



REPUBLIC OF KENYA



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**Kariuki v Wanyoike (Environment and Land Appeal E019 of 2022)
[2023] KEELC 17672 (KLR) (22 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17672 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E019 OF 2022**

BM EBOSO, J

MAY 22, 2023

BETWEEN

JOHN MANGARA KARIUKI APPELLANT

AND

MARY WAMBUI WANYOIKE RESPONDENT

(Being an Appeal arising from the Judgment of Hon. Jacinta A. Owiti (SPM) delivered at Kikuyu Senior Principal Magistrate Court on 18/2/2022 in Kikuyu ELC No 35 of 2021)

JUDGMENT

Background

1. This appeal challenges the ruling rendered on 18/2/2022 by Hon Jacinta A Owiti, SPM at Kikuyu SPMC E & L Case No 35 of 2021. The appellant, John Mangara Kariuki, was the plaintiff in the said suit. The impugned ruling related to an application dated 4/11/2021, through which the appellant sought, among other reliefs, an interlocutory injunction restraining the respondent against selling, transferring, alienating, demising or in any other manner or fashion dealing with LR No 7497/87. Before I delve into the issues that fall for determination in the appeal, I will outline a brief background to the appeal.
2. Parties to this appeal entered into a sale agreement dated December 20, 2015 pursuant to which the respondent agreed to sale to the appellant $\frac{1}{4}$ of an acre that was to be exercised from Land Reference No 7497/18, situated in Northwest of Kiambu Municipality. The agreed purchase price was Kshs 5,000,000. It was agreed that a sum of Kshs 2,500,000 was to be sent by RTGS onto the respondent's bank account upon execution of the sale agreement. It was further agreed that the balance of the purchase price [Kshs 2,500,000] would be paid within 180 days to the respondents' advocates' account to be held by the said advocates on a stakeholders basis, pending registration of the transfer in favour of the appellant.



3. In June 2021, the appellant initiated Kikuyu SPMC E & L Case No 35 of 2021, in which he contended that the respondent had failed to complete the sale and had failed to heed his completion notice. He sought an order of specific performance and punitive damages for breach of contract, against the respondent.
4. Subsequent to that, the appellant filed a notice of motion dated 4/11/2021, in which he sought against the respondent: (i) an interlocutory injunction; (ii) an order of specific performance of the agreement dated 20/12/2018; and (iii) leave to amend the plaint. The respondent oppose the application through a replying affidavit sworn on 24/1/2022 in which he deposed that the appellant breached the sale agreement by failing to deposit the sum of Kshs 2,500,000 into his advocates' bank account as required under Clause 3.3 of the sale agreement. He added that owing to the appellant's breach, she had refunded to the appellant the sum of Kshs 3,000,000 which the appellant had paid to her. She further deposed that the order of specific performance was not available at the interlocutory stage.
5. The lower court ultimately rendered the impugned ruling, in which the learned magistrate found that: (i) the appellant had failed to satisfy the criteria for grant of an interlocutory injunction.(ii) the order of specific performance was not merited at the interlocutory stage; and (iii) the plea for leave to amend the plaint was merited.

Appeal

6. Aggrieved by the findings and order of the lower court, the appellant brought this appeal, advancing the following verbatim grounds:
 1. That the learned magistrate erred in law and in fact in failing to observe the necessity to preserve the subject matter of litigation from interference and wastage.
 2. That the learned magistrate erred in fact and in law in failing to discern the successful party to the litigation and awarding costs of the suit accordingly.
 3. That the learned magistrate erred in law and in fact in failing to appreciate that this was a suit for specific performance and pre-determining the same at an interlocutory stage.
 4. That the learned magistrate erred in law and fact in purportedly finding that the plaintiff had defaulted under the terms of the contract whereas it was the plaintiff who issued a completion notice in the transaction.
 5. That the learned magistrate erred in law and in fact in failing to consider the appellant's offer to pay into court/ or to the respondent the full purchase value to complete the transaction.
 6. That the learned magistrate erred in law and fact in purporting that there was a refund of the purchase price whereas no such evidence was presented.
 7. The learned magistrate erred in law and in fact in failing to consider any of the authorities furnished to her, analyzing the same and/or distinguishing the applicability of the same.
 8. The learned magistrate erred in law and in fact in purporting to distinguish LR 7497/87 and IR 7497/18 whereas it was manifestly clear that one resulted from the subdivision of the other.
 9. The learned magistrate erred in law and in fact in feigning confusion over what property was the subject of the suit whereas from the plaint and the attached sale agreement, it was a quarter (1/4) to be excised from LR No 7497/87 and which was done to yield LR No 7497/18 the subject matter herein.



10. That the learned magistrate erred in law and in fact in misapplying the law to the facts to arrive at a pre-conceived decision.
 11. That the learned magistrate erred in law and in fact in misapplying the principles in *Giella – vs- Cassman Brown* to the facts of this case resulting in grave miscarriage of justice.
7. The appellant urged this court to set aside the ruling of the lower court and grant him the plea for an order of interlocutory injunction in terms of prayer 2 of the notice of motion dated 4/11/2021.

Appellant’s Submissions

8. The appeal was canvassed through written submissions dated 21/10/2022, filed by M/s M M Muriuki & Co Advocates. On whether leave to appeal was necessary, counsel submitted that the application giving rise to the impugned ruling was filed under Order 40 rule 1 of the *Civil Procedure Rules* hence leave was not necessary by dint of the provisions of Order 43 rule 1(u) of the *Civil Procedure Rules*.
9. Counsel faulted the lower court for finding that there was confusion as to the identity of the subject matter, contending that the respondent was the one holding completion documents which contained the full identification of the $\frac{1}{4}$ of an acre hence the confusion about the identity of the sold property could not be used against the appellant.
10. On the lower court’s finding to the effect that the appellant defaulted to pay the balance of the purchase price as agreed, counsel submitted that the agreement was “altered in all its terms regarding time when the respondent requested a further deposit and received the same”. Counsel contended that the “essential character of the agreement i.e payment and time were fundamentally altered by conduct of the parties.”
11. Counsel added that the lower court erred in failing to take into consideration the fact that the appellant communicated his readiness to complete the transaction “well before the respondent took any step.” Counsel argued that the appellant had satisfied the criteria for grant of an interlocutory injunction.

Respondent’s Submissions

12. The respondent opposed the appeal through written submissions dated 30/1/2023, filed through M/s Masaviru & Ketto Advocates. Counsel submitted that the lower court made correct findings. Counsel pointed out that whereas the appellant sought an order of specific performance in relation to Land Reference Number 7497/18, he sought interlocutory injunctive reliefs in relation to a completely different parcel, LR No 7497/87, without any explanation whatsoever. Counsel submitted that the lower court was right in pointing out that the property subject matter of the application had not been pleaded. Counsel argued that in the absence of pleadings and documentary evidence relating to LR No 7497/87, the trial court was correct in rejecting the application for interlocutory injunction.
13. Counsel for the respondent further submitted that the appellant had failed to comply with clause 3.3 of the sale agreement which required him to deposit Kshs 2,500,000 with the respondent’s advocates, hence the relief of specific performance, upon which the plea for an interlocutory injunction was anchored, was unavailable. Counsel urged the court to reject the appeal.

Analysis and Determination

14. I have considered the record of appeal, the parties’ rival submissions, the relevant legal frameworks, and the prevailing jurisprudence on the issues that fall for determination in this appeal. The appellant itemized 11 grounds of appeal. The key issue that emerges from the 11 grounds of appeal and from the submissions that were tendered is whether the lower court erred in the exercises of its discretion when



it declined to grant the appellant an interlocutory injunctive relief. Before I dispose the above issue, I will outline the principle upon which this court exercises appellate jurisdiction to review discretionary decisions of the lower courts and tribunals. I will also first dispose a preliminary question which arose in relation to leave to appeal.

15. On 3/10/2022, while admitting this appeal, this court directed parties to this appeal to address the court in their written submissions on the question as to whether leave to appeal was necessary. The respondent did not address the question in her subsequent written submissions. On his part, the appellant submitted that the application giving rise to the impugned ruling was filed and canvassed under Order 40 rules 1 and 2 and that by dint of the provisions of Order 43(1), leave to appeal was not necessary.
16. I have looked at the motion. I have also examined the rules alluded to. It is true that the application dated 4/11/2022 was anchored on Order 40 rules 1 and 2. Among the reliefs sought was an interlocutory injunction. Order 43 rule 1(u) of the Civil Procedure Rules grants automatic right of appeal to a litigant aggrieved by an order or finding made on an application brought under Order 40 rules 1, 2, 3, 7 and 11. This court is therefore satisfied that leave to appeal was not necessary. I now turn to the substantive issue.
17. As earlier observed, the single issue in this interlocutory appeal is whether the lower court erred in the exercise of its discretion in declining to grant the appellant the interlocutory relief of an injunction. The lower court was invited to exercise discretionary jurisdiction. Sir Charles Newbold P outlined the following principle in *Mbogo & Another v Shab* [1968] EA 98 which guides our appellate courts when exercising appellate jurisdictions over discretionary decisions of lower courts:

“ A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”
18. The Court of Appeal emphasized this principle in *Nguruman Limited v Jan Bonde Nielsen & 2 others* C A No 77 of 2012 [2014] eKLR in the following words:-

“ This dictum underlines what is well settled in our laws that as an appellate court, this court has a limited function in an appeal from the grant or refusal of an order of injunction issued by the court below. It has no jurisdiction to exercise an independent original jurisdiction of its own. It must defer to the exercise of jurisdiction by the judge in the court below and must not interfere with it merely upon the ground that the members of this court would have exercised the discretion differently.”
19. The appellant was required to satisfy the criteria upon which jurisdiction to grant an interlocutory injunction is granted. The criteria was outlined in the often cited case of *Giella v Cassman Brown* (1973) EA 358. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, the applicant is required to demonstrate to the court that if the interlocutory injunctive relief is not granted, he would stand to suffer damage that may not be indemnified through an award of damages. Third, should the court have doubt on the applicant’s satisfaction of both or either of the above requirements, the application is to be determined based on the balance of convenience. Last, at the stage of disposing the plea for an interlocutory injunction, the court seized of the application does not make definitive or conclusive pronouncements on the key issues in the suit.



20. The appellant’s application was anchored on a plaint in which the appellant pleaded and sought the equitable relief of an order of specific performance in the following terms:
- “ 1. Specific performance by way of transfer and delivery up of LR No 7497/18 to the plaintiff.”
21. In addition, the appellant sought against the respondent punitive damages for breach of contract.
22. When the appellant subsequently filed the notice of motion dated 4/11/2021, he sought an interlocutory injunctive relief in relation to LR No 7497/87 yet the pleadings in the plaint upon which the motion was anchored related to a completely different subject matter, LR No 7497/18. Without a prior amendment to the plaint to identify the correct suit property, it would have been glaringly irregular for the trial court to exercise discretion in favour of the appellant in relation to a property that was not the subject matter of the suit.
23. That is not all. The appellant was required to unconditionally remit the balance of the purchase price [Kshs 2,500,000] to the respondent’s advocate’s bank account. The appellant did not demonstrate that he duly discharged the above contractual obligation. Given that the appellant wanted an equitable interlocutory relief, it was his obligation to demonstrate compliance with the terms of the contract. He did not demonstrate compliance on his part. In the above circumstances, I do not think the appellant satisfied the criteria for grant of an interlocutory injunction.
24. For the above reasons, this court cannot fault the lower court in the manner it exercised its discretionary jurisdiction. The result is that this appeal is devoid of merit. The appeal is dismissed for lack of merit. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF MAY 2023

B M EBOSO

JUDGE

Court Assistant: Hinga

NOTE: Court Registry to promptly notify the parties that the Judgment has been rendered so that whoever wishes to pursue the appeal mechanism can do so within the prescribed time.

