



**Mulei v Mbaluto (Environment and Land Appeal 2 of 2023)  
[2025] KEELC 2886 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2886 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 2 OF 2023  
NA MATHEKA, J  
MARCH 26, 2025**

**BETWEEN**

**JOEL MULEI ..... APPELLANT**

**AND**

**TOM MBALUTO ..... RESPONDENT**

**JUDGMENT**

1. Joel Mulei the above named Appellant being dissatisfied with the Ruling of the learned Principal Magistrate Anne Nyoike delivered on 8<sup>th</sup> December, 2022 in the Chief Magistrate's Court at Machakos in ELC. Suit No. 96 of 2022 appeals against the entire decision on the following grounds;
  1. That the learned Magistrate erred in fact and in law in failing to determine the issues raised by the Appellant in the Replying Affidavit filed on 26<sup>th</sup> September, 2022 and in the Defendant's submission filed on 25<sup>th</sup> October, 2022.
  2. That the learned Magistrate erred in fact and in law in listing the issues raised by the Appellant and failed to make a determination as to the said issues which is prejudicial to the Appellant.
  3. That the learned Magistrate erred in fact and in law in considering the Plaintiff's suit only which is injustice to the Appellant.
  4. That the learned Magistrate erred in fact and in law in finding that the Plaintiff has a case with high chances of success and has a right, legal or equitable which required protection by injunction when there was no enough evidence to prove that the Plaintiff has a case with high chances of success to entitle him to an injunction.
  5. That the learned Magistrate erred in law and in fact in failing to consider the law governing the granting of interlocutory injunction as set out under Order 40(1) (a) and (b) of the Civil Procedure Rules 2010.



6. That the learned Magistrate erred in fact and in law in failing to find that the Plaintiff has not made a prima facie case to entitle the court to grant an injunction as the Plaintiff's Application was incompetent in that in the Plaint the Plaintiff seeks an order of specific performance and alternatively to be declared the owner by adverse possession there is no prayer for an injunction in the main suit and an injunction could not have been issued if not sought in the main suit.
7. That the learned trial Magistrate erred and misdirected in granting reliefs that were not sought for in the Plaint and failing to find that the Plaintiff is bound by his pleadings.
8. That the learned Magistrate erred in law and in fact in failing to find that the Plaintiff having not sought an injunction in the main suit and seeking the same through an application amounts to deviating from the pleadings which is not allowed by the rules and the court ought not to have considered the said Application.
9. That the learned Magistrate erred in failing to make a finding on the issue that the Plaintiff's claim is time barred notwithstanding overwhelming evidence that the suit was filed 33 years later from date of purported agreement.
10. That the learned Magistrate erred in fact and in law in failing to find that the Plaintiff has no suit with high chances of success since the Plaintiff's suit is time barred under Section 4(1) (a) of the Limitations of Actions Act Cap 22 Laws of Kenya as the agreement the Plaintiff is relying on was executed on 18<sup>th</sup> February, 1986 more than 33 years from date of filing this suit on 16<sup>th</sup> September, 2022 and since the Plaintiff's claim is time barred the same is incompetent and there is no prima facie case with high chances of success of the main suit and therefore an injunction could not issue as he failed to prove the first ground in the grounds set down in the case of *Giella verses Cassman Brown*.
11. That the learned Magistrate erred in fact and in law by failing to find that since the first ground in the grounds set down in the case of *Giella verses Cassman Brown* has not been proved there was no need to venture into the other grounds.
12. That the learned Magistrate erred in law and in fact in failing to assess the overwhelming evidence/affidavits and submissions presented by and for the Appellant and failed to find that the parcel of land subject of this proceedings *Machakos/Kiandani/2294* was registered in the name of the deceased on 1<sup>st</sup> September, 1989 and as at 18<sup>th</sup> February, 1986 the deceased had no land to sell and therefore there was no way he would have made an agreement of non-existing land and therefore the Plaintiff has no case with high chance of success.
13. That the learned Magistrate erred in law and in fact in disregarding the fact that the Plaintiff filed summons to revocation of Grant in Succession Cause No. 744 of 2015 which was dismissed by the High Court as there was no prove that the Plaintiff purchased the subject land *Machakos/Kiandani/2294* and since the Plaintiff did not appeal the said Judgment the trial court has no jurisdiction to interrogate the validity or authenticity of the Grant and confirmed Grant and therefore the Plaintiff has no case with high chances of success as the issue of purchase has already been determined by the Succession Court.
14. That the learned Magistrate erred in law and in fact in failing to find that the purported consent the Plaintiff is relying on was not adopted as a court order in the Succession Court and is not binding to the parties and the Plaintiff cannot use the said consent to claim land and therefore the case has no chances of success and injunction could not issue.



15. That the learned Magistrate erred in failing to find that the Plaintiff issued demand letter dated 14<sup>th</sup> February, 2018 to the Defendant demanding that the land Machakos/Kiandani/2294 be transferred to Peter Mutua Kanyi as he sold the same to him and this a clear evidence that the Plaintiff is not in possession of the parcel as he has already sold the same as he alleges and since the said Peter Mutua Kanyi or his children are not a party to the suit they are not entitled to an injunction as the claim for adverse possession is not merited.
  16. That the learned Magistrate erred in law and in fact in finding that the Plaintiff stated that he has been in possession from the time of purchase in 1986 where he has been farming and he has done so openly and without interruption from the deceased person, the Defendant or other family members when there was no evidence of actual possession of the land by the Plaintiff as he doesn't reside on the land as has already sold it as he alleges and he didn't disposes the Appellant or deceased as the Appellant uses the land and the claim of adverse possession could not succeed and therefore is not a basis for granting an injunction.
  17. That the learned Magistrate erred in law and in fact in granting an injunction restraining the Defendant and/or his agents from taking possession despite that the Appellant is in possession and resides on the land and no eviction orders has been sought against the Defendant/Appellant and this will amount to evicting the Appellant indirectly from the land in fact the appropriate order was for a status quo to be maintained as the Defendant is in possession.
  18. That the learned Magistrate erred in law and in fact in failing to find that the Plaintiff didn't prove the grounds of granting an injunction and erred in allowing the Application with costs to the Plaintiff.
  19. That the decision of the said Magistrate was against the weight of the evidence adduced in the Application.
2. The appellant prays for orders that;
    - a. THAT the Appeal be allowed.
    - b. THAT the Ruling of the Principal Magistrate delivered on 8<sup>th</sup> December, 2022 be set aside, varied and/or reviewed.
    - c. THAT the ELC Court does dismiss the Application dated 10<sup>th</sup> September, 2022.
    - d. THAT the Appellant be awarded costs of the Appeal.
    - e. THAT any further relief as justice of the case may require to be granted in the circumstances.
  3. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”



4. By an application dated 10<sup>th</sup> September 2022 the respondent filed an application praying for restraining orders against the appellant from interfering with the suit property known as Machakos/Kiandani/2294 pending the hearing and determination of this suit. The prayer for temporary injunction is well discussed in the celebrated case of *Giella vs Cassman Brown* (1973) EA 358. In *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) (2014) eKLR the Court of Appeal held that;

in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

5. On the first pillar, the respondent stated that by an agreement dated 18<sup>th</sup> February 1986 he entered into a sale agreement for a piece of land known as Machakos/Kiandani/2294 as per the annexed agreement. The parcel was two acres and the price was Kshs. 43,000/= which was paid in full. That the sale agreement was made in the presence of the area Assistant Chief Kiandani sub location with the consent of the late Benedict Kisalu’s wife, mother and brothers. That the appellant obtained letters of administration on the 27<sup>th</sup> July 2019 but has refused to transfer the same.

6. On the 2<sup>nd</sup> pillar of temporary injunctions, the applicant is required to show irreparable injury and I am guided by *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR where court held;

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

7. The respondent stated that he has undertaken farming on the land through which he feeds his family that he has had uninterrupted and continuous possession of the land for over 12 years after the sale agreement in 1986.

8. The 3<sup>rd</sup> pillar which is the balance of convenience. In *Pius Kipchirchir Kogo* case (Supra) the court held;

The meaning of balance of convenience will 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 Plaintiff 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 will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.



9. The respondent argues that he has been in possession of the suit property since 1986 and has been utilizing the farm for his benefit and that of his family and the title has become adverse to him. The appellant denied that there was any sale agreement of a portion of his father's land and also denies that any money was paid. He denied any consent or payment of Kshs. 20,000/= by the respondent. That the revocation of grant was dismissed and the respondent did not appeal. That the suit is time barred as 33 years have passed since the agreement. I find that this would be a matter of evidence which will be canvassed during the trial and cannot be determined at this interim stage.
10. I find that it was just and fit to prohibit the appellant, his agents, and/or servants from interfering with, alienating, wasting, transferring, charging or in any other way dealing with the suit property pending the hearing and determination of this main suit to obviate dissipation of the suit property and/or rendering these proceedings nugatory altogether. I find the balance of convenience falls in the favour of the respondent who is in possession of the suit property. I find that the respondent has established a prima facie case. I find that the learned Magistrate did not err in law and in fact by granting the application dated 10<sup>th</sup> September 2022 as she did. I find this appeal is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF MARCH 2025.**

**N.A. MATHEKA**

**JUDGE**

