



**Masinde v Sakwa & another (Environment and Land Appeal
E040 of 2023) [2026] KEELC 225 (KLR) (21 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 225 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E040 OF 2023
A NYUKURI, J
JANUARY 21, 2026**

BETWEEN

MUSIKOYO DAVID MASINDE APPELLANT

AND

PATRICK SAKWA 1ST RESPONDENT

ISA SAKWA 2ND RESPONDENT

*(Being an appeal against the ruling of Hon. J.R. Ndururi, (SPM) delivered
on 23rd November 2023 in Kakamega CMC ELC Case No. 195 of 2023)*

JUDGMENT

Introduction

1. The appeal before court was filed by Musikoyo David Masinde challenging the ruling of Hon. J.R. Ndururi (Senior Principal Magistrate) delivered on 23rd November 2023 in Kakamega Chief Magistrates Court ELC Case No. 195 of 2023. In the impugned ruling, the learned trial Magistrate dismissed the appellant's application dated 6th September 2023, wherein the appellant had sought orders that the restriction lodged on the register of land parcel No. East Wanga/Isongo/5312 (suit property) by the 1st defendant on 18th August 2023 be removed and that he be allowed access and use of the suit property. The appellant being dissatisfied with the court's refusal to exercise discretion in his favor, lodged the instant appeal.

Background

2. By a plaint dated 6th September 2023 the plaintiff before the lower court, (the appellant herein) instituted a claim against the respondents herein, seeking a declaration that he was the lawful registered proprietor of the suit property; a permanent injunction to restrain the defendants from dealing with the suit property and damages for trespass and denial of access thereto. He stated that the defendants



- trespassed on his land and that on 18th August 2023 the 1st defendant placed a restriction on the title of the suit property without any justification.
3. Simultaneous with the filing of the plaint, the plaintiff also filed a notice of motion dated 6th September 2023 under a certificate of urgency seeking orders that the restriction lodged on the title of the suit property by the 1st defendant on 18th August 2023 be removed. He also sought orders that he be allowed access and use of his land. The application was anchored on the supporting affidavit sworn by the plaintiff. His case was that he was the sole registered proprietor of the suit property. That the 1st defendant was his cousin and the 2nd defendant was the 1st defendant's father. That the suit property was a subdivision of parcel East Wanga/Isongo/1439 registered in his father's name and that he became registered as proprietor after undertaking succession proceedings in respect of his father's estate. That the 1st defendant had informed him that he purchased $\frac{3}{4}$ acres from the plaintiff's mother which he subsequently sold to one Mumali Silako Hillary. That he asked him to transfer the land directly to Mr. Mumali the new purchaser upon conclusion of succession proceedings. That therefore the 1st defendant has no interest in the suit property. That the 1st defendant has placed a restriction on the suit property and denied him access thereto. He attached inter alia, copies of titles, sale agreement, certificate of confirmation of grant and search certificate.
 4. The application was opposed. The 1st defendant filed a replying affidavit dated 24th October 2023. He stated that he was a bona fide beneficiary of the estate of the late Jared Musikoyo Masinde as demonstrated by the minutes of the elders who distributed his estate. That using a fraudulent consent, the plaintiff undertook succession secretly and fraudulently and allocated himself the entire suit property, when there are other legitimate beneficiaries, as demonstrated in the area Chief's letter dated 21st December 2018 addressed to the Succession Court, where the 1st defendant was listed as a purchaser.
 5. That parcel East Wanga/Isongo/5312 was allocated to the appellant's mother, where she resides whereof the 1st defendant is entitled to one acre. That on 31st August 2018, the 1st defendant entered into a land sale agreement with the mother of the plaintiff one Margret Nafuna Masinde for sale of one acre from the suit property, at a consideration of kshs. 400, 000/= which he paid in full. He further stated that the land he purchased from the plaintiff's mother is different from the $\frac{3}{4}$ acres land he purchased from the plaintiff's brother one Lessen Masinde, as per the land sale agreement presented by the plaintiff. That the plaintiff is not party to his transactions with Lessen Masinde and Mumali Salako Hillary.
 6. Further that he is also entitled to another one acre which he was shown by the plaintiff's father and where he has planted trees, which are now mature. That this allocation was affirmed by the elders in their meeting of 25th March 2018. That since he is entitled to two acres from the suit property, he had a legitimate reason to place a restriction on the suit property. That the plaintiff has sold his entire inheritance and is now just squatting on his mother's parcel. He attached the Elder's minutes, Chief's letter, consent filed in the Succession Cause, summons for confirmation of grant and sale agreements dated 31st August 2018 and 22nd March 2021.
 7. Upon consideration of the application, response and parties' respective submissions, the learned trial Magistrate held that as the succession process by which the plaintiff became registered proprietor of the suit property recognized existence of other persons including the 1st defendant, as beneficiaries of the deceased's estate, the issue of the legitimacy of the 1st defendant's claim on the land cannot be determined at the interlocutory stage and ought to await the full hearing of the case. The trial court also found that no cause of action had been disclosed against the 2nd defendant. On that basis, the trial court concluded that the plaintiff had not established a prima facie case and had also not pleaded or



demonstrated irreparable injury. It therefore proceeded to dismiss the application dated 6th September 2023.

8. Being aggrieved by the ruling of the trial court, the appellant herein filed a Memorandum of Appeal dated 4th December, 2023 in this court, citing thirteen grounds of appeal as follows: -
 - a. That the learned trial magistrate erred in law and fact in deliberately dwelling on the respondents' unsubstantiated statements made by the respondents in their submissions and replying affidavit, which were never served upon the appellant with a clear motive to hide the truth from the court.
 - b. That the learned trial magistrate erred in law and fact by not considering that failure by the respondent to serve their responses to the appellant's application was well calculated to prejudice the applicant's case by failure to clarify to the court the claims made by the respondents amounting to unfair trial.
 - c. That the learned trial magistrate by finding that the application lacks merit, failed to appreciate section 7 of the Land Registration Act number 3 of 2012 which provides that a restriction cannot be placed on a title indefinitely.
 - d. That the learned trial Magistrate erred in allowing the respondents to continue in illegality and unlawfulness.
 - e. That the learned trial magistrate erred in law and fact by failing to hold that more than six months have elapsed since the 1st respondent placed a restriction on the suit land but has not laid claim on the suit land.
 - f. That the trial magistrate erred in law and fact by finding that the appellant carried out a secret succession while overlooking the consent that was signed by all the beneficiaries and the succession court accepting the same.
 - g. That the trial magistrate erred in sitting in the seat of a succession court which carried out its proper work and no objection has ever been filed by the respondents objecting to the applicant's registration as the proprietor of the suit land.
 - h. That the learned trial magistrate erred in finding that the appellant carried out succession alone while overlooking the averments by the appellant in his affidavit that the 1st respondent despite being listed as a beneficiary sold his parcel to a third party hence was not entitled to any portion from the estate.
 - i. That the learned the trial magistrate erred in not holding that no objection was ever filed by the respondents since 2018 when the succession was concluded and claim of land is not by placing a restriction indefinitely.
 - j. That the learned trial magistrate erred in holding that there is no case against the 2nd respondent and overlooking the fact that the 2nd respondent has stopped the appellant from using his land by the virtue of a restriction placed on the land by the 1st respondent.
 - k. That the learned trial magistrate erred by finding and holding that there is no case against the 2nd respondent while the plaintiff has laid a claim on the suit parcel Number East Wanga Isongo/5312.



- l. That the learned trial magistrate erred in holding that the appellant has no prima facie case while overlooking the respondents' illegal action of stopping the appellant from using his land which is his only source of income.
 - m. That the learned trial magistrate failed to find the respondents untruthful litigants who failed to follow the orders of the court to serve their response to the appellants' application, with a clear motive to mislead the court and deny the appellant an opportunity to bring the truth in this matter.
9. The appellant sought the following prayers;
 - a. That the appellant's appeal be allowed with costs
 - b. That the ruling of Hon. J.R. NDURURI Senior Principal Magistrate be set aside or varied and substituted with the one that meets the end of justice.
 - c. That the Honourable Court be pleased to order the removal of the restriction placed on land parcel No. East Wanga/Isongo/5312 by the 1st respondent.
 - d. That the Honourable Court be pleased to order that the appellant be allowed to access and use his land.
10. The appeal was canvassed by way of written submissions. On record are the appellant's submissions dated 19th March 2025, and the respondent's submissions dated 11th March 2025.

Appellant's submissions

11. Counsel for the appellant submitted that there was no justification for placing the restriction on the suit property. Reliance was placed on the cases of *Rarl Limited v Land Registrar & Another Environment and Land Misc. Application E178 of 2023 (2023) KEELC 22034 (KLR) 5 December 2023* (Ruling) and *Sammy Nganga S.S v George Ngatiri & 2 Others (2021) e KLR* for the proposition that a restriction is a temporary measure and ought not be used to limit or deprive the registered proprietor his right to property indefinitely.
12. Counsel submitted that the appellant had been in possession of title since 9th March 2023 and that the respondent has neither challenged his title in any way or laid a claim thereon. It was further argued for the appellant that section 73 of the *Land Registration Act* grants this court power to grant orders for removal of caution. The court was further referred to the case of *Maria Ngang Gwako v Charles Mwenzi Nganga (2014) e KLR* for the argument that it is upon the cautioner to justify the lodging of a caution on another's property. Counsel submitted that it was now two years after the caution was placed on the suit property without any cause and no suit has been filed. Counsel urged the court to set aside the trial court ruling.

Respondents' submissions

13. While relying on the case of *Mrao Ltd v First American Bank of Kenya Limited & 2 Others Civil Appeal 39 of 2002*, counsel for the respondent submitted that in dealing with interlocutory appeals the appellate court ought to exercise caution so as not to prejudice the independence of the trial court.
14. It was also argued for the respondents that the trial court made a finding that the appellant had not established a prima facie case, while exercising discretionary powers. Counsel contended that there is distinction between an arguable case and a case with high probability of success, which is required for grant of interim orders.



15. Reliance was placed on the case of *United Insurance Co. Ltd v East African Underwriter (Kenya) Ltd [1985]* for the proposition that an appellate court will not interfere with a discretionary decision of the Judge just because it would have made a different decision. Counsel held the view that the grounds of appeal are matters that touch on the main suit and not the impugned ruling.
16. On whether this court has the power to grant interlocutory orders on appeal, counsel submitted that if the court lifts the restriction, it will jeopardize the main suit and lead to a mistrial in the lower court. Counsel relied on the decision in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others CA No. 77 of 2012* and submitted that to get an injunction, an applicant must demonstrate a prima facie case, irreparable injury and demonstrate that the balance of convenience tilts in favour of granting the injunction.

Analysis and determination

17. The court has carefully considered the appeal, parties' written submissions and the entire record.
18. This is an interlocutory appeal challenging the exercise of discretion by the trial court in dismissing the appellant's application wherein he sought removal of restriction on register of the suit property and access to the said property.
19. This being a first appeal, the duty of this court is to re-analyze the findings made by the trial court in view of the issues raised in the matter and decide whether or not the conclusions arrived at by the trial court should stand, and give reasons either way.
20. Although the appellant raised thirteen grounds of appeal, in his submissions, there is nowhere, where he faulted the trial court's analysis or findings. What the appellant did was to argue the application dated 6th September 2023 afresh. That notwithstanding, and having considered the grounds of appeal raised in the Memorandum of Appeal, the parties' rival submissions and the entire record, the only issue that arise for the court's determination is whether there is sufficient material placed before this court to justify this court's interference with the exercise of discretion by the trial court in dismissing the appellant's application dated 6th September 2023.
21. It is trite law that this court will not ordinarily interfere with the exercise of discretion by the trial court, merely on the basis that it would have arrived at a different decision if it had heard the matter in the first instance. This court will only interfere with the exercise of discretion by the trial court where it is shown that the trial court made an error of law or principle; took into account irrelevant considerations; failed to take into account relevant considerations; misapprehended facts and misdirected himself; or the decision is plainly wrong.
22. In the case of *Mbogo & Another vs. Shah [1968] EA. 93* at page 96, the Court of Appeal stated that: -

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice....”
23. Similarly, the Supreme Court of Kenya in the case of *Apungu Arthur Kibira v Independent Electoral and Commission Boundaries & 3 Others [2019] eKLR* stated:

“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.”

24. Similarly, in the case of *United India Insurance Co. Ltd v East African Underwriter (Kenya) Ltd* [1985] KECA 39 (KLR), the Court was categorical that an appellate court will not interfere with a discretionary decision of the lower court merely on the basis that if it had sat at first instance, it would have made a different decision. The court further emphasized that the appellate court can only interfere with the exercise of discretion where, the lower court misdirected itself in law; misapprehended facts; took into consideration irrelevant matters; failed to take into consideration relevant matters or the decision is plainly wrong.
25. In the instant matter, the trial court held that there was evidence from the appellant that apart from himself, there were other beneficiaries to the estate of his late father, and that that list included the 1st respondent. Further that the question of the 1st respondent’s claim is central to the dispute between the parties in the lower court and cannot be determined at the interlocutory stage but must await the full hearing. For those reasons the trial court was not convinced that a prima facie case with chances of success had been established.
26. I have considered the application dated 6th September 2023. It sought removal of the restriction on the suit property and that the plaintiff be granted access thereto. Thus, the appellant sought mandatory injunction. The threshold for mandatory injunction is higher and more stringent than that for temporary injunction. While the court would require proof that there is a prima facie case, irreparable injury and balance of convenience, it goes further to establish whether there are special circumstances, where the applicant’s case is clear and unusually strong.
27. Halsbury’s Laws of England Vol. 24 para 948 summarizes principles governing grant of temporary mandatory injunction as follows;

“A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff..... a mandatory injunction will be granted on an interlocutory application.”
28. The right of every litigant to be heard and be given opportunity to test the opponents case is non-derogable and therefore before a court makes orders that would determine a suit at the interlocutory stage it must be satisfied that a hearing will not serve any useful purpose and that the ends of justice will be served by determining the matter at the interlocutory stage. That jurisdiction can only be exercised cautiously and sparingly where the circumstances of the case show the clarity and strength of the applicant’s case that would warrant granting substantive mandatory orders before granting the respondent the benefit of a full trial.
29. In the instant case, the suit property is registered in the name of the appellant but is in possession of the 1st respondent. The appellant sought removal of the restriction on the register of the suit property and to be allowed access thereto on the basis that he is the registered owner thereof. The legality of the appellant’s registration is contested by the respondents who maintain that it was done fraudulently as



there were other beneficiaries to the estate, which matter is a prima facie demonstrated in the appellant's own evidence in the form of a certificate of confirmation of grant. In view of the contested facts and noting that the respondents have filed defence and counterclaim in the suit before the trial court, it is clear to me that the appellant's is not a strong and clear case to warrant the grant mandatory injunction sought. Therefore, the trial court considered all the relevant matters before reaching its conclusion and was thus right in declining to grant the orders sought on the basis the same would amount to determining the dispute at an interlocutory stage without a substantive hearing.

30. In the result, I find no basis to interfere with the exercise of discretion by the trial court. I therefore dismiss this appeal with costs to the respondents.

31. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 21ST DAY OF JANUARY, 2026

A. NYUKURI

JUDGE

In the presence of;

Ms Masakhwe for the appellant

Ms Mburu for the respondent

Court Assistant: Delphine

