2023 was in respect of VIHIGA SPMC SUCC CAUSE NO. 399 OF 2023 in respect of the estate of Maria Kagehi Lijodi. It directed that:-

- i) “The Grant of Letters of Administration Intestate and its subsequent Certificate of Confirmation of Grant issued to Henry Walter Magaga be and is hereby revoked and/or annulled.
- ii) All transactions and registrations carried out on L.R No. N/MARAGOLI/BUGINA/1005 as resulting the impugned Grant of Letters of Administration Intestate be and are hereby declared null and void and the land to revert back to the names of MARY KEGOHI LIJODI.
- iii) A fresh Grant of Letters of Administration do issue in the names of Alex Dimba Lijodi and Rose Catherine Dimba as new administrators of the estate and the same be confirmed accordingly.
- iv) The costs of the cause to the objector”

This order had in effect revoked the Grant of Letters of Administration in favour of and the title derived therefrom in the name of the vendor who had sold the land to the plaintiff and the title of the plaintiff. It divested the plaintiff of the land and vested it in the name of the deceased and identified the vendors who sold the land to the appellant as the administrators of the estate of the deceased.

Therefore, the title exhibited to the court by the respondent at the time of filing suit had already been cancelled. The existing title at the time of filing the suit was the one held by the appellant. It appears the court did not appreciate this fact hence the finding that there was double allocation of the land by the Ministry of Lands.

So far there is no evidence that the court order dated 23rd November 2023 in the succession cause has ever been reviewed or set aside. Had the trial court addressed its mind to the reply by the appellant, it could have come to a different conclusion in respect of the application by the respondent.

From the foregoing, this court respectfully finds that the trial court misdirected itself by finding that the respondent had title to the suit land when there was evidence that the title had been cancelled thorough the order in the succession cause, by finding that the appellant made no response to the application, by failing to find that as at the time the application was made , it was the appellant who had both title and possession to the suit land and by failing to find that as the holder of title as at the time, the appellant was entitled to protection of the law under the provisions of sections 24, 25 and 26 of the Land Registration Act and article 40 of the Constitution and by finding that the Ministry of Lands made a double allocation.

Further that the trial court having found that the allegation that title of the appellant was acquired through fraud was a matter that could only be determined through evidence by calling witnesses inclusive of the Land Registrar, the trial court ought not have proceeded to summarily award possession of the land to the respondent whose title had been cancelled.

Regarding the application dated 2/10/2024 by the appellant perusal thereof shows that all the orders sought were interim orders pending herein of the application.

For the foregoing reasons I find that the trial court misdirected itself and erred in allowing the application dated 23rd September 2024 and granting the order of temporary injunction and the order to the police to ensure compliance.

Regarding the order of inhibition, given that the purpose of an order of inhibition is to preserve the status of the records of the land at the registry pending further orders or event, the court finds that the same was necessary to preserve the land pending determination of the suit. The land should remain as registered in the name of the appellant pending hearing of the suit.

I find that the appeal has merit and hereby allow it as follows; -

- a) The ruling of the trial court dated 28th January 2025 is hereby set aside and substituted with an order dismissing the application dated 23rd September 2024 together with all orders made thereunder save for the order of inhibition.
- b) The suit to proceed to hearing before a different Judicial Officer other than Hon Agonda who handled the application.
- c) Each party to bear own costs of the appeal.

Orders accordingly.

Judgement dated and signed at Vihiga, delivered virtually this 22nd day of January 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen- Court Assistant.

Kadenyi for the Appellant

Kahura for the Respondent.