



**Mwangi v Kinyanjui (Environment & Land Case E023 of 2022)
[2023] KEELC 20114 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E023 OF 2022
JO OLOLA, J
SEPTEMBER 28, 2023**

BETWEEN

BENJAMIN GATHIRU MWANGI PLAINTIFF

AND

JOHN MUCORI KINYANJUI DEFENDANT

RULING

1. By the Notice of Motion dated October 26, 2022, Benjamin Gathiru Mwangi (the Plaintiff) prays for orders restraining the Defendant from further transferring, selling, charging or in any other way dealing with the properties known as Gatarakwa/Gatarakwa Block 4/1406; 4/1407; 4/1408; 4/1409 and 4/1410 pending the hearing and determination of this suit.
2. The application which is supported by an Affidavit sworn by the Plaintiff is premised on the grounds *inter alia*, that:
 - (i) On March 30, 2019, the Plaintiff entered into a sale agreement for the said properties with the Defendant;
 - (ii) At the time of the sale agreement which was prepared for both Parties by the same Advocate, the Plaintiff was not informed that the properties were in the name of Joe Wagura Wanjau and as such the Defendant did not have the legal capacity to sell the same;
 - (iii) When the Plaintiff confronted the Defendant and their joint Advocate on the issue, he was informed that the Defendant had purchased the property from the said Joe Wagura Wanjau who was the registered proprietor and that they were in the process of finalizing the transfer to the Defendant's name;



- (iv) Out of an abundance of caution given that he had already paid a deposit, the Plaintiff made it clear to the Defendant that he would only pay the balance of the purchase price upon receipt of confirmation that indeed the properties had been so transferred to the Defendant's name;
 - (v) On October 25, 2022, the Plaintiff came to learn that the Defendant had clandestinely transferred the properties and was actually selling the same to innocent third parties who were not aware that the Plaintiff had paid a deposit for the same;
 - (vi) The Plaintiff had earlier lodged a caution on the property to prevent its sale but was persuaded by the Defendant to remove the same to facilitate transfer to his name on July 12, 2021. The Defendant then took advantage of the removal to orchestrate the sale of the land to innocent third Parties;
 - (vii) Unless this Court intervenes and grants the orders sought in the application, there is eminent risk that the Defendant will dispose of the same to a third Party to the detriment of the Plaintiff; and
 - (viii) The impending sale is not only unfair but also unprocedural and illegal and it is only through the Court's intervention that the Plaintiff's property will not pass to a third Party.
3. John Mucori Kinyua (the Defendant) is opposed to the application. In his Replying Affidavit sworn on November 17, 2022, the Defendant avers that the suit and the application have both been overtaken by events as the ownership of the suit properties have already passed to a third Party.
 4. The Defendant avers that contrary to the Plaintiff's assertions, the suit properties known as Gatarakwa/ Gatarakwa Block 4/1406; 1407 and 1408 were registered in the Defendant's name as captured in the agreement dated March 30, 2019. It is his case that only Block 4/1409 was at the time in the name of a third party, a fact which was again reflected in their agreement.
 5. The Defendant asserts that it was a term of the agreements executed that the Plaintiff would clear the balance within 30 days of execution but the Plaintiff failed to do so. The Defendant states that arising from the said failure to pay, his Advocate caused a demand letter to be written to the Plaintiff on July 1, 2019 asking for the outstanding payment of Kshs 6,300,000/- together with damages amounting to Kshs 540,000/- but the Plaintiff did not oblige.
 6. The Defendant avers further that he proceeded to obtain Land Control Board consent to transfer the properties in the Plaintiff's name on September 22, 2021 but when the Plaintiff failed to pay the balance of the purchase price as demanded, he proceeded to sell the same to a third party. Accordingly the Defendant asserts that the suit and the application are frivolous and vexatious and that the same ought to be dismissed with costs.
 7. I have carefully perused both the application and the response thereto. I have similarly perused the submissions and authorities to which I was referred by the Learned Counsels representing the Parties.
 8. By his application before the Court, the Plaintiff prays for an order of injunction to restrain the Defendant from further transferring, selling, charging or in any manner whatsoever dealing with the properties described as Gatarakwa/Gatarakwa Block 4/1406; 1407; 1408; 1409 and 1410 pending the hearing and determination of this suit.



9. The guiding principles for the grant of interlocutory injunctions are now well settled. As was stated in the celebrated case of *Giella vs Cassman Brown & Company Limited* (1973) EA 358:

“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 a balance of convenience.”

10. That being the case, the question that then arises is whether or not the Plaintiff’s application meets the threshold for the grant of such orders. Considering what would constitute a prima facie case in a matter such as this, the Court of Appeal pronounced itself as follows in *Mrao Limited vs First American Bank of Kenya Limited & 2 Others* (2003) KLR 125:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which apparently has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

11. In the matter before me, there was no dispute that the Parties herein entered into various sale agreements for the suit properties on March 30, 2019. A perusal of the said agreements similarly drawn reveals that the purchase price for the respective parcels of land were to be paid within 90 days from the date of the execution.

12. According to the Plaintiff, he was unable to comply with that provision because shortly after the execution of the agreements, he came to realise that the suit properties were registered in the name of a third party by the name Joe Wagura Wanjau. It is the Plaintiff’s case that following this discovery, he made it clear to the Defendant that he would not pay the balance of the purchase price unless and until the properties were transferred to the name of the Defendant as the vendor.

13. There was however nothing placed before the Court by way of evidence to support this claim by the Plaintiff. A perusal of the sale agreements for the suit properties indicates that the Defendant was the registered owner thereof save for Gatarakwa/Gatarakwa Block 4/1410 wherein the Defendant is shown to be a beneficial owner having purchased the same from the registered owner on October 13, 2016. That agreement further indicates that the Defendant was in the process of registering the same in his name having obtained transfer documents from the said Joe Wagura Wanjau.

14. As it were, it was incumbent upon the Plaintiff to do due diligence and establish the proper ownership of the suit properties prior to the execution of the agreements. Having so executed the agreements, the Plaintiff was bound by the terms thereof and his unsupported claim that the properties were not in the name of the Defendant was not a good excuse for failure to adhere to the terms thereof.

15. At any rate, it was also apparent that by September 2021, the Defendant had obtained the Land Control Board consent to transfer the properties to the name of the Plaintiff. In this respect, the Defendant wrote to the Plaintiff on September 23, 2021 demanding for the balance of the purchase price. There is no evidence on the Plaintiff’s part that he settled the amount after this demand.

16. Interestingly, while the Plaintiff urges the Court to restrain the Defendant from further selling or transferring the suit properties, it was clear from both the Supporting and the Supplementary Affidavits sworn and filed by the Plaintiff herein that he was aware as at the time of filing this suit that the Defendant had disposed the suit properties to people he terms as innocent third Parties. Having so



conceded that the properties are now in the hands of innocent third Parties, I was unable to see how any orders issued against the Defendant would be useful to the Plaintiff. Those third Parties have not been enjoined as Parties herein and hence this Court cannot make orders against them.

17. Arising from the foregoing, I was not persuaded that the Plaintiff had established a prima facie case with a probability of success. There was similarly no evidence that the Plaintiff stood to suffer any injury that cannot be compensated by an award of damages unless the orders sought were granted.
18. It follows that I was not persuaded that there was any merit in the Plaintiff's application dated October 26, 2022. It is dismissed with costs to the Defendant.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 28TH DAY OF SEPTEMBER, 2023.**

In the presence of:

Ms Oawe for the Applicant

Ms B. Maina for the Respondent

J. O. OLOLA

JUDGE

