



REPUBLIC OF KENYA



KENYA LAW
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**Bahasi v Uhutta Properties Limited & another (Environment & Land
Case 11 of 2021) [2023] KEELC 16466 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16466 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 11 OF 2021**

**AE DENA, J
MARCH 20, 2023**

BETWEEN

MDOE TUNGWA BAHASI APPLICANT

AND

UHUTTA PROPERTIES LIMITED 1ST RESPONDENT

DEVKI STEEL MILLS LIMITED 2ND RESPONDENT

RULING

1. The Plaintiff/Applicant through an amended Notice of Motion dated February 16, 2022 seeks for the following orders before court;
 1. Spent
 2. That this honourable court be pleased to issue a temporary injunction, restraining the Defendants/Respondents and/or its director and/or agents employees and/or servants and/or relatives or any other persons acting on the Defendants/Respondents behalf from entering and/or erecting any structures and/or selling the suit premises being a plot of land situated at Samburu South, Gora Village, Matope Sub location measuring approximately 84 acres or any portion thereon and/or dealing with the suit premises in any manner whatsoever detrimental to the rights and interest of the plaintiff/applicant herein pending the hearing and determination of this application.
 3. That this honourable court be pleased to issue a temporary injunction, restraining the Defendants/Respondents and/or its director and/or agents employees and/or servants and/or relatives or any other persons acting on the Defendants/Respondents behalf from entering and/or erecting any structures and/or selling the suit premises being a plot of land situated at Samburu South, Gora Village, Matope Sub location measuring approximately 84 acres or any portion thereon and/or dealing with the suit premises in any manner whatsoever



detrimental to the rights and interest of the plaintiff/applicant herein pending the hearing and determination of this suit.

4. That costs of this application be provided for.
2. It is the Applicants case that he is the registered owner of plot land situated at Samburu South, Gora Village, Matope Sub location measuring approximately 84 acres (the suit property). That the 1st Defendant/Respondent purchased the said parcel on February 11, 2017 for a sum of Kshs 30,240,000/- and upon execution of the sale agreement made a Kshs 3,024,000/- payment leaving a balance of Kshs 27,216,000/-. It is further stated that additional payments were made leaving a balance of Kshs 17,262,000. The Applicant states that the 1st Respondent has sold the suit property to the 2nd Respondent and who is making developments on the suit property. The Applicant is apprehensive that he might lose his property before full purchase price is paid hence the instant application.
3. In his supporting affidavit Mdoe Tungwa Bahasi further averred that the 1st Defendant is in serious breach of the contract for the sale of the suit property. That unless the court issues the orders sought, the 2nd Defendant will complete construction of the suit property and occasion the applicant loss and damage.

Response

4. The 1st Defendant filed a replying affidavit on July 25, 2022 sworn by its Director Ibrahim Santur. It is averred that the agreement referred to by the Applicant is unknown to the 1st Defendant and a fabrication. That the only agreement in respect of the suit property was entered on December 9, 2016 when the Applicant was paid a deposit of Kshs 3,000,000/- and further payment was received by the Applicant's representatives until payment in full. The application is termed an abuse of the court process disclosing no cause of action as the Applicant has been paid the purchase property in full. The court is urged to dismiss the Application with costs.

Submissions

5. The Applicant submissions are filed before court on July 26, 2022. It is submitted that the Plaintiff/Applicant stands to suffer irreparable loss since there exists a sale agreement between him and the 1st Respondent. That the 1st Respondent has failed to specifically perform its contractual obligations by breach of the agreement herein. occasioning the Applicant untold misery and economic abuse which cannot be compensated by an award of damages. It is submitted that the only document with sovereignty is the sale agreement dated February 11, 2017 and the agreement relied upon by the Respondents is null and void. The applicant states that he has met the three key ingredients for grant of an interlocutory injunction and places reliance in the case of *Prudential assurance company of Kenya Limited v Sukhwender Singh Jutney* Civil Appeal No 23 Of 2005 and *Giella v Cassman Brown & Company Limited* [1973] EA 358
6. It is further submitted that the transfer of the suit property to the 2nd Respondent was fraudulent. The particulars were listed in the submissions. The applicant prays that the application is allowed wholly with costs.

Determination

7. I have read the application, affidavit in support of the application, replying affidavit and their accompanying annexures. I have also considered the Applicant's submissions in this application as regards the grant of orders of temporary injunction and further note that the Respondents submissions are not on record.



8. The first issue for determination is whether the Plaintiff/Applicant has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* [1973] EA 358. This position has been reiterated in numerous decisions in Kenyan courts and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 [2014] eKLR where the Court of Appeal held that;
- “In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to establish his case only at [a] *prima facie* level, [b] demonstrates irreparable injury if a temporary injunction is not granted and [c] 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”.
9. The plaintiff/Applicant submitted that he has established a *prima facie* case and relied on the judicial decision of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR in which the Court of Appeal gave the following determination on a *prima facie* case; -
- “... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
10. This court has noted that there are two agreements in respect of the suit property dated February 11, 2017 and December 9, 2016 presented by the plaintiff and the defendants respectively.
11. It is clear that the suit property was initially owned by the applicant. However, it is also clear that the suit property has been sold by the Plaintiff. Infact the crux of the matter is which of the two agreements is valid and the completion of the purchase price that is in issue. This can only be resolved upon hearing the evidence of both parties. Guided by the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR I would say on the material presented to this court there exists a legal right which has apparently been infringed by the 1st defendant which calls for an explanation or rebuttal from the latter. A *prima facie* case has therefore been established.
12. I’m aware that establishing a *prima facie* case alone is not enough as all the three ingredients cited for the grant of orders of injunction must be satisfied by the applicant see *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (Supra). The applicant must in addition establish that they will suffer irreparable loss. On this point the Applicant avers that the 1st Defendant has failed to complete his part of the bargain occasioning him untold misery and economic abuse which cannot be compensated by an award of damages. What is irreparable loss?
13. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured - see *Paul Gitonga Wanjau v Gathuti Tea Factory Company Ltd & Two Others* [2016] eKLR.
14. Having considered the Applicants case and submissions, I’m not persuaded that the alleged damage is incapable of compensation. The economical loss stated is capable of being ascertained and repaid. Is this not the difference of the purchase price once it is established which agreement is valid? It is also trite that interest will be payable on the said amount for the period the defendant will have kept the balance or as may be directed by the court.



15. The applicant having failed to establish that they will suffer irreparable loss, I will not dwell on the other requirement. In my view this is not a case fit for the grant of the orders sought given that the substantive issue is which is the valid agreement and whether there is any balance payable.
16. The upshot of the above is that I find no merit in the amended application herein and I hereby dismiss it. Costs shall follow the event.

DELIVERED AND DATED AT KWALE THIS 20TH DAY OF MARCH, 2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Onyango for the Plaintiff

Ms. Kyalo for the 1st Defendant

Mr. Disii – Court Assistant

