



**Karanja v Progressive Credit Limited & another (Environment and Land Appeal E039 of 2023) [2024] KEELC 4308 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4308 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E039 OF 2023**

**JA MOGENI, J**

**MAY 27, 2024**

**BETWEEN**

**PENINAH NYAKIO MBURU KARANJA ..... APPELLANT**

**AND**

**PROGRESSIVE CREDIT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SAMECA ENTERPRISES AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of the Learned Senior Principal Magistrate, Hon P.K ROTICH dated and delivered on 17th October 2023 in Milimani MCELC/E011/2023)*

**JUDGMENT**

1. This Appeal arises from the decree of the learned Senior Principal Magistrate Hon. P.K Rotich CMELC NO. E011 of 2023. Following an interlocutory application for injunction by the appellant who was the plaintiff before the Lower Court. The learned trial Magistrate dismissed the application on the ground that a similar application had been dealt with in MCCC No 2468 and that the substantive issues relating to the loan shall be dealt with in the main suit.
2. The appellant dissatisfied and aggrieved by the ruling of the Hon. Senior Principal Magistrate has appealed to this Court and has set out five grounds of appeal which are set out hereunder: -
  1. That the Honorable Learned Magistrate erred and misdirected himself on the law and facts by erroneously holding that the Appellant had filed a similar Application in CMCC NO. 2468 of 2021 that had been dismissed for lack of merit
  2. That the Honorable Learned Magistrate misdirected himself by failing to consider that the Ruling delivered in Milimani CMCC No. 2468 of 2021 was in relation to chattels and not the Appellant's land and thus substantially different from the matter for determination



3. That the Honorable Learned Magistrate erred in fact and law in failing to note that the Appellant's Application before the subordinate court had been provoked by the Respondent's instructions to auctioneers who had advertised the Appellant's land for sale via public auction without following the requisite procedure under the law
  4. That the Honorable Learned Magistrate erred in law and fact by failing to apply the principles for grant of an injunction in not stating any reasonable basis for the determinations made on establishment of a prima facie case, the balance of convenience and irreparable loss to be suffered.
  5. That the findings of the Honorable Learned Magistrate are prejudicial to the Appellant as she risks losing her land through sale by public auction before the case is determined as no orders of temporary injunction pending the hearing and determination of the suit were granted.
3. The brief facts of the aforesaid suit are that the appellant/applicant herein had sometime in 2021 been given a loan of Kshs. 4,932,613 and he used as security property title Karai/renguti/942. The facility fell into arrears after the appellant had paid Kshs. 630,000. The 1<sup>st</sup> respondent instructed the 2<sup>nd</sup> respondent to advertise for sale by public auction the security. The appellant/plaintiff then filed the suit MCCC E2468 of 2021 and an application seeking injunctive orders against the sale by the public auction and the respondent opposed the application. The court declined to grant the injunctive orders whereupon the appellant/plaintiff filed on 10/01/2021 a Notice of Withdrawal of Suit and then filed an application dated 2/11/2023 and the instant Appeal.
  4. The parties agreed to compromise the application so as to have the substantive appeal heard and determined.
  5. The appellant dissatisfied with the said ruling of 17/10/2023, appellant brought this appeal and sought the following verbatim orders in the appeal:
    - a. The Ruling dated 17<sup>th</sup> October 2023 be set aside.
    - b. This Honorable Court do issue its own orders in respect of the Appellant's Notice of Motion dated 10<sup>th</sup> January 2023.
    - c. The costs of this Appeal be borne by the Respondents
    - d. Any other relief that this Honorable Appellate Court may deem fit to grant.
  6. My perusal of the documents filed in court has not come up with any documents filed in opposition to the appeal by the Respondents. I have however managed to peruse the court record and I am acquainted with the ruling of the Honorable Senior Principal Magistrate Hon Rotich in CMCELCE011 of 2023 dated 17/10/2023 and Principal Magistrate Hon. C.K Cheptoo in CMCC E2468 of 2021 dated 6/05/2022.
  7. This being a first appeal this court is by law mandated and obligated to proceed by way of a retrial. In doing so the court has the duty to re-examine and reappraise all the facts on record and the law applicable and find for itself a conclusion without the need to be bound by the findings of the trial court. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See *Selle & another Vs. Associated Motor Boat Co. Ltd & others* (1968) E.A 123; *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR; *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.



8. I have examined and carefully considered the entire record of the trial court, the tenor and import of the application leading to the impugned ruling, and the tenor and import of the ruling itself. I have also carefully considered the grounds of appeal set out in the memorandum of appeal dated 2/11/2023 and the appellant's submissions in this interlocutory appeal. The appellant's submissions have not been controverted by the respondents.
9. What I have before me for determination therefore is an interlocutory appeal against an interlocutory order made in the course of trial in the subordinate court. The interlocutory appeal specifically sought the setting aside of the impugned interlocutory order.
10. The Honorable Magistrate stated in his ruling:

The court frowns at the fact that similar application had been argued in Milimani CMCC No. 2468 of 2021 before Hon. Cheptoo which was dismissed for lack of merit and the Plaintiff quickly withdrew the matter and filed this one. The solution to settling a loan is to repay and not filing multiple applications in court.
11. As already stated my perusal of the record of appeal reveal that this issue was indeed canvassed in the application before Hon Cheptoo and the interlocutory injunction was not issued. Upon dismissal of the application in CMCC E2468 of 2021 the appellant moved to have the suit withdrawn by filing an application on 10/01/2023. I do not want to delve into the details of the suit but I am aware that the suit property was given as security for the loan which has fallen into arrears. Clause 6 of the Offer letter lists the suit property Karai/renguti/942 as security including household and business chattels.
12. Now, this being an interlocutory appeal, my pronouncements on the issues raised in the appeal will be restricted to the grounds of appeal set out in the memorandum of appeal. I will also refrain against making definitive pronouncements on issues pending before the Senior Principal Magistrate Court.
13. The first ground of appeal relates to holding by the Learned Magistrate that a similar application in CMCC No. 2468 of 2021 had been dismissed for lack of merit. I have already addressed this issue hereinabove and observed that indeed a similar application had been dismissed by Hon. Cheptoo through the ruling in the above-referenced suit.
14. Without withdrawing the case at the Magistrate's Court, the appellant having lost the benefits of the interim orders opted to file a fresh suit in the Senior Principal Magistrates Court whereupon the Senior Principal Magistrate Court declined to grant interim injunctive orders observing that this was already canvassed before the Honorable Principal Magistrate's Court. In my view, the plea for interim injunctive orders in the Senior Principal Magistrates Court was an abuse of the process of the court and violated the provisions of Section 6 of the *Civil Procedure Act*.
15. The plaintiff/appellant filed a Notice of Withdrawal of Suit after the Principal Magistrate's Court had dismissed the application for interim injunctive orders but went ahead to file a similar application before the Senior Principal Magistrate's Court yet the Principal Magistrate's Court was seized of the same dispute and had dismissed the application for interim injunctive orders which the Senior Principal magistrate was being invited to grant. If the applicant/appellant was aggrieved by the discharge, she ought to have appealed against the decision, not to file a fresh suit for the same interim relief in the Senior Principal Magistrates Court.
16. I am therefore satisfied that the Senior Principal Magistrate did not err in its observation nor in dismissing the application filed before the court in respect of issuance of interlocutory injunctive orders which was a subject of a similar decision in CMCC 2468 of 2021 in which the Magistrate's Court had found a similar application unmerited.



17. The contention that the application in the Magistrate Court was necessitated by action of the 1<sup>st</sup> respondent to advertise for sale the suit property which was not offered as security for the loan not tenable because the letter of offer at Clause 6 list the suit property as security for the loan. This as rightly observed by the Hon Magistrate shall form a substantive issue at the full trial of the suit.
18. In the same vein, the contention by the appellant that the 1<sup>st</sup> respondent violated the provisions of Section 90 (1) (2) of the Land Act will canvassed further at the full trial. Further the fact the issue that necessitated filing of the application before the Senior Principal Magistrate's Court was about attachment of the appellant's property which was a result of failure to service a loan facility the Honorable Magistrate was satisfied that the appellant did not show that she had serviced the facility. Instead she pleaded hard economic times which precipitated her failure to service the loan.
19. Moreover, there is no evidence that the appellant had withdrawn the dispute(s) at the time of seeking restraining orders in the Principal Magistrate's court. The Notice to Withdraw was filed on 10/01/2023 yet a ruling had been delivered on 6/05/2022.
20. The last ground of appeal relates to the question of prejudice that the appellant will suffer in view of the fact that there is no temporary injunctive orders in place. I have carefully examined the impugned ruling. It largely dealt with the issue of granting of injunctive orders. The Honorable Magistrate observed that the appellant had not fulfilled conditions for granting of injunctive orders and stated:

“...The applicant is at liberty to redeem her property before the fall of the hammer”.
21. It is instructive that the appellant should have put in place mechanisms to redeem her property but that again is an issue to be deliberated at full trial. In a plea for interim injunctive relief, the court is obligated to pronounce itself on the question as to whether the criteria in *Giella v Cassman Brown* (1973) EA 358 has been satisfied. In the present dispute, the appellant admitted that due to COVID 19 effect she had not been able to service her loan and the facility was in arrears.
22. Evidence was placed before the Senior Principal Magistrate to demonstrate that the appellant was seeking restraining orders after she failed to service the loan. In my view, without evidence that the loan facility was being serviced the Senior Principal Magistrate was justified to not grant the injunctive relief sought. This is because the consequence of granting the injunctive order sought in these circumstances would be to allow one owing the loan and had admitted having been unable to service the loan facility to continue owing and accumulating interest without payment at the expense of the lender not being able to realize their security. That in my view was inequitable.
23. The Learned Senior Principal Magistrate applied the law correctly and arrived at the correct decision. I find no reason to fault his decision.
24. The Appeal is dismissed with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY 2024**

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**MOGENI J**

**JUDGE**

In the virtual presence of: -

Ms. Muriuki for Appellant



Mr. Osumba for Mr. Juma for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> Respondent

Caroline Sagina: Court Assistant

