



**Gitonga v Muhugu Limited & 2 others (Environment & Land Case
E165 of 2023) [2023] KEELC 20487 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E165 OF 2023
J OMANGE, J
SEPTEMBER 29, 2023**

BETWEEN

JOHN NDERITU GITONGA APPLICANT

AND

MUHUGU LIMITED 1ST RESPONDENT

LEO CAPITAL HOLDINGS LIMITED 2ND RESPONDENT

MOONSTAR ENTERPRISES AUCTIONEERS 3RD RESPONDENT

RULING

1. The application dated May 11, 2023 is brought in respect of the property LR No 5842/13 formerly LR 5842/ 12 (the Suit Property).
2. The application prays for the following reliefs:
 - a. Spent.
 - b. That pending hearing and determination of this application there be an order of temporary injunction issued against the respondents by themselves, agents or any person acting under their instructions restraining them from trespassing, entering into the demised property and takin away the proclaimed properties of the Applicant, evicting or in any other manner interfering with the Applicant’s quiet possession.
 - c. That pending hearing and determination of this suit there be an order of temporary injunction issued against the respondents by themselves, agents or any person acting under their instructions restraining them from trespassing, entering into the demised property and takin away the proclaimed properties of the Applicant, evicting or in any other manner interfering with the Applicant’s quiet possession.



- d. That this honourable court make any further or other orders it may deem fit and just to grant.
 - e. That the Respondent be awarded the costs of this application.
3. The Application is based on grounds inter alia that the Defendant offered to sell house no 15 of the suit property and the Plaintiff accepted the offer. The Plaintiff paid a deposit of Kshs 1,000,000 and took possession of the suit property and has made further payments on the same. The Applicant avers that the 3rd Respondent has threatened to attach his household goods claiming that he has not paid rent.
 4. The application is supported by the affidavit of the Applicant in which he produces a letter of offer and evidence to indicate that he made payment of Kshs 1,000,000. He also attaches the proclamation by the 3rd Respondent.
 5. The application is strenuously opposed by the 1st Respondent who contends that the Applicant has not come to court with clean hands. The Director of the 1st Respondent depones that the Applicant did not comply with the terms of the offer and paid the commitment fee to a third party the 2nd Defendant who is a stranger to the 1st Defendant. This payment to a third party was contrary to express terms of the letter of offer which were clear as to the designated bank account to make the payments.
 6. Counsel for the 1st Respondent filed written submissions which I have duly considered. The law on granting interlocutory injunctions is set out under Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules as follows:

“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 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.”

7. The principles for grant of injunction are well settled by the locus classicus of *Giella Vs Cassman Brown & Company Limited* [1973] EA 358, where the court stated thus:

“First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

8. This court is thus required to determine whether the Applicant has satisfied the three conditions for grant of injunction. In *Nguruman Limited Vs Jan Bonde Nielsen & 2* the Court of Appeal had this to say on prima facie case; “The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to



be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion” .

9. In this case, it is not in contention that there was a letter of offer which the Applicant accepted. The terms of the letter of offer dated May 20, 2021 was clear that the Purchaser who is the Applicant herein was to pay a sum of Kshs 1,000,000 upon signing the letter of offer and other sums in the manner agreed upon in the offer letter. It is the uncontroverted contention of the 1st Respondent that the Applicant did not comply with the terms of the offer hence should not benefit from any equitable remedy from the court. The Applicant did not dispute any of the facts in the Replying Affidavit.
10. Given that the Applicant has not complied with the terms of the letter of offer, he has not demonstrated that he has a clear and unmistakable right to the protection of the court. As such the application fails the test of a prima facie case. In the circumstances, I find that the application has no merit and is dismissed. The costs shall abide the determination of the main suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF SEPTEMBER, 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Bigambo for Applicant

Steve - Court Assistant

