



**Mwazighe & another v Mgaro (Suing as the legal representative & administrator of the Estate of Mbonde Mugaro Mwadilo) (Environment and Land Appeal E006 of 2023) [2024] KEELC 4674 (KLR) (Environment and Land) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4674 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND APPEAL E006 OF 2023  
EK WABWOTO, J  
JUNE 14, 2024**

**BETWEEN**

**GRAVEL MWAZIGHE ..... 1<sup>ST</sup> APPELLANT**

**MICHAEL MWEANULA MWAPEA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MWAJUMA MARURA MGARO (SUING AS THE LEGAL REPRESENTATIVE & ADMINISTRATOR OF THE ESTATE OF MBONDE MUGARO MWADILO) ..... RESPONDENT**

**JUDGMENT**

PARAGRAPH 1.

**GRAVEL MWAZIGHE**

2. MICHAEL MWEANGULA MWAPEA.....APPELLANTS

=VERSUS=

MWAJUMA MARURA MGARO (Suing as the Legal Representative & Administrator of the Estate of

**MBONDE MUGARO MWADILO).....RESPONDENT**

**JUDGMENT**

1. This is a judgment in respect to the Ruling of Hon. T. N. Sinkiyian SRM delivered on 15<sup>th</sup> February 2022 in respect to Voi PM ELC Case No. 2 of 2020 Mwajuma Mgaro (suing as the Legal Representative & Administrator of the Estate of Mbonde Mugaro Mwadilo vs Thomas Mwaapea & 2 Others).



2. Upon hearing the application dated 6<sup>th</sup> February 2020, the trial court granted temporary injunction orders pending the hearing and determination of the suit. The Appellants being dissatisfied with the outcome, filed this appeal through Memorandum of Appeal dated 14<sup>th</sup> March 2022. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:-
  1. The Learned trial Magistrate erred in law and in fact in holding that the Respondent had met the criteria for grant of orders of injunction.
  2. The Learned trial Magistrate erred in law and in fact in holding that the Respondent had land occupation disputes with all the appellants in the original suit contrary to the evidence placed before the court.
  3. The Learned Magistrate erred in law and in fact in failing to rule on the exact location of the disputed land; whether it is in Ndara or Voi Location.
  4. The Learned Magistrate erred in law and in fact in failing to accord the evidence of the appellants due consideration.
  5. The Learned Magistrate erred in law and in fact in granting the injunction orders in total disregard of the fact that the disputed property in lawfully registered to a third party Messr Kishamba B Group Ranch as title Sagalla/ Kishamba B/1, measuring 1084 hectares.
  6. The Learned Magistrate erred in law and in fact in failing to hold that the court had no pecuniary jurisdiction to adjudicate over the matter.
  7. The Learned Magistrate erred in law and in fact in failing to rule whether the Respondent was in actual occupation of any portion of land in Kishamba B Group Ranch and specifically in Kizumanzi village.
  8. The Learned Magistrate erred in law and fact in ruling that the deceased alleged membership in Kishamba B. Group Ranch entitled him to occupation of the land without compliance with Kishamba B. Group Ranch Constitution.
3. On the basis of those grounds, the Appellants prayed that the injunction orders issued against them be set aside with costs and that the Respondent be enjoined from invading portions of land given to the Appellants by the cluster members in Kizumanzi village.
4. The Appeal was canvassed through with submissions. The Appellants filed written submissions dated 4<sup>th</sup> March 2024. Counsel for the Appellant submitted on the following three issues; whether the Respondent herein had met the criteria for grant of the orders of injunction sought, whether the Respondent proved ownership of the suit property and whether the trial court had jurisdiction to preside over the matter.
5. It was submitted that the trial court failed to consider the necessary elements before granting the injunctive orders. One of the elements of injunction had not been established. The trial Magistrate also looked at reparable injury on the part of the Respondent which was also not proved. The cases of Robert Mugo Wa Karanja =Versus= Ecobank (Kenya) Limited & Another (2019) eKLR, Kenya Commercial France Co. Ltd =Versus= Afaha Education Society (2001) Voi EA 86 and Pius Kipchirchir Kogo =Versus= Frank Kimeli Tenai (2018) eKLR were cited in support of the Appellants case.



6. It was argued that pursuant to Section 107 of the *Evidence Act* Cap.80, the Respondent had failed to prove and provide any documentation confirming that she is the owner of the suit property since the property does not have any individual titles and usage of the land is through allocation of parcels of land by village cluster members as per *the Constitution* of the Ranch.
7. The Appellants further submitted that the trial court lacked jurisdiction to preside over the subject matter. It was argued that the suit property is 12 acres of the larger portion of 10.684 hectares which property is worth way more than 7 million that could be handled by the trial Magistrate. The court was urged to allow the appeal and grant the reliefs sought.
8. The Respondent filed written submissions dated 4<sup>th</sup> April 2024. It was submitted that the trial Magistrate exercised her discretion correctly in granting the injunctive orders in the matter. The trial Magistrate rightly found that the Respondent's late husband was a member of Kishamba B group Ranch as member No. 1618 since 2015 and that the Respondent had been in occupation of the suit land. The trial Magistrate did not make any error since the Respondent had established a prima facie case and hence there was need to issue the injunctive orders to safeguard the Respondent from being evicted. The Respondent would have suffered irreparably if the orders sought would not have been granted.
9. In respect of the jurisdiction of the trial Magistrate in hearing the suit, it was argued that the same was determined vide a Ruling delivered by F. M. Nyakundi SRM on 17<sup>th</sup> June 2021. The court was urged to dismiss the appeal with costs.
10. The court has considered the entire Record of Appeal and is of the view that the following are the salient issues for determination in respect to this appeal:-
  - i. Whether the trial court had jurisdiction to entertain the suit.
  - ii. Whether the trial court erred in the exercise of its discretion in granting the temporary injunctive orders.
11. The court shall now proceed to address the said issues sequentially.
12. The jurisdiction of the court flows from *the constitution* and statute. In The Matter of Advisory Opinion of the Court under Article 163 of *the constitution* - Application No. 2 of 2011 at paragraph 30, the Supreme Court held: -
 

“It is trite law that a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity.”
13. Similarly, by the Supreme Court in the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 others, [2012] eKLR where it stated;
 

“A court’s jurisdiction flows from *the Constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law.”
14. The judicial system in Kenya includes the Magistrates’ courts as established under Article 169 of *the Constitution* of Kenya, 2010. Pursuant to Article 169 (2), parliament is mandated to enact legislation conferring jurisdiction, functions and powers on the magistrates’ courts. In that regard parliament



legislated the following provisions at Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011:

- (3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
- (4) Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —
  - (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
  - (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

15. The Chief Justice has, by various gazette notices, made appointments pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011. Such gazette notices include Gazette Notice No. 1472 dated 1<sup>st</sup> March 2016, Gazette Notice No. 1475 dated 1<sup>4th</sup> March 2016, Gazette Notice No. 11930 dated 5<sup>th</sup> December, 2017 and Gazette Notice No. 2575 dated 28<sup>th</sup> February, 2019. Thus, there exist within the magistrates' courts, several magistrates duly gazetted and granted jurisdiction and power to handle cases involving occupation and title to land. Some four years after enactment of the *Environment and Land Court Act*, 2011, parliament also enacted the *Magistrates' Courts Act*, 2015 so as to among others give effect to Articles 23 (2) and 169 (1) (a) and (2) of *the Constitution* and to confer jurisdiction, functions and powers on the magistrates' courts. The Act came into operation on 2<sup>nd</sup> January, 2016 and its Section 9 (a) provides:

A magistrate's court shall –

- (a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to –
  - (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - (ii) compulsory acquisition of land;
  - (iii) land administration and management;
  - (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - (v) environment and land generally.

16. The upshot of the provisions at Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, is that magistrates who are duly gazetted have the requisite pecuniary jurisdiction and power to handle cases involving occupation and title to land.

17. In the instant case, having perused the Record of Appeal, it is indeed evident that the trial court had earlier on vide its ruling dated 17<sup>th</sup> June 2021 considered the Appellants objection to the jurisdiction of the trial court and dismissed the said objection based on the fact that there was no valuation report indicating that the 12 acres within the said Kishamba B Ranch is higher in pecuniary value than the court could handle. The said ruling was never appealed against by the Appellants neither was it



reviewed by the trial court. Equally this court has not been furnished with any valuation report and as such the Appellants' objection to the jurisdiction of the trial court to hear and determine the suit on the basis of pecuniary jurisdiction equally fails.

18. As to whether or not the trial court had erred in granting the injunctive orders, as earlier observed, one of the issues in this interlocutory appeal is whether the lower court erred in the exercise of its discretion in granting the interlocutory relief of an injunction.

19. The lower court was invited to exercise discretionary jurisdiction. Sir Charles Newbold P. outlined the following principle in *Mbogo & Another v Shah* [1968] EA 98 which guides our appellate courts when exercising appellate jurisdictions over discretionary decisions of lower courts:

“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 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 misjustice.”

20. The Court of Appeal emphasized this principle in *Nguruman Limited v Jan Bonde Nielsen & 2 others* C A No 77 of 2012 [2014] eKLR in the following words:-

“This dictum underlines what is well settled in our laws that as an appellate court, this court has a limited function in an appeal from the grant or refusal of an order of injunction issued by the court below. It has no jurisdiction to exercise an independent original jurisdiction of its own. It must defer to the exercise of jurisdiction by the judge in the court below and must not interfere with it merely upon the ground that the members of this court would have exercised the discretion differently.”

21. The criteria was outlined in the often cited case of *Giella v Cassman Brown* (1973) EA 358. First, an applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate to the court that if the interlocutory injunctive relief is not granted, he would stand to suffer damage that may not be indemnified through an award of damages. Third, should the court have doubt on the applicant's satisfaction of both or either of the above requirements, the application is to be determined based on the balance of convenience. Last, at the stage of disposing the plea for an interlocutory injunction, the court seized of the application does not make definitive or conclusive pronouncements on the key issues in the suit.

22. In *Patriotic Guards Ltd v. James Kipchirchir Sambu* [2018]eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

23. In *Patel v. E.A Cargo Handling Services Ltd.*(1974) EA the court stated that:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as may be just ... The main concern of the court is to



do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”

24. In the instant appeal, the material on record shows that the Respondent was and is in occupation of the suit property prior to the institution of the suit. There was also evidence that the Respondent’s deceased husband was a member of the group ranch No. 1618 which was indicated in the letter dated 2<sup>nd</sup> April 2016 from the group secretary confirming Mbonde Mgaro Mwadilo as a member. In the above circumstances the court is satisfied that the Respondent had satisfied the criteria for grant of the temporary injunctive orders and as such the trial court properly exercised its discretion in granting the same. Consequently, this court is unable to set aside the temporary injunctive orders at this stage.
25. In conclusion, I do not find any merit in the appeal and the same is hereby dismissed. Each party to bear own costs of the appeal.

Judgment accordingly.

**Dated, Signed and Delivered virtually at Voi this 14<sup>th</sup> day of June, 2024.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of:-**

**Ms. Carol Nga’ng’a for the Appellants.**

**N/A for the Respondent.**

**Court Assistants; Patrick Maina.**

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