



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC APPEAL NO.15 OF 2019**

**JOSHUA MWILU KIMEU.....APPELLANT/APPLICANT**

**VERSUS**

**JULIANA NDUKU JOSEPH (Suing as the legal Representative**

**of the estate of MWILU LUMU NGOTHO- deceased).....RESPONDENT**

**RULING**

1. The Respondent herein moved the Senior Resident Magistrate's Court vide the notice of motion application dated 12<sup>th</sup> November, 2018 and filed in court on even date. In the application, the Respondent sought the following prayers: -

**1) THAT the application be certified as urgent in the first place and service hereof be dispensed with.**

**2) THAT one JOSHUA MWILU KIMEU be enjoined as the 2<sup>nd</sup> Defendant in this suit.**

**3) THAT pending service of the application hereof, a temporary order of injunction do issue against the intended 2<sup>nd</sup> Defendant restraining him from entering in, remaining thereon, cultivating, ploughing, planting, grazing, fencing, dealing, selling, charging, sub dividing, transferring or in any other way interfering with Land Parcel Number KITETA/NGILUNI/2108 pending hearing and determination of this application.**

**4) THAT a temporary order of injunction do issue against the intended 2<sup>nd</sup> Defendant restraining him from entering in, remaining thereon, cultivating, ploughing, planting, grazing, fencing, dealing, selling, charging, sub dividing, transferring or in any other way interfering with Land Parcel Number KITETA/NGILUNI/2108 pending hearing and determination of this suit.**

**5) THAT the 1<sup>st</sup> Defendant herein MULIMA NGUI MBUA be committed to civil jail for a period of six months for being in contempt of the court orders granted on 2/7/2018.**

**6) THAT the Plaintiff be granted leave to amend the plaint and the draft amended plaint annexed herein be deemed as duly filed and served.**

**7) THAT the costs of this application be provided for.**

2. The learned Senior Resident Magistrate heard the application and delivered the ruling dated 09<sup>th</sup> May, 2019. In essence, the

ruling allowed the enjoinder of the Appellant/Applicant as the 2<sup>nd</sup> Defendant in the suit pending before the trial Court. In addition, an order of injunction was issued against the Appellant/Applicant restraining him from entering in, remaining thereon, cultivating, ploughing, planting, grazing, fencing, dealing, selling, charging, sub-dividing, transferring or in any other way interfering with land parcel number Kiteta/Ngiluni/2108 pending the hearing and determination of the suit before the trial Court. The Respondent was also granted leave to amend her plaint.

3. Being aggrieved by the ruling and the orders issued by the learned Senior Resident Magistrate, the Appellant/Applicant filed the memorandum of appeal on 07<sup>th</sup> June, 2019 the same being dated 04<sup>th</sup> June, 2019. In the appeal, the Appellant/Applicant raised the following grounds: -

*1) The learned Trial Magistrate erred in law and fact and misdirected himself in making a ruling and orders upon application dated 12/11/2018 on basis only of the Respondent's affidavit evidence and submissions while totally neglecting, ignoring and failing to consider adequately or at all the Appellants' case vide his affidavits, annexures, written submissions and Judicial authorities thereby reaching a wrong conclusion on both law and facts with consequent failure of justice as in effect the Appellant was condemned unheard.*

*2) (a) The learned Trial Magistrate grossly erred in law and fact and misdirected himself in granting orders of Temporary Injunction and joinder of the Appellant when the Respondent had not established a prima facie case with a probability of success or satisfied upon proper evidence the legal requirements for grant of temporary injunctions and same was based on no reasonable and probable grounds on material evidence nor was there valid evidence to necessitate enjoining the Appellant in light of his purchase and Land Control Board Consent without notice and before the suit was instituted.*

*(b) The said ruling and orders was contrary to law and uncontroverted evidence and relevant authorities tendered by the Appellant but totally ignored or neglected by the Trial Magistrate that the suit land No.Kiteta/Ngiluni/2108 was long before the suit lawfully purchased by the Appellant as bona fide purchaser for value and without notice of the Respondent's claim and who took possession as such.*

*(c) The learned Trial Magistrate erred in law and fact in failing to note and find that the transfer was pursuant to a valid Land Control Board Consent validating the sale upon which execution and presentation of transfer instruments long before filing the suit rendered the transactions outside the purview of the Trial Magistrate who lacked jurisdiction to question the transaction upon the said consent being final and not questionable before any court thus there was no cause of action against the Appellant.*

*3) The learned Trial Magistrate erred in law and fact and misdirected himself in failing to adequately or at all to note, consider, analyze, interpret and correctly apply the law on joinder of parties and the effect and finality of a sale before suit pursuant to valid Land Control Board Consent under Section 8(2) of the Land Control Act and thereby reached erroneous conclusions and orders contrary to the evidence and law.*

*4) (a) The learned Trial Magistrate erred in law and fact in failing to note and hold that by law title for land parcel No. Kiteta/Ngiluni/2108 registered on 6/5/2002 was a First Registration after adjudication process and thus indefeasible even on grounds of fraud alleged and its register not subject to rectification.*

*(b) He further erred in law in failing to appreciate that the transfer to the Appellant was pursuant to a valid Land Control Board Consent issued before the suit was filed and thus by injunctioning the Appellant registered thereunder (time of actual transfer being irrelevant and Appellant not being a party to the suit and ex-parte order of 2/7/2018), he was acting without jurisdiction and purporting to question or overrule a transfer under a valid consent of the Land Control Board which is declared by law as final and not questionable before any court.*

*(c) Had the Trial Magistrate correctly applied the Appellant's evidence and the law, he would have reached a different conclusion as to Appellant's wanting chances of success on basis of the sale of 20/04/2018 Land Control Board Consent and execution and lodging of transfer instruments of 10/5/2018 long before the suit was filed on 2/7/2018 all which rendered the Plaintiff without any cause of action and no basis for joinder and injunction orders against the Applicant.*

*5) The learned Trial Magistrate erred and misdirected himself in law in finding for the Respondent (Plaintiff/Applicant in lower court) in so far as the named deceased's estate had no claim to the suit land in so far as the suit land was registered concurrently*

*on same date (ie) 6/5/2002 with the deceased's rightful land No.Kiteta/Ngiluni/960, same as for all other parcels in the same registration section and which suit land was not even listed in the confirmed grant as part of the said deceased's estate assets.*

*6) The learned Trial Magistrate's findings, ruling and orders are oppressive, unjust, one sided, unfair and against the weight of the evidence and contrary to law and legal principles on joinder, temporary injunctions and finality and sanctity of a Land Control Board Consent and transfer of land, matters which he totally wrongfully ignored, neglected and failed to consider, analyze, interpret and apply.*

*7) The learned Trial Magistrate erred in law and fact in injunctioning the Appellant against his property and failed to appreciate, note and hold that the Appellant as a bona fide purchaser for value and in possession under transactions completed and validated under mandatory statutory process before the suit was filed was protected by law and his title as thereby transferred was sacrosanct and indefeasible under the Plaintiff's suit and was not liable to joinder and injunction orders in the circumstances of his transactions and was not subject to the expired Ex-parte orders of 2/7/2018.*

4. The Appellant/Applicant prays for: -

*"That this appeal be allowed with costs AND the ruling of the said Trial Magistrate dated 9/5/2019 and all consequential orders thereon be set aside and same be substituted with an order dismissing with costs the Respondent's application in the lower court dated 12/11/2018."*

5. Both parties have captured well the facts to the suit pending before the trial Court in their submissions filed herein. The background is as follows: -

*1) The Respondent vide her plaint filed in court on 2/7/2018 sought cancellation of Title Deed for Land Parcel Number Kiteta/Ngiluni/2108 which she pleaded was illegally excised from Land Parcel Number Kiteta/Ngiluni/960 which was then family land and belonged to her father in law Mwilu Nyumu (deceased). She also sought for orders of injunction to restrain the 1<sup>st</sup> Defendant from selling, charging, subdividing, transferring or in any way interfering with the said parcel of land.*

*2) The Respondent had conducted a search at the Makueni Land's Office and obtained a certificate of official search dated 20/12/2017 which confirmed that Land Parcel Number Kiteta/Ngiluni/2108 was registered in the name of Mulima Ngui Mbua the 1<sup>st</sup> Defendant. The Respondent also filed together with the plaint an application dated 29/06/2018, seeking for orders of injunction which were issued on 2/7/2018 against the 1<sup>st</sup> Defendant.*

*3) Upon service of the summons to enter appearance, plaint and the application, the 1<sup>st</sup> Defendant filed appearance and replying affidavit to the application. In paragraph 8 of the replying affidavit filed in court on 16/7/2018 she deponed "I have not and do not intend to sell and have not been demonstrated or proved and intending to or selling my land to anyone including the purported MWILU KIMEU." (page 40 of the record).*

*4) The Respondent later conducted a search and discovered that the 1<sup>st</sup> Defendant had sold and transferred the land to the Appellant on 11/9/2018 (see page 65 of the record). The sale and transfer of the suit land was done during the pendency of the court orders issued on 2/7/2018 hence the 1<sup>st</sup> Defendant was in contravention of the court orders.*

*5) This sale and transfer of the suit property precipitated the Respondent to file the application dated 12/11/2019 seeking the purchaser Joshua Mwilu Kimeu to be enjoined as a party to this suit. His presence was necessary to assist the court effectively and effectually adjudicate and determine all the issues in controversy between the parties.*

6. The appeal herein was canvassed by way of written submissions.

7. In ground one (1) of the appeal, the Counsel for the Appellant submitted that the Appellant was prejudiciary and irregularly condemned unheard. In other words, the learned Senior Resident Magistrate ignored the material and the submissions that the Appellant had placed before him. The Appellant's Counsel submitted that the learned Senior Resident Magistrate erred in law and in fact.

8. In grounds 2(a) to (c), the Appellant's Counsel submitted that there was no prima facie case to warrant the temporary injunction

and joinder orders against the Appellant and the 2<sup>nd</sup> intended Defendant. The Counsel correctly submitted that this being the first appellate court, it is bound to re-evaluate the evidence before the trial Magistrate and arrive at its own conclusion as to the merits or otherwise of the temporary injunction and the joinder orders which the Appellant contends were unjustified.

9. Ground 3 of the memorandum of appeal would be in my view appropriate at this stage as it appears to attack the substantive suit itself which is yet to be heard.

10. On the other hand, the Counsel for the Respondent cited **Order 1 Rule 3 of the Civil Procedure Rules** which provides as follows: -

*“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”*

11. The Counsel further cited **Order 1 Rule 10 Subrule 2 of the Civil Procedure Rules** which provides that: -

*“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”*

12. The Counsel went on to cite **Rule 10 subrule (4)** of the same Order 1 which provides that: -

*“Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary....”*

13. On joinder of parties the Respondent’s Counsel relied on the case of **Kenya Commercial Bank vs. Titus Kilonzo Mutua & 24 others in Nairobi HCCC No.505 of 2007** where the Court ruled thus on a preliminary objection raised on misjoinder of parties: -

*“The causes of action clearly arise out of the same transaction or series of transactions namely; the alleged fraudulent conversion of the Plaintiff’s money. Whether the recipients were innocent receivers of the same is a matter for determination in due course. However, each of the recipients are intrinsically involved with moneys which is alleged were converted.”*

14. The Counsel further relied on the quotation by the Court on the **Code of Civil Procedure – Mulla 12<sup>th</sup> Edition pages 497 and 549** which provides as follows;

*“As a general rule where claims against different parties involve or may involve a common question of fact bearing sufficient importance in proportion to the rest of action to render it desirable that the whole of the matter be disposed of at the same time, the court will allow the joinder of defendants, subject to its discretion as to how the action is to be tried.”*

15. Arising from the above, the Counsel for the Respondent submitted that the issue for determination before the trial Court pertains to land parcel number Kiteta/Ngiluni/2108 whose ownership is being claimed by the Respondent, the 1<sup>st</sup> Defendant and the Appellant. The Counsel was of the view that a common question therefore arises and the Plaintiff’s claim against the 1<sup>st</sup> Defendant cannot be tried separately without the presence of the Appellant who is the current registered owner of the land. The Counsel added that the presence of the Appellant cannot be wished away as it would not be prudent for the Court to issue orders which may adversely affect him thus his participation in the suit is therefore crucial and hence his enjoyment.

16. The Counsel further submitted that the issue of how the Appellant acquired the land for valuable consideration from the 1<sup>st</sup> Defendant is for the trial Court to consider upon hearing evidence from all the parties and cannot be determined in this appeal.

17. It was also submitted that the suitland has always been in exclusive use by the Respondent. That after acquiring the land in contravention of the court order, the Appellant began interfering with it by ploughing and that to avoid breach of peace, the trial

Court issued orders of injunction pending the hearing and determination of the suit. The Counsel added that the trial Court cannot be faulted for allowing the application.

18. The Counsel concluded by submitting that this appeal was filed prematurely and that the Court should remit the file back to the lower court in order for the suit to proceed to its logical conclusion. That any party aggrieved by the eventual judgment can lodge an appeal. The Counsel urged the Court to dismiss the appeal with costs as it has no merits.

19. Upon reading the record of appeal and the rival submissions by the Counsel on record for the parties, I do agree with the Appellant's Counsel that this being the first appeal, this court must reconsider the evidence, evaluate it itself and draw its own conclusions.

20. I will start by addressing the issue of joinder of parties. I do note that the Appellant herein has conceded that he was given a hearing by the trial Court before the said Court delivered its ruling on 09<sup>th</sup> May, 2019. That being the case, the Appellant cannot claim to have been condemned unheard. As was correctly submitted by the Respondent's Counsel, the issue for determination before the trial Court pertains to ownership of land parcel number Kiteta/Ngiluni/2108 which is claimed by the Appellant, the Respondent and the 1<sup>st</sup> Defendant. That question cannot be tried separately between the Respondent and the 1<sup>st</sup> Defendant without the presence of the Appellant as the end result would be the likelihood issuance of orders adverse to the Appellant. The learned Trial Magistrate cannot be faulted for joinder of the Appellant herein in suit before the trial Court. As for the order of injunction, it will be recalled that on the 29<sup>th</sup> April, 2020, this Court while granting prayer 3 and 4 of the Appellant's notice of motion application dated 20<sup>th</sup> June, 2019 in effect granted the order of status quo. In my view, that is the most appropriate order to grant in this appeal. Thus the order of injunction against the Appellant granted by the trial Court on 09<sup>th</sup> May, 2019 is hereby substituted with an order of status quo so that neither the Appellant nor the Respondent will be able to carry out further developments, cultivation and/or disposing land parcel number Kiteta/Ngiluni/2108 pending the hearing and determination of the substantive suit before the trial Court.

21. The upshot of the foregoing is that the appeal has no merit and the same is hereby dismissed with each party bearing their own costs. This file is remitted back to the lower court for hearing and determination of the substantive suit.

Signed, dated and delivered at Makueni via email this 27<sup>th</sup> day of **November, 2020**.

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Ms. G. Kwemboi



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