



REPUBLIC OF KENYA



**Kimondiu & 9 others v Watari (Environment and Land Appeal
E063 of 2023) [2024] KEELC 5795 (KLR) (1 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5795 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E063 OF 2023**

**BM EBOSO, J
AUGUST 1, 2024**

BETWEEN

**DOROTHY MBULA KIMONDIU 1ST APPELLANT
JAMES MAINA KURUGA 2ND APPELLANT
PATRICK KABIRO 3RD APPELLANT
ROBERTSON MWANGI KARUGA 4TH APPELLANT
PAUL MAINA MWANGI 5TH APPELLANT
MOSES MUTWIRI MARANGU 6TH APPELLANT
JAMES MAINA BUGARA 7TH APPELLANT
JOHN GATHAMBO MWANGI 8TH APPELLANT
JANE WANGECI NGACHIRA 9TH APPELLANT
AGNES NJERI MUIRURI 10TH APPELLANT**

AND

LUCIA WANJIKU WATARI RESPONDENT

*(Being an Appeal against the Ruling of Hon J.A Agonda, Senior Principal Magistrate,
delivered on 2/11/2023 in Ruiru Chief Magistrate Court MCL & E Case No. E111 of 2023)*

JUDGMENT

1. This appeal challenges the ruling rendered on 2/11/2023 in Ruiru SPMC E & L Case No E111 of 2023 by Hon J A Agonda, Principal Magistrate. The respondent in this appeal was the plaintiff in the suit in the lower court. The 1st to the 4th appellants were the four defendants in the suit.



2. The impugned ruling disposed two applications. The first application was the respondent's notice of motion dated 19/6/2023, through which she sought interlocutory injunctive orders against the 1st to the 4th appellants in relation to land parcel number Ruiru/Ruiru East Block 2/984 and the 16 subdivisions that had already been surveyed out of the land, namely, Ruiru/Ruiru East Block 2/42920 to 42935. The second application was a notice of motion dated 11/8/2023 by the 1st to the 4th appellants, through which they sought an order joining the 5th to the 10th appellants as interested parties in the suit. They also sought a status quo order in relation to the occupation, possession and use of land parcel numbers Ruiru/Ruiru East Block 2/42921 to 42926, Ruiru/Ruiru East Block 2/42931 and Ruiru/Ruiru East Block 2/42933 to 42935.
3. The key issue which fell for determination in the respondent's application dated 19/6/2023 was whether the criteria for grant of an interlocutory injunctive relief had been satisfied. The lower court's finding on the issue was in the affirmative. The lower court issued the following verbatim orders in relation to the application dated 19/6/2023:
 - a. A temporary injunction is issued directing the defendant only utilize and occupy portions of land Ruiru/ Ruiru East Block 2/42922, 42923, 42926 and 42928 and be restrained by themselves, their servants, agents and or employees from interfering with plaintiff's possession and or access, advertising for sale, disposing charging, evicting or otherwise leasing, letting or interfering with the ownership in the remaining portion Ruiru/ Ruiru East Block 2/984 pending hearing and determination of the main suit. [sic]
 - b. A temporary injunction is issued directing the defendants not to further develop land parcels No. Ruiru/ Ruiru East Block 2/42922, 42923,42926 and 42928.
 - c. Costs of this application shall be in the cause.
 - d. Parties to comply with Order 11 of Civil Procedure Rules, 2010. Mention on 5th December 2023 for pre trial directions with a view to take hearing date for the main suit.
4. The two key issues which fell for determination in the application dated 11/8/2023 by the four appellants were: (i) Whether the criteria for joinder had been met; and (ii) Whether the criteria for grant of an interlocutory injunctive order in the nature of a status quo order had been satisfied. The lower court analysed and disposed the first issue but it did not analyse the second issue. The lower court nonetheless allowed the said application in the following terms:

“In the foregoing premises and based on the reasons hereinabove, I find merit in the defendants / interested parties' application for joinder. I therefore proceed to allow the notice of motion application dated 11th August, 2023”
5. The above three issues that fell for determination in the two applications are the key issues that fall for determination by this court in the exercise of its jurisdiction as a first appellate court. Before I analyze and dispose the issues, I will briefly outline the parties' respective cases in the lower court; the grounds of appeal; and the parties' respective submissions before this court.

Respondent's Case

6. The suit in the lower court was initiated by the respondent through a plaint dated 19/6/2023. She alleged that she owned land parcel number Ruiru/Ruiru East Block 2/984 which she had caused to be sub-divided into 16 duly registered subdivisions, namely Ruiru/Ruiru East Block 2/42920 to 42935. It was her case that the four appellants [Appellant Nos 1 to 4] had trespassed onto 4 out of the 16 subdivisions, namely, Ruiru/Ruiru East Block 2/42922, 42923, 42926 and 42928. She sought: (i)



an order decreeing demolition of the structures which the four appellants had erected on the four subdivisions; and (ii) a permanent injunction restraining the four appellants against trespassing on the four subdivision parcels.

7. Together with the plaint, the respondent filed a notice of motion dated 19/6/2023, seeking interlocutory injunctive reliefs against the four appellants. As observed in the introductory part of this Judgment, the said application was one of the two applications that culminated in the impugned ruling that is the subject of this appeal. The lower court granted the respondent the interlocutory relief that she sought.

Appellants' Case

8. The four appellants who had been sued as defendants in the lower court filed a replying affidavit sworn on 11/8/2023 by Dorothy Mbula Kimondu. Their case was that the 1st appellant was the owner of parcel number Ruiru/Ruiru East Block 2/42922, having purchased it in April 2014 from M/s Gatuamba Investment Agency at Kshs 250,000. They further contended that the 2nd respondent was the owner of parcel number Ruiru/Ruiru East Block 2/42926, having purchased it jointly with his spouse, Grace Njeri Kuria, from M/s Gatuamba Investment Agency in 2014 at Kshs 300,000. They added that the 3rd appellant was the owner of parcel number Ruiru/Ruiru East Block 2/42923, having purchased it in 2014 from M/s Gatuamba Investment Agency at Kshs 350,000. Lastly, they contended that parcel number Ruiru/Ruiru East Block 2/42928 belonged to a lady known as Ruth and did not belong to the respondent, hence the respondent could not claim ownership rights over the parcel.
9. The four appellants added that it had come to their attention that parcel number Ruiru/Ruiru East Block 2/42926 was registered in the name of one Euphrasie Wanjiru Watari, hence the respondent could not claim ownership rights over it. It was their case that the respondent did not own the four parcels and was therefore not entitled to the interlocutory injunctive reliefs that she sought. They contended that the respondent had failed to present documents that showed a chain of documentation on how she acquired her land registration documents.
10. Subsequent to filing that defence, the appellants filed a notice of motion dated 11/8/2023, seeking, inter alia, an order joining the 5th to the 10th appellants as the 5th to the 10th defendants in the suit and an order directing the maintenance of status quo in terms of occupation, possession and use of land parcel numbers Ruiru/Ruiru East Block 2/42921 to 42926, Ruiru/Ruiru East Block 2/42931 and Ruiru/Ruiru East Block 2/42933 to 42935 all of which were subdivisions surveyed out of parcel number Ruiru/Ruiru East Block 2/984.
11. The respondent opposed the application dated 11/8/2023 through her replying affidavit sworn on 12/9/2023. Her case was that she was the registered proprietor and the legal owner of land parcel numbers Ruiru/Ruiru East Block 2/42922, 42923, 42926 and 42928. On the plea for an order of joinder of the 5th to the 10th appellants, the respondent contended that the 5th to the 10th appellants were not in occupation of the suit land, adding that they occupied other parts of the parent parcel which did not belong to her. The respondent contended that were the lower court to issue the order of maintenance of status quo, the appellants would continue with the illegal developments on the suit land to her detriment. The applications were canvassed through written submissions.
12. The lower court subsequently rendered the impugned ruling on 2/11/2023. It allowed the respondent's application dated 19/6/2023 in the above verbatim terms. Among the interlocutory orders given was an injunctive order against the appellants. The lower court, similarly, allowed the four appellants' application dated 11/8/2023. Among the orders granted was an injunction in the form of a status quo order.



Appeal

13. Aggrieved by the ruling of the lower court, the appellants brought this appeal, advancing the following four (4) verbatim grounds:
1. That the learned magistrate erred in law and fact in finding that the respondent had established a prima facie case with a probability of success and met the principles for granting an injunction notwithstanding:
 - a. The appellants have been in exclusive possession of the suit properties for ten (10) years and the issuance of the order of injunction will lead to the appellants' dispossession of the suit properties even before the suit is heard and determined.
 - b. The respondent is not the registered owner of a majority of the suit properties excised from Ruiru/Ruiru East Block 2/984 and further the registered owners thereof are not party to the suit.
 - c. The suit land is verifiable and quantifiable and the respondent can be compensated by monetary terms or through damages.
 - d. The respondent has never been in possession or occupation of the suit properties at any point whatsoever.
 - e. The court's determination that the balance of convenience demanded the maintenance of status quo.
 2. That the learned trial magistrate erred in law and fact in failing to find that LR No. Ruiru/Ruiru East Block 2/984 was no longer available as it was subdivided and some of the resultant plots were transferred to third parties who are not party to the suit and an injunction would not issue in the circumstances.
 3. That the learned trial magistrate erred in law and fact in granting the orders sought by the respondent in her application whose effect was to give legal ownership of the suit properties to the respondent with finality even before the suit is heard and determined.
 4. The learned magistrate erred in law and fact in allowing the appellants' application dated 11/8/2023 which contained a prayer for maintenance of status quo and yet contradictorily gave legal ownership of the suit properties to the respondent even before the suit is heard and determined.
14. The appellants urged this Court to: (i) allow the appeal with costs; (ii) vacate the injunctive orders issued against the appellants and order that the parties revert back to their respective positions as they were before the issuance of the injunctive orders; and (iii) grant status quo orders pending the hearing and determination of the suit.

Appellants' submissions

15. The appeal was canvassed through brief written submissions dated 6/2/2024, filed by M/s GNK & Associates LLP. Counsel for the appellants contended that in deciding whether the injunctive reliefs should be granted, the lower court was required to satisfy itself that the principles laid down in the case of *Giella vs Cassman Brown Limited supra* were met. Counsel further contended that the appellants challenged the manner in which the registration of the suit properties/plots was done in favour of the respondent and the other individuals who were not even parties to the suit. Counsel submitted that



the appellants were purchasers for value, having bought the properties from Gatuamba Investment Agency on various dates between 2013 and 2014. Counsel further submitted that the appellants took immediate possession of the plots and constructed their homes thereon. The appellants' counsel added that the appellants lived on the plots in active occupation for almost 10 years, adding that, on the other hand, the respondent had never been in possession of the plots. Counsel submitted that no material was placed before the lower court to suggest that the appellants bought the suit properties from the respondent in the first place.

16. On whether the learned magistrate erred in law and in fact in failing to find that land parcel number Ruiru/Ruiru East Block 2/984 was no longer in existence as it had been subdivided and some of the resultant subdivision plots had been transferred to third parties, some of whom were not parties to the suit, hence an injunction ought not to have been issued in the circumstances.
17. Counsel submitted that the respondent lacked the locus standi to secure injunction orders over the plots known as land parcel numbers Ruiru/Ruiru East Block 2/42924, 42925,42926,42931, 42933,42934 and 42935 since she was not the registered owner.
18. On whether the learned magistrate erred in law and in fact in granting the injunction orders whose effect was to give legal ownership of the suit plots to the respondent with finality before the hearing and determination of the main suit, counsel submitted that it was settled law that in an interlocutory application, the court ought not to determine the trial issues. Counsel further submitted that by granting the respondent the injunctive orders as sought, the lower court allowed the respondent to do as she pleased with the suit plots, hence negating the purpose of the trial.
19. On whether the learned magistrate erred in law and in fact in allowing the appellants' application dated 11/8/2023 which contained a relief for maintenance of status quo and contemporaneously giving legal ownership of the suit plots to the respondent even before the suit was heard and determined, counsel submitted that the contradictory orders were untenable.
20. In conclusion, counsel submitted that the learned trial magistrate erred in law and in fact in arriving at a decision that was not in consonance with the available evidence and law. Counsel urged the Court to set aside the impugned ruling in its entirety.

Respondent's Submissions

21. The appeal was opposed through written submissions dated 29/2/2024, filed by M/s Mugo Mugo & Company Advocates T/a Double M Advocates. Counsel for the respondents identified the following as the issues that fell for determination in the appeal: (i) merits and propriety of the orders issued; and (ii) who should bear costs of the appeal.
22. On the merits and propriety of the orders issued, counsel submitted that the lower court exercised its discretionary power to grant injunctive orders judiciously. Counsel further submitted that this court needed to discern whether the lower court made a fundamental errors which may have led to the wrong conclusion. Counsel added that the appellants having failed to demonstrate any fundamental error in the lower court's findings, the findings should not be interfered with. Counsel urged the Court to find that the appeal lacked merit and proceed to dismiss it.
23. On who should bear the costs of the appeal, counsel submitted that the respondent had gone to agonizing lengths in seeking redress and reaffirming her proprietary rights against the appellants. Counsel relied on Section 27 of the *Civil Procedure Act* to submit that it would only be fair and just for this Court to conclude that it was the appellants' unjustifiable and unreasonable actions that precipitated the proceedings, hence they should bear the costs of the appeal.



Analysis and Determination

24. I have read and considered the record of appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The appellants advanced and argued four grounds of appeal. The following are the issues that flow from the four grounds of appeal: (i) Whether the lower court erred in proceeding from the premise that land parcel number Ruiru/Ruiru East Block 2/984 was available for the purpose of the plea for interlocutory injunction; (ii) Whether the lower court granted parallel and contradictory injunctive orders and thereby erred; (iii) Whether the parallel applications satisfied the criteria for grant of interlocutory injunctive orders; and (iv) Whether the orders granted to the respondent were final in nature and therefore irregular. I will dispose the four issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
25. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:-
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
26. The principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
27. Did the lower court err in proceeding from the premise that Ruiru/Ruiru East Block 2/984 was available for the purpose of the plea for interlocutory injunctive orders? In her pleadings, the respondent disclosed that parcel number Ruiru/Ruiru East Block 2/984 had been subdivided into 16 registered subdivision parcels. She identified the 16 subdivisions parcels as Ruiru/Ruiru East Block 2/42920 to 42935. Indeed, she exhibited copies of titles and official searches relating to some of the 16 subdivision parcels.
28. Against the above background, the respondent, through the application dated 19/6/2023, sought an interlocutory injunction in relation to Ruiru/Ruiru East Block 2/984. The lower court did not detect the above obvious confusion that had been created by the respondent. It proceeded to issue an injunction relating to a parcel that no longer existed. The proper thing to do was for the respondent to identify the affected parcels by their new registered parcel numbers and proceed from that premise. The lower Court did not do that. It instead proceeded from the premises that Ruiru/Ruiru East Block 2/984 still existed. It granted injunctive reliefs in respect of the non-existent parcel. For the above reason, the court agrees with the appellants that there was a grave error.
29. Did the lower court issue parallel and contradictory injunctive orders? My answer to the above question is in the affirmative. The respondent sought and was granted injunctive orders in the terms set out in paragraph 3 of this Judgment. The reliefs granted were to the 1st to the 4th appellants are set out in paragraph 4 of this Judgment.



30. Clearly, these were parallel and contradictory interlocutory reliefs. Secondly, whereas the lower court analysed the plea for joinder, grant of the interlocutory reliefs to the 1st to 4th appellants was done without any analysis of the plea for interlocutory reliefs made by the four appellants.
31. That is not the only grave error that the lower court made. Whereas as the lower court admitted the 5th to the 10 appellants as defendants in the suit, it proceeded to issue the interlocutory injunctive orders against them without hearing them on the two applications. The proper procedure in applications of this nature is to first dispose the plea for joinder. If the plea is found to be merited, pleadings are amended and all the parties are served and heard on the plea for interlocutory injunctive reliefs.
32. The third key issue is whether the parallel applications met the criteria for interlocutory injunctive relief. The fourth key issue is whether the orders granted to the respondent were final in nature and therefore irregular. The court has noted that the 5th to the 10th respondents were condemned without being heard. They will need to respond to the relevant applications and file submissions on them. Put differently, they have a right to be heard on the parallel. Consequently, plea for interlocutory injunctive relief, this court will not make a pronouncement on issue numbers (iii) and (iv).
33. For the above reasons, this court finds merit in the appeal. Except the order for joinder of the 5th to the 10th appellants, all the other orders will be set aside so that the parallel pleas for injunctive reliefs can be heard afresh in the presence of the new parties.
34. On costs, the errors giving rise to this appeal were committed by the court itself. Consequently, parties will bear their respective costs of the appeal.
35. The result is that this appeal has merit. The appeal is partially allowed and disposed in the following terms:
 - a. The ruling rendered by Hon J. A Agonda on 2/11/2023 in Ruiru CMC E & L Case No E111 of 2023 is set aside except for the order of joinder of the 5th to the 10th appellants.
 - b. The pleadings in the suit and the two relevant applications shall be amended to reflect the added parties and the correct current registered parcel numbers.
 - c. The two applications will be heard afresh by a different magistrate should the respective applicants desire to pursue them.
 - d. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 1ST DAY OF AUGUST 2024

B M EBOSO

JUDGE

In the Presence of: -

Mr. Kurui for the Appellants

No appearance by the Respondents

Court Assistant: Hinga

