



REPUBLIC OF KENYA



**Githugu & another v Pieroni & another (Civil Appeal 644 of 2019)
[2022] KEHC 437 (KLR) (Civ) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 644 OF 2019

CW MEOLI, J

APRIL 28, 2022

BETWEEN

GODFREY MACHARIA GITHUGU 1ST APPELLANT

NANCY WANJIKU GITHUGU 2ND APPELLANT

AND

MAURIZIO PIERONI 1ST RESPONDENT

DORCAS KARANJA PIERONI 2ND RESPONDENT

*(Being an appeal from the ruling of P.N Gesora, CM delivered on
7th October 2019 in Nairobi Milimani CMCC No. 1293 of 2019)*

RULING

1. This appeal emanates from the ruling delivered on 7th October, 2019 in Nairobi CMCC No. 1293 of 2019. On 28th February, 2019 Maurizio Pieroni and Dorcas Karanja Pieroni, (hereafter the 1st and 2nd Respondents, respectively) filed the suit above, accompanied by a notice of motion against Godfrey Macharia Githugu and Nancy Wanjiku Githugu (hereafter the 1st and 2nd Appellants, respectively). The motion was expressed to be brought under Section 3A of the *Civil Procedure Act*, Order 40 Rules 2 and Order 51 Rule 1 of the *Civil Procedure Rules*, *inter alia* seeking orders that an injunction do issue to compel the Appellants to allow the Respondents through their servants or agents access to the rooftop of Navilla Apartments situated on L.R Number 870/V/213 on Church Road Westlands, for purposes of setting up a satellite dish for cable television, pending the hearing and determination of the suit and; that a temporary injunction do issue restraining the Appellants through themselves their servants or agents in any way from interfering with the Respondents' quiet possession of all that apartment known as Apartment A6 Navilla Apartments on L.R Number 870/V/213 pending the hearing and determination of the suit.



2. The grounds on the face of the motion were amplified in the supporting affidavit sworn by 2nd Respondent. To the effect that the Respondents entered into an agreement for sale dated July 2, 2019 with the Appellants for the purchase of Apartment A6 Navilla Apartments on L.R Number 870/V/213, on terms *inter alia* that the Respondents would pay Kshs. 20,900,000/- upon signing the agreement as a condition of taking possession thereof and the balance of Kshs. 1,100,000/- before the completion date. She further deposed that the deposit was paid, and possession of the apartment obtained; that however before execution of the agreement, the vendors did not disclose the fact that they would demand the Respondents use their (vendor's) central cable television known as DSTV, and neither was the matter included in the agreement for sale.
3. That having taken possession, the Respondents unsuccessfully attempted to connect onto the central DSTV because it only functioned with old decoders, yet the Respondents were using a PVR; that upon consulting technicians they were advised that the connection provided by the Appellants was incompatible with their PVR system. It was her assertion that several requests to the 2nd Appellant to allow the Respondents install their own satellite dish on the roof top were ignored, and despite taking possession of the apartment, the Respondents had been unable to connect their PVR decoder to Appellants' main cable network, and were deprived of quiet enjoyment. In conclusion she deposed that the unreasonable action by the Appellants were constituted an unjustified infringement on the Respondents' constitutional rights.
4. On March 20, 2019 the Appellant filed a replying affidavit in opposition to motion, accompanied by a statement of defence denying the averments in the plaint. The replying affidavit was sworn by the 1st Appellant who deposed that the subject apartment was fitted with and or connected to a common satellite dish to be utilized and shared by all occupants and apartment owners and that whereas the Respondents had been given all possessory rights upon payment of the deposit of the purchase price, this did not confer ownership of the suit property to the Respondents until the whole purchase price was paid. That the Respondents were yet to settle the balance of the purchase price within the stipulated 30 under the agreement and had been served with a completion notice. Thus, the Respondents had not acquired any ownership rights over the subject property and therefore had no right to install any fixtures or their own satellite dish on the roof top of the said apartment.
5. He contended that allowing the Respondents to install a satellite dish on the apartment when all the units in the apartment had not been sold out could deter other potential buyers. He concluded by deposing that since the Respondents are in breach of their obligation under the agreement there is no guarantee that they may complete the transaction by paying the final purchase price and there is likelihood that the said agreement may be rescinded and/or revoked.
6. In a further affidavit, the 2nd Respondent deposed that the entire purchase price for the Apartment A6 had been paid. Parties thereafter canvassed the motion by way of written submissions and vide its ruling delivered on 7th October, 2019 the lower court allowed the motion thus provoking the instant appeal which is based on the following grounds:
 - “ 1. That the learned trial magistrate erred in law and fact by allowing the Respondents to install a separate satellite dish for cable television at the rooftop of the Navilla Apartments suited in LR No. 1870/V/213 on Church Road Westlands.
 2. That the learned trial magistrate erred in both law and fact by failing to consider the fact that the said apartment had been fitted with a central cable



TV connection and satellite dish for use in the whole apartment by the house owners.

3. That the learned trial magistrate erred both in law and in fact by failing to appreciate the law on Sectional Properties Act on ownership and acquisition of units.
 4. That the learned trial magistrate erred in both law and in fact by failing to consider the fact that the Respondent had not completely acquired ownership of the said unit as per the agreement and therefore could not be allowed to erect or set up a satellite dish at the roof top of the said house which will significantly change and interfere with the architectural and structural plan and outlook of the apartment to the detriment of the Appellants and other house owners within the apartment.
 5. That the learned magistrate erred in both law and in fact by failing to interpret and appreciate clause B, 3 & 7 of the sale agreement dated 2nd July, 2018 thereby arriving at a wrong decision.
 6. That the learned magistrate erred in both law and fact by failing to consider the Appellant's submission thereby arriving at the impugned ruling.
 7. That the learned magistrate erred in both in law and in fact in failing to find that the Respondents had written letter to commence arbitration proceedings over the dispute herein and therefore ousted the court of jurisdiction to entertain the said application thereby arriving at a wrong decision.” (sic)
7. The appeal was canvassed by way of written submissions. Counsel for the Appellants while submitting on whether the lower court had jurisdiction in view of the arbitration clause in the sale agreement cited several decisions including *Pius Kimaiyo Langat v Co-operative Bank (K) Ltd* [2017] eKLR and *Kenya Pipeline Company Limited v Datalogix Limited and another* [2008] eKLR to argue trial court lacked jurisdiction in the matter and ought to have allowed the arbitration process commenced by the parties to continue. And relying on *Nation Media Group & 2 Others v John Harun Mwau* [2014] eKLR and *Robai Kadili Agufa & Another v Kenya Power & Lighting Co. Ltd* [2015] eKLR he contended that the orders issued by the trial court were mandatory in nature, yet the Respondents did not satisfy or demonstrate any special circumstance to justify the same.
8. Submitting on the conditions to be considered in granting an injunction as set out in the oft-cited case of *Giella v Cassman Brown & Company Limited* (1973) EA 358 and the decision in *Pius Kipchichir Kogo v Frank Kimeli Tenai* [2018] eKLR counsel argued that the Respondents did not establish a *prima facie* case with a probability of success, whereas it was the Appellants who stood to suffer irreparable injury as a result of the ruling as other house owners had raised concerns or complaints against the installation of the second satellite dish which also adversely affected prospects of obtaining buyers for the unsold units at Navilla apartments . On the issue of balance of convenience, counsel submitted that tilted in favour of the Appellants as installation of the Respondents' satellite dish interfered with the apartment's architectural plan thereby deforming the structure permanently.
9. Citing section 43(3) of the *Land Act*, Clause 3.2, 5 & 5.5 of the sale agreement counsel asserted that at the date of filing suit the Respondents had not acquired absolute ownership rights over the apartment and therefore had limited interest in the unit. The Court was urged to allow the appeal.



10. The Respondent defended the trial court's findings. Concerning the jurisdiction of the subordinate court in view of the arbitration clause, counsel cited *Mary Waithera Gikima & Another v Kariuki Wairagu & 3 Others* [2019] eKLR to argue that the dispute between the parties did not fall within the contemplation of the arbitration clause. Further that the option to refer the matter to arbitration was sealed when the Appellants entered appearance and filed defence. Citing *Patrick Pakiro Odeke t/a Airport Africana Restaurant v Kenya Airport Authority* [2013] eKLR counsel argued that no term regarding the use of a communal satellite dish was incorporated into the sale agreement or any addendum thereto.
11. It was asserted that the Respondents having paid the full purchase price and taken possession of the apartment had acquired an equitable beneficial interest in the suit property and thus entitled to quiet and peaceful possession thereof. Referring to Article 40 of *Constitution* and Section 65(1) of the Land Act the respondents submitted that the Respondents were entitled to the orders sought in the lower court as the Appellants by illegally denying the Respondents access to the rooftop had denied them their right to use and enjoy the common areas of the suit property.
12. Further, that the Appellants had not tendered a professional assessment report to support their allegation that the installation sought by the Respondents could compromise the structure of the apartment permanently. Lastly, it was stated that the Appellants having already complied with the lower court order the appeal had been overtaken by events and ought to be dismissed with costs.
13. The court has perused the record of appeal as well as the original record and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd* and others (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.
14. There is no dispute that the parties herein had entered into a sale agreement in respect of the apartment described as A6 at Navilla Apartments and that the Respondents had paid a substantial portion, if not full payment of the purchase price and taken possession of the apartment. A dispute subsequently broke out between the parties. Although on the surface the dispute appears to relate to a mundane issue concerning the installation of a satellite dish by the Respondents, it appears to me that at the heart of the dispute between the parties is the question of the Respondent purchasers' ownership rights over the suit property vis-a-vis the Appellant vendors' rights in respect of the entire apartment block. Grounds 3 and 4 of the memorandum of appeal and the parties' respective submissions clearly demonstrate this fact. For this reason, it is my considered view that the Environment and Land Court is best placed to deal with this appeal. Accordingly, the court directs that the appeal be and is hereby transferred to the Environment and Land Court in Nairobi.

DELIVERED AND SIGNED ELECTRONICALLY IN NAIROBI ON THIS 28TH DAY OF APRIL, 2022

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the Respondents: Ms. Minyiri h/b for Ms. Shaw



C/A: Carol

