



Ndalila & 2 others v Wambu (Environment and Land Appeal E013 of 2024) [2025] KEELC 555 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELC 555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E013 OF 2024
EC CHERONO, J
FEBRUARY 13, 2025**

BETWEEN

SILAS WAFULA NDALILA 1ST APPELLANT

CHRISTINE MAINA KWEYU 2ND APPELLANT

ALEX NDALILA 3RD APPELLANT

AND

CRESTERS KULOBA WAMBU RESPONDENT

*(Being an appeal from the ruling by Hon. T. OLANDO (PM)
delivered on the 27/03/2024 in Bungoma CM ELC E019 OF 2024)*

JUDGMENT

1. Vide a Memorandum of Appeal dated 05/04/2024, the Appellants preferred this appeal challenging the ruling delivered on 27/03/2024 (I believe it should read 26/03/2024) in Bungoma CM ELC E019 OF 2024 wherein the trial court had granted an order for a temporary injunctive restraining the Appellants and/or their proxies from entering, invading and or interfering in any manner with land parcel no. E.Bukusu/W.Sang’alo/ 9304,9307 and 9308. The trial court also issued an order for re-opening the surveyed road of access on the land parcel no. E.Bukusu/W.Sang’alo/ 9304,9307 and 9308.

Background.

2. A brief background of the case is that the Appellants herein were the Defendants while the Respondent were the Plaintiff in Bungoma CM ELC E019 OF 2024 (herein referred to as the ‘former suit’) The Respondents substantive claim in the former suit as reflected in a plaint dated 16/2/2024 was for a permanent injunction against the Appellants and their proxies from interfering with land parcel no. E.Bukusu/W.Sang’alo/ 9304,9307 and 9308, re-opening of a road access, eviction orders, mesne profits, special damages, costs and interests. The Appellants filed a statement of defence dated



28/02/2024 denying the Respondents claim and alluded to the existence of another suit between the parties herein. They sought to have the Respondents suit dismissed with costs.

3. The Respondents had filed the plaint contemporaneously with a notice of motion application of even date seeking the following orders;
 - a. That this application be certified urgent and heard ex-parte in the first instance.
 - b. That an order do issue restraining the defendants by themselves, their agents, servants, workers and or whomsoever claiming under them from entering, invading and or interfering in any manner whatsoever with land parcel no. E.Bukusu/W.Sang'alo/9304,9307 and 9308 pending inter-partes hearing of this application.
 - c. That an order do issue restraining the defendants by themselves, their agents, servants, workers and or whomsoever claiming under them from entering, invading and or interfering in any manner whatsoever with land parcel no. E.Bukusu/W.Sang'alo/9304,9307 and 9308 pending inter-partes hearing of this suit.
 - d. That an order do issue re-opening the surveyed road of access on the land parcel no. E.Bukusu/W.Sang'alo/9304,9307 and 9308.
 - e. Costs.
4. In response, the Appellants filed grounds of opposition dated 28/02/2024 and a Replying affidavit sworn by the 3rd Appellant on 08/03/2024. It was their argument that land parcel no. E.Bukusu/W.Sang'alo/9304,9307 and 9308 (hereinafter referred to as "the suit properties") are sub-divisions of land parcel no. E.Bukusu/W.Sang'alo/676 which was registered in the name of one Wambu Wamukota (dcd) who was the Respondent's father. That succession proceedings for the estate of the said Wambu Wamukota were done vide BGM HC Succ. Cause No. 78 of 2007 and a grant subsequently issued. That land parcel no. E.Bukusu/W.Sang'alo/676 was sub-divided into 12 portions in line with the grant i.e E.Bukusu/W.Sang'alo/9304,9305,9306,9307,9308,9309,9310,9311,9312,9313,9314 & 9315.
5. That prior to the demise of his father (3rd appellant) on 11/02/2015, he had purchased land from the beneficiaries of the estate of Wambu Mukota to be hived from the original land parcel no. E.Bukusu/W.Sang'alo/676 vide various agreements. That upon the said purchase, his father and family moved into the land and occupied the same with clear demarcation in place to the exclusion of others. That the Respondent has never occupied the land and that denying them (the appellants) use and occupation of the suit land will occasion hardships. They argued that the Respondents title has been extinguished by operation of the law and that the Respondent holds the said titles in trust for them.
6. It was also argued that the suit offends the provisions of section 6 of the *Civil Procedure Act* as there exists another suit i.e Bungoma ELC(OS) E005 OF 2024. That they have been in the suit property since the year 1985 and have extensively developed the suit properties including building a home, renting units and planting trees. That their deceased father and grandmother were buried in the suit properties.
7. After considering the said application, the trial court delivered its Ruling allowing the Respondents application on 27/03/2024.
8. Being aggrieved by the trial courts decision, the Appellants instituted the current appeal on the following grounds;
 - a. That the learned trial magistrate erred in law and in fact by granting an injunction restraining the appellants from entering, invading or interfering in any manner with land



parcel no. E.Bukusu/W.Sanga'lo/9304,9307 &9308 pending the hearing and determination of Bungoma ELC E019 OF 2024 contrary to the evidence tendered.

- b. That the learned trial magistrate erred in law and in fact by failing to consider the issues raised in the appellants replying affidavit sworn on 08/03/2024 and by totally disregarding it as though none was filed thereby occasioning miscarriage of justice.
 - c. That the learned trial magistrate erred in law and in fact by allowing the application which are eviction orders in disguise thereby occasioning gross miscarriage of justice.
 - d. That the learned trial magistrate erred in law and in fact by failing to find that Bungoma ELC E019 OF 2024 is sub judice contrary to the evidence that was tendered in the replying affidavit.
 - e. That the learned trial magistrate erred in law and in fact by failing to find that the application did not pass the test laid down in the celebrated case of Giella vs. Casman Brown.
 - f. That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellants have been in occupation of the suit land parcels for a period exceeding 12 years and therefore they had acquired rights over the said property.
 - g. That the learned trial magistrate erred in law and in fact by failing to appreciate that the balance of convenience tilt in favour of maintaining the status quo obtaining until the determination of the suit.
 - h. The ruling by the learned trial magistrate was obviously biased.
9. The appellant sought for the following orders;
- a. The appeal be allowed with costs.
 - b. The ruling of Honourable Tom Orland delivered on the 27/03/2024 be set aside in its entirety.
 - c. An order do issue maintaining the status quo until the determination of the suit.
 - d. An order directing that the suit be heard by another judicial officer save the trial court.
10. When this appeal came up for directions, the parties agreed to have the same canvassed by way of written submissions.
11. Those submissions have been filed both by M/s Mukisu & Co. Advocates And M/s Omundi Bw'onchiri Advocates for the Appellants and the Respondent respectively.
12. I have considered the Memorandum of appeal, the record of appeal and the submissions by counsel and find that the singular issue for determination in this appeal is whether the grant of an order of a temporary injunction issued in favour of the Respondent by the trial Court was exercised in accordance with the law and established precedents. This is therefore an appeal against the exercise of that discretion by the trial magistrate in granting the order of a temporary injunction. In considering this appeal, this Court will therefore be guided by the general principles which apply when an Appellate Court may interfere with the discretionary jurisdiction of a trial Court. These principles were set out in the case of Mbogo & Another -v- Shah 1968 E.A. 93 as follows:

“An Appellate Court will not interfere with the exercise of the trial Court’s discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as



a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice.”

13. Grounds 1, 2,3, 5,6 &7 of the Memorandum of appeal can be combined as one ground. Here, the trial magistrate is faulted for his application of the law regarding injunctions. The orders that were sought in the application dated 16/02/2024 were anchored under the provisions of Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules as well as Sections 3A and 63 of the Civil Procedure Act 2010. Order 40 Rule 1 of the Civil Procedure Rules,2010 is meant to preserve the subject matter of a dispute pending the hearing and determination of the suit.
14. The principles for the grant of a temporary injunction were set out in the cases of *Giella -v- Cassman Brown & Company Ltd* 1973 EA 358 where the Court held as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
15. These conditions are considered sequentially so that where no prima facie case is established, the application fails and if a prima facie case is demonstrated but damages would be an adequate remedy, then an injunction cannot be issued.
16. A prima facie case was defined by the Court of Appeal in *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR as follows;

“a prima facie case in a civil application includes but is not confined to a genuine and arguable case”. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
17. The Respondent’s claim is that he is the registered owner of the suit properties and that on 26/11/2023, the Appellant without his consent invaded the suit land and destroyed his property, cut down his trees and assaulted his son. He argued that he reported the incident to the area chief, police and forest department and annexed documents to that effect. The Appellants on the other hand argued that their deceased father purchased the properties in issue from the Respondent’s co-beneficiaries between the years 1985 and 2012. That they occupied the purchased land and have been in occupation for over 12 years.
18. In determining whether the Applicants have established a prima facie case, this court ought not to delve into the merits and demerits of the case as in the case of; *Peter Kasimba & 219 others V Kwetu Savings & Credit Co-operative Society Limited & 11 others* (2020)eKLR, where Odunga J (as he then was) stated as follows;

“at an interlocutory stage, the court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties.”

According to the provision of Sections 24 (1), 25 (1) and 26 (1) of The Land Registration Act, NO. 3 of 2012, the law provides that for any one claiming legal proprietorship and ownership of land, the prima facie evidence is a Certificate of title.



19. It is clear that the Respondent is the holder of a certificate of title of the suit properties and the Appellants argue that they bought a portion of the suit land from some of the beneficiaries of the estate of Wambu Wamukota and immediately taken physical possession and occupation of the same. The Respondent herein has expressly and explicitly stated that the Appellants entered upon and took possession of ½ acre of L.R.NO.E.Bukusu/W.Sangalo/9304. For clarity, it is confirmed both in ground three (11) of the certificate of urgency, as well as in paragraph 5 of the supporting affidavit. Therefore, this particular occupation has not been contested by either of the parties
20. From the evidence, I note that apart from the attached proceedings in Bungoma ELCOS NO.5 OF 2024 with further attached photographs showing some houses and a grave, the Appellants have not pleaded or proved any further occupation. It is therefore not clear whether the Appellants occupy all the three portions comprised in the suit properties. In my considered view, an order of a temporary injunction cannot issue where the act and/or activity complained of has already taken place and/or otherwise happened. On the basis of the evidence and material placed before me, it is my view that with regard to the other areas where the Appellants have constructed the said permanent structures, I find that the Respondent had established a prima facie case that require to proceed to the main hearing for determination.
21. The other cardinal principle for the grant of a temporary injunction is whether the Respondent would suffer irreparable injury or damage unless the application is granted. If the answer is in the affirmative, then the Court ought to grant the order. By irreparable injury means that the injury or damage to be suffered must be a substantial or material one that is; one that cannot be adequately atoned for in damages. The Applicant claims that the Respondents have vandalized his piped wires and cut down his trees. Having found that the Respondent is the registered owner and has proprietary rights protected under the law, I find that he is likely to suffer irreparable damage that cannot be compensated in monetary terms.
22. The third limb is that if the Court is in doubt on any of the above two principles, it will decide the application on the balance of convenience. The term balance of convenience was defined in the case of Bryan Chebii Kipkoech V Barnabas Tuitoek Bargoria & Another (2019) KLR where the court stated inter-alia;

“—The court should issue an injunction where the balance of convenience is in favour of the plaintiff and not where the balance is in favour of the opposite party. The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiffs would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience, it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the Defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it...”

I agree with the defining of the court in the above decision. Applying the same to this case, I find that the balance of convenience tilts in favour of the Appellant herein.

23. The Appellants in ground 7 of the Memorandum of appeal argues that the trial court ought to have maintained the status quo. This order would have been ideal if only the said status was properly defined. The court was left to grapple with what status quo could be since it had not been properly defined.



In the case of Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others [2015] eKLR, the Court stated that;

“...It is undesirable to simply make an order of status quo to be maintained without clearly describing the state of affairs then existing and being preserved. Assistance of the counsel should always be sought in such instances otherwise each party may walk away with its own state of affairs in mind.”

24. In ground 4, the Appellant argued that the suit pending before the trial court is sub-judice to Bungoma ELC(OS) E005 of 2004. Copies of Pleadings to the said case were attached to the application and from a perusal of the same, it appears that the Appellant is claiming adverse possession of L.R. No. E.Bukusu/W.Sanga’lo/9306/9307/9308/9309 and 9315. The concept of sub judice is one that bars one Court from trying a matter that is before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine the two cases without deference to the former, they would arrive at similar or different decisions on the same subject matter claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system.
25. From the foregoing, and having perused the pleadings in both cases, it is my considered view that indeed these are two matters touching on the same subject matter and co-related parties. It would be a miscarriage of justice to allow the two suits to proceed separately as this might lead to conflicting determinations. Further, since the Appellants herein have raised the defence of adverse possession in Bungoma ELC CM E019 of 2024, it would be proper to have two cases consolidated, especially after the by the Court of Appeal that the Magistrate Courts did not have jurisdiction to determine claims for adverse possession. (see CA No. of 2022 (NAIROBI) It is therefore my considered view that Bungoma ELC CM E019 of 2024 should be transferred to this court for purposes of consolidation, hearing and determination with Bungoma ELC No. E005 of 2004 (O.S).
26. The upshot of my finding is that ground 7 fails, ground 4 succeeds while the other grounds partially succeed. Consequently, this appeal is allowed in the following terms;
 - a. The Appellants herein shall restrict their occupation and use to the area where they have constructed their home with a reasonable allowance as to the existing access road.
 - b. Bungoma CM-ELC E019 of 2024 shall be transferred to this court for purposes of consolidation with Bungoma ELC(OS) E005 of 2004.
 - c. Each party shall bear their own costs.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF FEBRUARY, 2025.

HON.E.C CHERONO

JUDGE

In the presence of:

Appellant/Advocate-absent.

Respondent/Advocate-absent.

Bett C/A.

