



REPUBLIC OF KENYA



**Odongo v Leo Gas Limited (Environment and Land Appeal
E026 of 2023) [2024] KEELC 4239 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4239 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E026 OF 2023
GMA ONGONDO, J
MAY 13, 2024**

BETWEEN

SAMUEL ODONGO APPELLANT

AND

LEO GAS LIMITED RESPONDENT

(Appeal from the ruling and order of Hon B. Omwansa, SPM dated 26th April, 2023, in Oyugis SPM's Court Environment and Land Case No. 71 of 2023)

JUDGMENT

1. The instant appeal was provoked by the ruling of the trial court (Hon. B.O Omwansa, SPM) rendered on 26th April 2023 where the appellant/applicant/plaintiff's application by way of a Notice of Motion dated 30th November 2022 for an order of temporary injunction, amongst others, against the 1st defendant/ the respondent in respect of original title LR No. WEST KASIPUL/KONYANGO KOKAL/3371 combined with original title WEST KASIPUL/KONYANGO KOKAL/3369 and currently registered as WEST KASIPUL/KONYANGO KOKAL/3704 (Hereinafter referred to as "the suit parcel"), was dismissed with costs.
2. The appellant through Ochillo and Company Advocates generated the appeal by way of the memorandum of appeal dated 5th May 2023 anchored upon the following grounds;
 - a. The Learned Trial Magistrate erred in law and fact by rendering a Ruling that went into the merits of the Appellant's main case at interlocutory stage.
 - b. The Learned Trial Magistrate erred in law and fact in failing to grant the Appellant's Notice of Motion dated 30th November, 2022 seeking for Temporary Injunction when the principles applicable were satisfied by the Appellant.



- c. The Learned Trial Magistrate erred in law by failing to consider the doctrine of precedent which was binding on him on the issue of the Appellant's possession and actual occupation of the suit parcel, which conferred upon the Appellant with overriding interest in the nature of trust and customary trust, as protected by the provisions of section 30 (g) of the Registered [Land Act](#) Cap 300 (now repealed), section 28 (b) of the [Land Registration Act](#) No. 3 of 2012 and Article 40 (1) of the [Constitution of Kenya](#).
 - d. The Learned Trial magistrate erred in law in failing to apply both High Court, Court of Appeal and Supreme Court decisions which were binding on him on the issue of overriding interest in the nature of trust and customary trust, which right had been infringed by the 1st defendant and Respondent.
 - e. The Learned Trail Magistrate erred in law by failing to properly be guided by the fact that Appellant having acquired an overriding interest on suit parcel, the Respondent's purchase of the suit parcel from the 1st Defendant, had knowledge/notice both actual and constructive of the Appellant's competing overriding interest which ranked in priority and protected by law, thereby divesting the Respondent of a claim of bona fide doctrine.
 - f. The Learned Trial Magistrate erred in Law by failing to be guided by the Appellant's possession and actual occupation, which conferred upon the Appellant with overriding interested in nature of trust and customary trust, the 1st defendant held suit parcel in trust for the Appellant therefore, any purchase thereof was subject to the Appellant's overriding interest.
 - g. The Learned Trial Magistrate erred in law by failing to be persuaded and guided by the Appellant's acquired overriding interest in the nature of trust and customary trust, as expounded in the precedents quoted before him, as such the Appellant's overriding interest ranked in priority against the Respondent's purchaser's interest which was not bona fide.
 - h. The Learned Trial Magistrate erred in law by quoting the decision in Kisii ELC No. 466 of 2015, out of context and which decision is distinguishable, as facts are different from the present case.
 - i. The Learned Trial Magistrate erred in law in failing to frame points for determination, the decision thereon and the reasons for such decision thereby rendering one-page ruling.
 - j. The Trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and authorities in support thereof.
3. In that regard, the appellant has sought the orders as follows;
- a. That the Appeal be allowed and Ruling and Order in Oyugis SPMC ELC 71 of 2022 be set aside.
 - b. That the Honourable court do allow the Notice of Motion Application dated 30th November, 2022 or make an order of status quo on the suit parcel as at the time of filing the said case.
 - c. Costs of the said application and appeal be awarded.
4. On 5th December 2023, the court directed that the appeal be heard by way of written submissions.
5. Accordingly, the appellant's counsel filed submissions dated 2nd February 2024 making reference to the application, the replying affidavit and the response thereto. Counsel submitted in part that the appellant had prior competing interest in the suit parcel at the time of it's purchase and transfer. That



- the appeal has no merit and cited Order 40 Rule 1 of the *Civil Procedure Rules*, 2010 and *Giella-vs-Cassman Brown* (1973) EA 358, among other authorities, to buttress the submissions.
6. The respondent through Owaka and Company Advocates filed submissions dated 12th March 2024 giving the background facts including the parties to the dispute and interlocutory injunction sought. Counsel submitted that the appellant was trying to stop his father from sale of the suit parcel and that he has no locus standi on the same. That no justice would be served if interim injunction is granted in the suit before the trial court.
 7. In the plaint dated 30th November 2022, the appellant sued the respondent and another for, inter alia;
 - a. A Declaration that the 1st Defendant in converting Lease dated 20th June 2018 for a period of 30 years, created on Original title WEST KASIPUL/KONYANGO KOKAL/3369 in favour of the 2nd Defendant to sale and sold it together with title WEST KASIPUL/KONYANGO KOKAL/3371, is illegal, unlawful and unconstitutional.
 - b. A Declaration that 2nd Defendant holds parts of suit parcel, having original title WEST KASIPUL/KONYANGO KOKAL 3371, combined therewith in trust for the Plaintiff.
 - c. General Damages against the 2nd Defendant for trespass on original title WEST KASIPUL/KONYANGO KOKAL/3371.
 8. By the statement of defence and counter claim dated 15th May 2023, the respondent/counter claimer denied the appellant's claim and averred that the appellant's act of encroaching and cultivation of the suit parcel belonging to the respondent, constitutes trespass. So, the respondent has sought the orders which include;
 - a. A declaration that the Counter claimer is the sole and the legally registered owner of the suit parcel.
 - b. A declaration that the Defendant actions of planting crops in a section of the Counter claimer parcels constitutes trespass.
 - c. An order of eviction of the defendant from the Counter claimer's suit parcel.
 9. I have duly considered the grounds of appeal, the parties' respective submissions and pleadings alongside the application and the impugned ruling. Therefore, is the appeal merited?
 10. In the application, the applicant sought a temporary interlocutory relief as stated in paragraph 1 hereinabove. In arriving at the impugned ruling, the learned trial magistrate cited the decision in Kisii ELC No. 466 of 2015 on parents' disposal of land vis a vis consent of their children and proceeded to dismiss the application with costs.
 11. Order 40 (supra) provides for temporary injunction and temporary orders. It is within the discretion of the court to grant temporary injunctive relief and the guiding principles thereof were laid down in the celebrated *Giella* case (supra).
 12. Learned counsel for the appellant lamented that the learned trial magistrate failed to state the points for determination in the impugned ruling. Clearly, the said points apply to judgments in defended suits under Order 21 Rule 4 of the *Civil Procedure Rules*, 2010.
 13. The learned trial magistrate generally referred to the submissions of the parties in the ruling. Besides, I subscribe to the Court of Appeal decision in the case of *Daniel Toroitich Arap Moi and another-vs-Mwangi Stephen Murithi and another* (2014) eKLR that submissions are not and cannot take the place



of evidence. That the same can be heard or dispensed with as they are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one.

14. It was the trial court's view that that a parent must not consult his or her children before disposing of his or her land. To that extent, the ruling touched on trusts which are overriding interests under section 28 (b) of the [Land Registration Act](#), 2016 (2012) and as sought at the foot of the plaint. Therefore, the ruling pointed at the merits of the appellant's main suit and may occasion prejudice to the parties in the suit and the counter claim which call for their hearing on merits.
15. To meet the ends of justice, there shall be status quo order to preserve the suit parcel pending the hearing and determination of the case at the trial court; see sections 3, 13 (7) (a) and 19 of the [Environment and Land Court Act](#), 2015 (2011) as well as sections 3 and 3A of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya and the Court of Appeal decision in [Ogada-vs-Mollin](#) (2009) KLR 620.
16. A fortiori, the appeal is meritorious and the same is hereby allowed in terms of the orders set out in paragraph 3 (a) and (b) hereinabove.
17. By the nature of the present matter and in light of the proviso to section 27 (1) of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya, each party to bear own costs of the appeal and the costs of the application be in the cause.
18. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 13TH MAY 2024

G M A ONGONDO

JUDGE

PRESENT;

