



Wanganga v Black Spider Auto Tech Limited; Rafiki Micro Finance Bank Limited (Interested Party) (Environment & Land Case E017 of 2022) [2023] KEELC 18277 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E017 OF 2022**

**EK WABWOTO, J
JUNE 16, 2023**

BETWEEN

EMILY WANJIKU WANGANGA PLAINTIFF

AND

BLACK SPIDER AUTO TECH LIMITED DEFENDANT

AND

RAFIKI MICRO FINANCE BANK LIMITED INTERESTED PARTY

RULING

1. The Plaintiff filed a Notice of Motion Application dated October 5, 2022 which was accompanied by a Supporting Affidavit sworn by Emily Wanjiku Wanganga. The Plaintiff sought the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That an order do issue to restrain Rafiki Microfinance Bank Limited from paying to the defendant the amount of Ksh 18,300,000 secured by way of a charge of the property LR No 8226/122 (suit property) vide the charge dated 31/3/2022 pending hearing and disposal of the application before the court.
 - iv. That an order do issue to Rafiki Microfinance Bank Limited to deposit in court the amount of Ksh 18,300,000 secured by way of a charge of the suit property vide the charge dated 31/3/2022 pending hearing and disposal of the suit before the court.
 - v. That in the alternative an order do issue to Rafiki Microfinance Bank Limited to cancel the charge under the suit property dated 31/3/2022 of the amount of Ksh 18,300,000/= and



deposit in court the title to the suit property pending hearing and disposal of the suit before the court.

- vi. Costs of this application.
- vii. Any other orders as the court may deem fit.

2. The Application was made on the grounds that:

- i. The plaintiff and the defendant entered into a sale agreement on April 30, 2021 for the plaintiff to sell the defendant land parcel Land Reference Number 8226/122 at a price of Ksh Twenty Million (Ksh 20,000,000/=) which amount was to be paid as stipulated in the said sale agreement as follows; (a) 10% of the sale price the sum of Ksh. Two Million (Ksh 2,000,000.00) to be paid in the manner below (i) Ksh One Million (Ksh 1,000,000.00) on execution of the sale agreement (ii) Ksh One Million (Ksh 1,000,000.00) after confirmation of the search lodged at the Lands Registry prior to the agreement for purposes of ascertaining the status of title. (b) The balance of Ksh. Eighteen Million (Ksh 18,000,000) within One Hundred Eighty Days (180) days of the sale agreement.
- ii. The sale agreement stipulated that the defendant was to pay the full purchase within a duration of One Hundred Eighty (180) days of the sale agreement which period was defined as the completion date, which date in terms of the agreement fell on October 27, 2021.
- iii. The sale agreement provided that time was of essence. 4. In compliance with the terms of the agreement, the plaintiff effected transfer of the suit property to the defendant for purposes presented by the defendant to be enabling the defendant to successfully acquire financing through a charge at the bank, to subsequently pay the balance of the purchase price owed to the plaintiff Pursuant to which presentation it was the expectation of the plaintiff that the balance of the purchase price was to be secured and paid with the security the defendant presented it was to procure.
- iv. That to the utter surprise of the plaintiff she came to realize that the lawyer's representing her in the transaction and on whose professional services she relied on, released the plaintiff's title and did not secure with the title and or at all the balance of the purchase price contrary to the plaintiff's expectation.
- v. That the defendant in breach of the sale agreement transferred the suit property to its name and has subsequently charged the property to Rafiki Microfinance Bank Limited on 31/3/2022 for Ksh 18,300,000.00 and to the date of filing the suit and this application the defendant had not paid the plaintiff the balance of the purchase price, which balance as at the date of the suit was Ksh 17,730,000.00.
- vi. That the plaintiff vide a letter dated July 26, 2022 notified the Rafiki Microfinance Bank of the fraud herein perpetrated by the defendant in relation to transfer of title to the defendant and subsequent use of the title to secure finance under the charge the subject of the suit property.
- vii. That the Plaintiff after serving the summons and plaint herein upon the defendant has learnt from the defendant that the Rafiki Microfinance Bank has not yet released the money that was secured by the subject charge over the suit property and the defendant has informed the sales agent involved in the transaction Mr David Kariuki that the reason for the money being withheld is the letter dated July 26, 2022 which the plaintiff wrote to the financier
- viii. That to the utter surprise of the plaintiff she came to realize that the lawyer's representing her in the transaction and on whose professional services she relied on, released the plaintiff's title



and did not secure with the title and or at all the balance of the purchase price contrary to the plaintiff's expectation.

- ix. That the defendant in breach of the sale agreement transferred the suit property to its name and has subsequently charged the property to Rafiki Microfinance Bank Limited on 31/3/2022 for Ksh 18,300,000.00 and to the date of filing the suit and this application the defendant had not paid the plaintiff the balance of the purchase price, which balance as at the date of the suit was Ksh 17,730,000.00.
 - x. That the plaintiff vide a letter dated July 26, 2022 notified the Rafiki Microfinance Bank of the fraud herein perpetrated by the defendant in relation to transfer of title to the defendant and subsequent use of the title to secure finance under the charge the subject of the suit property.
 - xi. That the Plaintiff after serving the summons and plaint herein upon the defendant has learnt from the defendant that the Rafiki Microfinance Bank has not yet released the money that was secured by the subject charge over the suit property and the defendant has informed the sales agent involved in the transaction Mr David Kariuki that the reason for the money being withheld is the letter dated July 26, 2022 which the plaintiff wrote to the financier.
 - xii. That the plaintiff having filed the application dated 7/9/2022, the court has directed that the Interested Party should be joined as a party in the matter before the court.
3. In the Plaintiff's submissions dated March 25, 2023, it was submitted that the Plaintiff had rescinded the agreement and now sought prayers for the title to revert from the defendant. Furthermore, it was argued that by granting the prayers in the application, the Court would justly conserve the subject matter. It was conceded that since the bank had taken action in respect to the revocation of the loan facility, Prayer 4 was spent and therefore the only remaining prayer for determination was Payer 5 and 6.
 4. In support of the Plaintiff's application, the Interested Party filed a Replying Affidavit sworn by Hellen Nyaboke dated November 21, 2022, and submissions dated April 27, 2023, where it was submitted that all due diligence was given to register the charge in favour of the Interested Party. Furthermore, upon receipt of the new information, preliminary inquiries were conducted which resulted in revocation of the loan approval under Clause 3 of the offer letter. The revocation was communicated to the Respondent vide a letter dated September 4, 2022.
 5. The Respondent filed a Replying Affidavit sworn by David Njuguna Ngoi dated March 3, 2023 and submissions dated April 17, 2023. It was submitted that the Plaintiff was fully aware of the transfer process and delays that had been occasioned by the Plaintiff who gave incomplete documents. It was further argued that substantial loss would be incurred by the Respondent who had spent in excess of Ksh 14,000,000.00 in development of the suit property and an additional 8,000,000.00 towards the purchase price. Moreover, the prayer for cancellation of a charge was neither sought in the Plaint and could not be issued by the Court at this stage.
 6. On October 6, 2022, the Court granted leave for Rafiki Microfinance Bank Limited be enjoined as an Interested Party and granted interim orders prohibiting transfer of funds from the Interested Party to the Respondent.
 7. I have considered the application, rival affidavits and respective submissions and authorities cited. In my view, the issue that arises for determination is whether the application dated October 5, 2022 is merited.
 8. It is a well understood principle that interlocutory applications should be utilized as a first line of defence in the protection of the parties' rights and thus ought to be determined on face value and



- decided on a scale of a balance of convenience. With this in mind, granting of prayers sought in such applications would be of no permanence but merely offer first-aid to an aggrieved party.
9. *Giella v Cassman Brown* (1973) EA 358 and *Nguruman Limited V Jan Bonde Nielsen & 2 Others*, CA No 77 of 2012, set out the principles to determine the threshold for temporary injunction in that a party seeking a temporary injunction has to establish a prima facie case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.
 10. This Court is guided by Section 63 of the *Civil Procedure Act* and Order 40(1) of the *Civil Procedure Rules*, where in any suit it is proved by affidavit or otherwise—
 - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.[Emphasis Mine]
 11. In *Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 Others* [2016] eKLR, where the Court expressed itself:-

“Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right...Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.”[Emphasis Mine]
 12. Additionally, Steven Mason & McCathy Tetrat in their well-researched article entitled "*Interlocutory Injunctions: Practical Considerations*" have authoritatively stated as follows:-

“...In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a more strong prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the plaintiff to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply...”[Emphasis Mine].
 13. In this instance, it is undisputed that there existed a sale Agreement dated April 30, 2021 between the Plaintiff and the Respondent for the purchase of the suit property. As contracting parties, the Agreement bestowed upon each specific responsibility as Vendor and Purchaser. It is also undisputed that a further contractual relationship was created between the Respondent and Interested Party after which a charge was registered in favour of the Interested Party.



14. Prayer 5 of the Plaintiff's application calls upon the Court to determine the validity of the charge and in effect make a final decision on the disposition of the suit property. In my opinion, the prayer in itself raises pertinent questions on the ownership and transfer of the suit property which in the interest of justice should be heard and decided in the main suit. The Plaintiff has not made out a case for grant of the orders sought at this stage.
15. In the foregoing, this Court finds that the prayer sought for cancellation of the charge cannot be granted at this interlocutory stage. Therefore, the Notice of Motion application dated October 5, 2022 is found to be unmerited and the same is dismissed in its entirety. Costs to abide the determination of the main suit.
16. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JUNE 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Chege for the Plaintiff/Applicant.

Mr. Githinji for the Defendant/Respondent.

Mr. Olunga for the Interested Party.

Court Assistant; Caroline Nafuna

