



**Tuwei v Barsoy (Environment and Land Appeal E042 of 2024)  
[2025] KEELC 5413 (KLR) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5413 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E042 OF 2024**

**EM WASHE, J**

**JULY 22, 2025**

**BETWEEN**

**JOHN TUWEI ..... APPELLANT**

**AND**

**SARAH JEROP BARSOY ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein (who was the 1<sup>st</sup> Defendant in the proceedings known as Eldoret CM ELC Misc Application No. E150 of 2024) filed a Memorandum of Appeal dated 07.10.2024 (hereinafter referred to as “the present Appeal”) seeking for the following Orders against the Ruling of Hon.peter Areri (hereinafter referred to as “the Trial Court Ruling”) pronounced on the 03.10.2024; -
  - a. The Appeal be allowed.
  - b. Costs of the Appeal be borne by the Respondent.
2. The grounds upon which the Appellant sought the above prayers in the present Appeal are as follows; -
  - i. That the Trial Learned Magistrate erred in law and in fact in issuing and confirming Orders issued on the 3<sup>rd</sup> of October 2024 that were not premised on any suit.
  - ii. That the Trial Learned Magistrate erred in law and in fact in issuing temporary injunction through a miscellaneous application that lacked substantive pleadings like, Petition, Originating Summons or Plaint.
  - iii. That the Trial Learned Magistrate erred in law and in fact in issuing Orders under Section 40 and 3A on an application that lacked a prayer of permanent injunction in its motion pleadings.
  - iv. That the Trial Learned Magistrate erred in law and in fact in not making a point of law raised in the Appellant’s Affidavit that the Application was fatally defective for lack of pleadings.



- v. That the Trial Learned Magistrate erred in law and in fact in not inviting the parties to file submissions and proceeded to rely on the affidavit and his own submissions as a magistrate.
  - vi. That the Trial Learned Magistrate erred in law and in fact in not inviting the parties to file submissions and proceeded to rely on his own submissions as a Magistrate. (Repeated)
  - vii. That the Trial Learned Magistrate erred in law and in fact in allowing and admitting a Further Affidavit without leave and after he had set the matter for Ruling.
  - viii. That the Trial Learned Magistrate erred in law and in fact in concluding that the Appellant had met the four limbs precedent to granting injunctive Orders without submissions from both the parties hence infringed on the tenets of Article 25,50 and 159 of the *Constitution* of Kenya.
  - ix. That the Trial Learned Magistrate erred in law and in fact in failing to clearly note the issue is not about land and ownership but the public access road and the question of whether the disputed area is a public road or a private land.
3. The Record of Appeal dated 2<sup>nd</sup> December 2024 was duly filed and served on the Respondent.
  4. On the 03.04.2025, the Record of Appeal was admitted and parties directed to prepare, file and exchange their written submissions in support of their positions.
  5. The Appellant filed his submissions on the 11.04.2025 while the Respondent filed their submissions on the 14.05.2025.
  6. The mandate and jurisdiction of this Court in handling the present Appeal was discussed and settled in the case of *Selle & Another v Associated Motor Boat Co.ltd & others* (1968) EA 123 where the Court of Appeal stated as follows;-
 

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”
  7. In essence, the Court is required to relook at the Notice of Motion Application dated 27.08.2024, the Replying Affidavit dated 16.09.2024 in opposition, the submissions of the parties and arrive at its own determination prior to evaluating where or not the Trial Court applied the facts and the law correctly or not.
  8. The Respondent (who was the Plaintiff in the proceedings known as Eldoret CM ELC Miscellaous E.150 of 2024) filed Notice of Motion Application dated 27.08.2024 against the Appellant in the present Appeal seeking for the following Orders; -
    - i. That this Application be certified urgent and be heard on priority basis.
    - ii. That the Honourable Court be pleased to issue Orders of Temporary Injunction against the Defendant/Respondents restraining themselves, their families, agents and/or employees from trespassing, interfering onto, forcing pathway, destroying property, entering, occupying and or in any way whatsoever interfering with her ownership, occupation and possession of the suit property known as LR.No.Moi’s Bridge/Ziwa Block 16 (Legebet)/98 pending the hearing and determination of this Application inter-parte.



- iii. That the Honourable Court be pleased to issue Orders of Temporary Injunction against the Defendant/Respondents restraining themselves, their families, agents and/or employees from trespassing, interfering onto, forcing pathway, destroying property, entering, occupying and or in any way whatsoever interfering with her ownership, occupation and possession of the suit property known as LR.No.Moi's Bridge/Ziwa Block 16 (Legebet)/98 pending the hearing and determination of this Application inter-parte.
  - iv. That the Orders of the Honourable Court be enforced by the OCS Kamukunji Police Station.
9. The grounds in support of the prayers sought for hereinabove are contained in the body of the Notice of Motion Application dated 27.08.2024 and the Supporting Affidavit Sworn by the Respondent which can be summarised as follows;
- a. The Respondent pleaded she was the registered owner of the property known as LR.No.Moi's Bridge/Ziwa Block 16 (Legebet)/98 (hereinafter referred to as "the suit property").
  - b. The Respondent and the Appellant herein share a common boundary on the ground.
  - c. The Respondent pleaded that the Appellant was forcibly creating an access road within the suit property despite a proper designated public road being in place and which the Respondent is supposed to utilise.
  - d. The Respondent stated that the actions of the Appellant to create an access road on the suit property is illegal, unjustified and infringes on the Respondents ownership rights over the suit property as enshrined in the Kenyan Constitution, 2010.
  - e. The Respondent therefore sought the Trial Court to issue a temporary injunction against the Appellant's actions pending the hearing and determination of the application as well as the main suit thereof.
  - f. The Respondent also adduced before the Trial Court various documents including the Title Deed of the suit property in her name, a Copy of a Mutation, various letters 23.07.2024, 12.08.2024, Minutes of a Meeting dated 11.08.2024, a Copy of a Medical Examination Report from the Kenya Police and the supporting Treatment Notes thereof.
10. The Notice of Motion Application dated 27.08.2024 was duly served on the Appellant who opposed the same by filing a Replying Affidavit dated 16.09.2024.
11. The Appellant in the Replying Affidavit dated 16.09.2024 pleaded the following facts and provisions of the law in opposition of the Notice of Motion Application dated 27.08.2024; -
- a. The Appellant pleaded that he was the registered owner of two properties namely LR.No.Moi's Bridge/ Ziwa Block 16 (Legebet)/106 and 107.
  - b. The Appellant stated that the Respondent had sued him wrongly for using a public road that is provided within the Mutation of the sub-division.
  - c. The Appellant averred that the portion of land that was being claimed by the Respondent was a public access road which had been in use since the 1970s.
  - d. The Appellant informed the Court that the dispute arose when the residents of the area sought the assistance of the County Government of Uasin Gishu and the Lands Department to map out the public road.



- e. The Appellant insisted that the Respondents declined to allow the residents to use the said public road and there has been many reports made at various police stations seeking to have the Respondent compelled to open the said access road.
  - f. The Appellant further pleaded that the Respondent's cause of action had failed to join crucial and material parties like the Department of Lands to assist in the determination of the dispute.
  - g. The Appellant complained that due to the closure of the public road by the Respondent, the residents of the area face a lot of hardship in accessing their portions of land.
  - h. In conclusion, the Appellant sought to have the Notice of Motion Application dated 27.08.2024 dismissed.
12. The Replying Affidavit dated 27.08.2024 was duly served on the Respondent who filed a Further Affidavit dated 25.09.2024 to which she stated as follows; -
- a. The Respondent denied knowledge that the Appellant is the owner of the properties known as LR.No.Moi's Bridge/Ziwa Block 16 (Legebet)/106 and 107.
  - b. According to the Respondent, the Appellant is the owner of the property known as LR.No. Sirikwa/Lolkinyei (Tegeltich)/106.
  - c. The properties known as LR.No.Moi's Bridge/Ziwa Block 16 (Legebet)/106 and 107 belong to Benjamin Kipsana Kipketer and Sarah Rono who are not parties in the proceeding.
  - d. The Respondent denied the allegation that the Land Registrar and Land Surveyor identified a road passing through the suit property and in her view, the determination by the Land Registrar and Land Surveyor was that there was no road provision.
  - e. The Respondent therefore insisted that the allegation of an existing public access road on the suit property was interfering with her ownership rights and hence violation of her Constitutional rights.
  - f. The Respondent stated that there has been no compulsory acquisition by the National Land Commission to warrant the interference being undertaken by the Appellant on the suit property.
  - g. The Respondent reiterated that the Appellant's actions of creating a road on the suit property with the help of the Area police, County Engineers and the Assistant Chief contravened the law.
  - h. The Respondent confirmed to the Court that there were other access roads to the Appellant's properties which were provided for in the mutation and ought to be used.
  - i. In conclusion, the Respondent sought the Court to grant the orders prayed for in the Notice of Motion Application dated 27<sup>th</sup> August, 2024.
13. After closure of the pleadings, the Court fixed a Ruling date of 03.10.2024.
14. Indeed, the Trial Court delivered a Ruling on the 03.10.2024 and granted a Temporary Injunction restraining the Appellants from accessing and using the public access road created on the suit property on interference and/or any other portion thereof.



15. This Court has been able to peruse the Application, the Replying Affidavit and the Further Affidavit and identifies the following issues for determination in this appeal.

Issue No.1- In which proceeding was the ruling pronounced on 03.10.2024 made?

Issue No. 2- Was there a substantive cause of action in support of the application for temporary injunction?

Issue No. 3- Was the application for temporary injunction merited?

Issue No. 4- Is the present appeal merited?

Issue No.5- Who bears the costs of the present appeal?

16. The Court having identified the above issues for determination, the same will now be discussed as provided below.

**Issue No.1- In which proceeding was the ruling pronounced on 03.10.2024 made?**

17. As regards the first issue, it is important that the proceedings which gave rise to the present Appeal are properly identified.

18. According to the Memorandum of Appeal dated 07.10.2024, the Appellant is seeking to Appeal against the Ruling made on 03.10.2024 in the proceedings known as Eldoret CM ELC Miscellaneous Application No.E 150 of 2024.

19. Looking at the Ruling dated 01.10.2024, it is clear from the citation that it was made in the proceedings known as Eldoret CM ELC Miscellaneous Application No. E. 150 of 2024.

20. The Trial Court file indicates that the proceedings known as Eldoret CM ELC Miscellaneous Application No. E.150 of 2024 was actually filed on 28.08.2024.

21. Similarly, the only document that was filed in the proceedings known Eldoret CM ELC Miscellaneous Application No. E.150 of 2024 was the Notice of Motion Application dated 27.08.2024.

22. In essence therefore, it is clear that the Ruling dated 03.10.2024 was in the proceedings known as Eldoret CM ELC Miscellaneous Application No. E.150 of 2024.

**Issue No. 2- Was there a substantive cause of action in support of the application for temporary injunction?**

23. The second issue raised in the Present Appeal is whether or not there is a substantive issue filed by the Respondent to which an application for Temporary Injunction like the one dated 27.08.2024 could be sustained and determined.

24. According to the Appellant, the Trial Court did not have a substantive Cause of Action for determination to enable an Application for Temporary Orders to be considered.

25. In other words, the Appellant pleaded and submitted that there were no lawful proceedings that would have sustained the temporary Orders issued on the 03.10.2024 thereafter.

26. The Respondent on the other hand is of the considered view that she had applied for Consolidation of the proceedings known as Eldoret CM ELC No. 149 of 2024 with those known as Eldoret CM ELC Miscellaneous Application No. E.150 of 2024.



27. The Respondents submission therefore was that there was a substantive suit known as Eldoret CM ELC No. E149 of 2024 which could support the hearing and determination of the Notice of Motion dated 27.08.2024 that had been filed in the proceeding known as Eldoret CM ELC Miscellaneous Application No. E.150 of 2024.
28. From a perusal of the Trial Court file known as Eldoret CM ELC Miscellaneous Application No. E.150 of 2024, there is an Application dated 17.09.2024 made by the Respondent seeking for a Consolidation of the proceedings known as Eldoret CM ELC Miscellaneous Application No. E.150 of 2024 with Eldoret CM ELC CASE. 149 of 2024.
29. However, looking at the Trial Court file of Eldoret CM ELC Miscellaneous Application No. E.150 of 2024, the Application for Consolidation dated on 17.09.2024 is yet to be heard and determined by the Trial Court.
30. It is settled law that any application for Temporary Orders must be based on a substantive Cause of Action that is pending determination.
31. Legally, a Cause of Action can be presented for determination before a Court of Law by way of a Plaint, a Petition, Originating summons and/or Judicial Review Proceedings.
32. Once a Cause of Action has been presented for determination, a party can then invoke the provisions of Order 40 seeking for Temporary Reliefs pending hearing and determination of the substantive Cause of Action.
33. The Temporary Orders issued through the Ruling dated 03.10.2024 could no longer be dealt with beyond the said date because there was no other issue pending from the Miscellaneous file known as Eldoret CM ELC Miscellaneous Application No. E.150 of 2024.
34. In other words, the Orders of Temporary Injunction issued on 03.10.2024 based on the proceedings known as Eldoret CM ELC Miscellaneous Application No. E.150 of 2024 can constructively be deemed as final.
35. This Court is of the view and finding that the Application dated 27<sup>th</sup> August, 2024 was a non-starter for reason that it was not supported by any Substantive Cause of Action capable of giving the Court jurisdiction to make any Temporary Orders against the Appellant.

### **Issue No. 3- Was the application for temporary injunction merited?**

36. Based on the finding in Issue No. 3, this Court of the considered view and finding that the Trial Court did not have jurisdiction to consider the Application dated 27.08.2024 because there was no Substantive Cause of Action to sustain it.
37. The fact that the Respondent filed the Plaint dated 03.09.2024 which was recorded as Eldoret CM ELC No. E149 of 2024 did not salvage the situation as these were two separate proceedings that could not be consolidated.
38. In fact, in the Court's view, the proceeding known as Eldoret CM ELC Miscellaneous Application No. E.150 of 2024 were concluded by the Ruling dated 03.10.2024 and there is no issue to be Consolidation with Eldoret CM ELC Case No. 149 of 2024.

### **Issue No. 4- Is the present appeal merited?**

39. Based on the determination in Issues No. 2 and 3, this Court makes a finding that the present appeal is merited.



40. Based on the fact that the Trial Court in the proceeding known as Eldoret CM ELC Miscellaneous Application No. E.150 of 2024 did not have the jurisdiction to entertain an Application for Temporary Injunction for lack of a Substantive Cause of Action, then all the proceedings undertaken in Eldoret CM ELC Miscellaneous Application No. E.150 of 2024 are a nullity and are set aside including the Ruling pronounced on 03.10.2024.
41. In essence, the Notice of Motion Application dated 27.08.2024 was not merited and should have been dismissed with costs.

**Issue No.5- Who bears the costs of the present appeal?**

42. The present Appeal having been successful, the Respondent is condemned to pay costs.

**Conclusion**

43. In Conclusion, the Court hereby makes the following orders in determination of the Memorandum of Appeal dated 7<sup>th</sup> October, 2024; -
  - a. That the memorandum of appeal dated 7<sup>th</sup> october, 2024 is merited and allowed.
  - b. That the application dated 27<sup>th</sup> august, 2024 in the proceedings known as Eldoret CM ELC Miscellaneous Application No. E150 of 2024 is dismissed with costs.
  - c. That the ruling pronounced on 3<sup>rd</sup> october, 2024 in the proceedings known as Eldoret CM ELC Miscellaneous Application No. E150 of 2024 be and is hereby set aside forthwith.
  - d. That the respondent is condemned to pay costs of this appeal to the appellant.

**DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC THIS 22<sup>ND</sup> DAY OF JULY 2025.**

**EMMANUEL.M. WASHE**

**JUDGE**

In the Presence of:

Court Assistant: Brian

Advocates for the Applicant: Mr. Sang h/b for Mr Owuodho

Advocates for the Respondent: Ms. Otuma h/b for Mr. Gichana Momanyi

