



Kimaita v Kanampiu & 2 others (Environment and Land Appeal E080 of 2024) [2025] KEELC 5525 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E080 OF 2024**

**JO MBOYA, J
JULY 24, 2025**

BETWEEN

DANIEL KIMAITA APPELLANT

AND

CYRUS MUTHEE KANAMPIU 1ST RESPONDENT

THE DISTRICT LAND REGISTRAR MERU 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

(Being an appeal of the ruling by S.K Ngetich – SPM in Nkubu ELC No. E019 of 2024 delivered on 23rd October 2024)

JUDGMENT

1. The Appellant herein [who was the Plaintiff in the subordinate court] filed the Complaint dated 3rd April 2024 and contemporaneously filed an application dated 3rd April 2024; and wherein the Appellant sought the following reliefs:
 - i. That this Application be certified urgent and service be dispensed with in the first instance.
 - ii. That this Honourable court be pleased to issue an order of temporary injunction restraining the 1st respondent, either by himself, his agents, servants and or personal representatives interfering with L.R No. Abothuguchi/Makandune/1455 measuring 0.61 ha pending hearing and determination of this application inter parties.
 - iii. That this Honourable court be pleased to issue an order of temporary injunction restraining the 1st respondent, either by himself, agents, servants and or personal representatives interfering with L.R No. Abothuguchi/Makandune/1455 measuring 0.61 ha pending hearing and determination of this suit.



- iv. That costs of this Application be borne by the 1st respondent.
2. The 1st respondent thereafter filed a statement of defence dated 18th June 2024 and a Replying affidavit of even date. Suffice it to state that the 1st respondent denied the Appellant's claim as pertains to ownership of L.R. No. Abothuguchi/Makandune/1455. Furthermore, the 1st respondent contended that the said property, which is claimed by the Appellant, is non-existent. To this end, the 1st respondent posited that the Appellant had neither established nor demonstrated the existence of a prima facie case.
3. The application dated 3rd April 2024 was heard and disposed of vide ruling rendered on 23rd October 2024 [though erroneously stated to have been delivered on 23rd October 2023]. See page 15 of the record of appeal. For good measure, the learned trial magistrate found and held that the appellant had not established a prima facie case and thus same [trial magistrate] dismissed the application for temporary injunction.
4. It is the said ruling that has aggrieved the appellant, culminating into the filing of the memorandum of appeal dated 31st October 2024 and wherein the appellant has highlighted the following grounds of appeal.
 - a. The learned senior principal magistrate erred in law and fact in relying on irrelevant facts to disallow the appellant's application or granting temporary injunction despite overwhelming reasons.
 - b. The learned senior principal magistrate erred in law and fact in not considering the mutation forms and the photos on record and the weight of the evidence by the appellant.
 - c. The learned senior principal magistrate erred in law in totally ignoring the fact that the appellant is the registered owner of L.R No. Abothuguchi/Makandune/1455 and he holds a title document in that regard.
 - d. The learned senior principal magistrate erred in law by totally ignoring the fact that L.R No. Abothuguchi/Makandune/455.
 - e. The learned senior principal magistrate erred in facts and the law by failing to appreciate the application and thus came up with the unsupported ruling on facts and law.
 - f. The learned senior principal magistrate erred in law and in fact in failing to appreciate adequately or at all that the evidence on record sufficiently proved the appellant's application.
 - g. The whole of the ruling was unfounded on any law or fact.
5. The appeal beforehand came up for directions on 27th March 2025, whereupon the advocates for the parties confirmed that the record of appeal had been duly filed and served. Furthermore, it was confirmed that the record of appeal was complete and thus the appeal was ready for hearing. To this end, the court ventured forward and issued directions pertaining to the disposal of the appeal.
6. Suffice it to state that the court directed that the appeal be canvassed by way of written submissions to be filed and exchanged by the parties. In this regard, the appellant proceeded to and filed the written submissions dated 17th June 2025, whereas the 1st respondent filed written submissions dated 9th June 2025.
7. The appellant has raised and highlighted two [2] key issues, namely; that the appellant established and proved that same is the lawful owner of plot number Abothuguchi/Makandune/1455 [suit property]; and that the learned trial magistrate did not specifically consider the appellant's documentation.



8. Regarding ownership of the suit property, learned counsel for the appellant has submitted that the appellant bought/purchased the suit property from the father of the 1st defendant [now deceased]. Furthermore, it was submitted that following the purchase of what is now the suit property, the 1st respondent's father proceeded to and caused the original property to be subdivided culminating into the suit property. To this end, learned counsel for the appellant has referenced the copy of the mutation, green card and the certificate of title, respectively.
9. Be that as it may, it has been contended that despite tendering and producing the aforesaid documents, the learned trial magistrate failed to appreciate the import thereof and thus arrived at an erroneous conclusion that the appellant had not proved ownership of the suit property.
10. Secondly, learned counsel for the appellant has submitted that the learned trial magistrate failed to properly exercise her/his discretion in refusing to grant the orders of temporary injunction.
11. Flowing from the foregoing, learned counsel for the appellant has implored the court to find and hold that the appeal beforehand is meritorious and thus same ought to be allowed. In this regard, the court has been invited to allow the appeal and to grant the orders of temporary injunction.
12. The 1st respondent filed written submissions dated 9th June 2025 and wherein same has highlighted one singular issue, namely; the appellant did not tender and prove the existence of the suit property or at all. It was the submission by the 1st respondent that the suit property which is claimed by the appellant does not lawfully exist or at all. In any event, it was posited that the suit property is not even captured in the registry index map for Makandune registration section.
13. Additionally, it was submitted that though the appellant contended that the suit property arose from and or is a subdivision of L.R No. Abothuguchi/Makandune/455, evidence was tendered to show that L.R No. Abothuguchi/Makandune/455 was only sub-divided following the issuance of a certificate of confirmation of grant. Moreover, it was submitted that the said original parcel birthed L.R No's Abothuguchi/Makandune/3754, 3755, 3756, 3757, 3758 and 3759; and not the suit property being claimed by the Appellant herein. In this regard, it was submitted that there is no way that the original parcel of land could have been [sic] sub-divided in 1996 as alleged by the appellant.
14. Arising from the foregoing, it was submitted that the learned trial magistrate correctly appraised the evidence tendered before her and came to the correct conclusion that the appellant had not demonstrated a prima facie case pertaining to the existence of the suit property. To this end, it was posited that the ruling and decision of the learned trial magistrate was correct and thus same ought to be affirmed.
15. Simply put, learned counsel for the 1st respondent has invited the court to dismiss the appeal with costs.
16. Having reviewed the record of appeal; the affidavit evidence that was tendered before the trial court; the written submissions on behalf of the appellant and the 1st respondent and having considered the applicable law, I come to the conclusion that the determination of the instant appeal turns on two [2] issues, namely; whether the appellant established the existence of a prima facie case with probability of success or otherwise; and whether the learned trial magistrate improperly exercised her discretion in declining to grant the orders of temporary injunction or otherwise.
17. Before venturing forward to analyse the issue[s] that have been highlighted, it is imperative to observe that the Appeal beforehand is a first appeal from the decision of the court of first instance, namely, the Subordinate Court. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at an independent conclusions, taking into account the pleadings filed, evidence on record



and the applicable laws. [See the provisions of Section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya].

18. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is, however, called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless the findings of the trial court are informed by extraneous factors or better still, are perverse to the evidence on record; or based on no evidence; or where it is demonstrated that there exists an error of principle which vitiate[s] the decision of the trial Court.
19. The jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various [a plethora] decisions. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the Court of Appeal for Eastern Africa [EACA] elaborated on the applicable principle and stated thus;

“...this court is not bound necessarily to accept the findings of fact by the court below. 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

20. Likewise, the extent and scope of the Jurisdictional remit of the first appellate court was also elaborated upon in the case of *Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the Court of Appeal held thus;

We also wish to be guided by the reasoning of this court in the case of *Mwana Sokoni versus Kenya Business Limited* (1985) KLR 931 page 934,934 thus:-

“Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in *Sottos Shipping versus Sauviet Sohold*, the Times, March 16,1983.

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said”

Again, in *Peters versus Sunday Post Limited* (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O’ Conner, P said at page 429:

“It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses”

21. Without endeavouring to exhaust the case law that elaborate[s] on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in



the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the court held as hereunder;

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters –vs- Sunday Post Ltd* [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...”.

[See also the decision in *County Assembly of Kwale and Others versus Dzila* [2024]KECA; *Kenya Urban Roads Authority and Another versus Belgo Holdings Limited* [2025]KECA; and *Dosh versus Justice Charles Chemutut and 7 Others* [2025]KECA]

22. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the 1st appellate court, I am now disposed to revert to the subject matter and to discern whether the learned trial magistrate correctly appraised, analyzed and evaluated the evidence tendered by the parties and in particular, the appellant [who was the Plaintiff before the trial court] and thereafter correctly applied the law as pertains to temporary injunctions in the course of determining the dispute between the parties.
23. Additionally, I am also well positioned to review and re-evaluate the factual matrix [evidence] presented before the trial court and thereafter endeavor to ascertain whether the factual findings arrived at by the trial magistrate accord with the evidence on record or better still, whether the conclusions arrived at, were perverse to the evidence on record.
24. Back to the issues. Regarding the 1st issue, namely; whether the appellant established the existence of a prima facie case with probability of success, it is worthy to recall and reiterate that the burden of proving the existence of a prima facie case rested on the shoulders of the appellant. For good measure, it is the appellant who had contended that same is the lawful and legitimate proprietor of the suit property and thus sought to procure an order of temporary injunction.
25. Having sought to procure and obtain an order of temporary injunction, it behooved the appellant to establish the various conditions that underpin the grant of an order of temporary injunction. In particular, it was incumbent upon the appellant to establish the existence of a prima facie case; demonstrate the likelihood of irreparable loss arising in the event the orders sought are not granted; and to show that the balance of convenience tilts in his favour. [See *Giella vs Cassman Brown* (1973) E.A 153].
26. Moreover, it is important to highlight that the conditions which have been referenced in the preceding paragraph are sequential in nature. To this end, it behooves the appellant to demonstrate the existence of a prima facie case as a prelude/precursor to partaking of an order of temporary injunction. However, it is not lost on this court that where an applicant, the appellant herein not excepted, fails to demonstrate the existence of a prima facie case, then the court has no business venturing forward to interrogate the likelihood of irreparable loss.



27. To my mind, the establishment of a prima facie case is the gateway or pathway to accessing the road towards procuring an order of temporary injunction. Nevertheless, it bears repeating that proof of irreparable loss is the key pillar that underpins the grant/issuance of an order of temporary injunction.
28. To buttress the legal position that where prima facie case is not established, the court has no business venturing forward to interrogate irreparable loss, it suffices to reference the decision of the Court of Appeal in the case of Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) Vol.I EA 86 where the court stated thus;

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is adequate remedy and the respondent is capable of paying, no injunction should normally be granted, however strong the applicant’s claim may appear at that stage.

If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without hurdles in between.”

29. Did the appellant establish a prima facie case or otherwise? To start with, it is the appellant who contended that same is the lawful and registered proprietor of the suit property. To this end, it was then incumbent upon the appellant to place before the trial court evidence to demonstrate albeit on a prima facie basis ownership of the suit property.
30. I am aware that the appellant tendered and produced before the trial court a copy of the certificate of title, a copy of the mutation and a copy of the green card [register] in an endeavor to prove ownership of the suit property. However, I have had occasion to peruse the mutation being relied upon by the appellant. Quite clearly, the mutation under reference was not registered. For good measure, the segment relating to registration is blank.
31. Premised on the foregoing, it is difficult to comprehend how the unregistered mutation could have birthed the suit property or at all. Moreover, there is no gainsaying that the provisions of Section 26 (2) of the *Land Registration Act* [2012] provides that the instruments that require registration can only be tendered and produced before the court if same have been duly registered. [See also the provisions of Section 4 of the *Registration of Documents Act*].
32. For ease of appreciation, the provisions of Section 26 (2) of the *Land Registration Act* (2012) are reproduced as hereunder;
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
33. In the absence of registration and taking into account that the impugned mutation form was not certified in accordance with the provisions of section 80 of the *Evidence Act* Cap 80 Laws of Kenya, I am afraid that same cannot be relied on by the appellant.
34. Turning to the copy of the green card, which was annexed by the appellant, it is worthy highlighting that the green card under reference is contradictory and thus incapable of being relied upon. Instructively, the upper segment of the green card references L.R No. Abothuguchi/Makandune/1455. However, the lower segment of the said green card references [sic] L.R No. abothuguchi/Makandune/1435.



35. Quite clearly, one cannot discern whether the green card relates to L.R No. Abothuguchi/Makandune/1455 or Abothuguchi/Makandune/1435. To my mind, the discrepancy apparent on the face of the green card negates a finding of a prima facie case.
36. Before concluding on this issue, it is also imperative to recall that there is no way the original parcel L.R No. Abothuguchi/Makandune/455 could have been sub-divided on the basis of the mutation form relied upon by the appellant and thereafter be sub-divided on the 5th October 2023, culminating into L.R No's Abothuguchi/Makandune/3754-3759. [See the certificate of search at page 59 of the Record of Appeal].
37. Moreover, it is not lost on me that the suit property is not captured in the map for Makandune registration section. Suffice it to underscore that the Registry Index Map would have been amended to show or capture the suit property had the Mutation Form been registered. However, in the absence of registration, there is no way that the Registry Index Map would have been amended. Surely, something is amiss with the certificate of title underpinning the suit property.
38. Premised on the foregoing, I come to the conclusion that there is much more that the appellant herein will be called upon to do in his endeavor to demonstrate the legality of the certificate of title held by himself. However, at this juncture, I am afraid that the available evidence falls short of establishing a prima facie case with probability of success.
39. Flowing from the foregoing analysis and taking into account the holding[s] in *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) eKLR; *Nguruman Ltd vs Jan Bonde Nielsen & another* (2014) eKLR and *Vivo Energy Ltd vs Maloba Petrol Station and others* (2015) eKLR; I come to the conclusion that the learned trial magistrate arrived at the correct conclusion in finding that the appellant had not established a prima facie case with probability of success.
40. Next is the issue as to whether the learned trial magistrate improperly exercised her discretion in declining to grant the orders of temporary injunction. Instructively, the grant of an order of temporary injunction is dependent on the exercise of judicial discretion.
41. I have reviewed the ruling of the learned trial magistrate and I have ascertained that the learned trial magistrate correctly addressed its legal mind to the documentation that were tendered by the appellant. Suffice it to posit that the learned trial magistrate correctly appreciated that the appellant did not tender and or produce the transactional document underpinning the issuance of the impugned certificate of title. In particular, the learned trial magistrate highlighted the fact that the appellant did not produce a copy of the sale agreement [if any], a copy of the land control board consent or a copy of the transfer instruments.
42. There is no gainsaying that the learned trial magistrate was alive to the fact that a certificate of title by and of itself does not justify its validity. To this end, the learned trial magistrate correctly appreciated the obtaining jurisprudence that the appellant was chargeable with the burden of proving, [albeit on a prima facie basis] the root of his title.
43. Having appraised the ruling by the learned trial magistrate, I am afraid that the appellant herein has not demonstrated any improper or injudicious exercise of discretion by the trial court. Suffice it to underscore that this court can only interfere with the exercise of discretion by the trial court in circumscribed instances. [See *Mbogo vs Shah* (1968) E.A; and *Philip Keipto Chemwolo and Another versus Augustine Kubende and Another* 1986]eklr, respectively]
44. In a nutshell, I come to the conclusion that the appellant has not demonstrated any basis to warrant the appeal being allowed. On the contrary, I come to the same conclusion as the learned trial magistrate.



Final Disposition

45. Flowing from the analysis [details highlighted in the body of the ruling] it must have become apparent, nay evident that the appeal beforehand is devoid of merits. Same lends itself to dismissal.
46. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;
- i. The Appeal be and is hereby dismissed.
 - ii. The Ruling of the learned trial magistrate dated 23rd October 2023 [but which should be 23rd October 2024] be and is hereby affirmed.
 - iii. That Costs of the Appeal be and are hereby awarded to the 1st Respondent only.
 - iv. The Costs in terms of clause (III) shall be agreed upon and in default, shall be taxed by the Deputy Registrar of the court.
47. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF JULY 2025.

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE.

In the presence of:

Mutuma court assistant

Mrs. Bundi for the Appellant

Mr. Mokuia for the 1st Respondent

Ms Miranda [Senior Litigation Counsel] for the 2nd & 3rd respondents

