



**Thiani v Kedong Ranch Limited (Environment and Land Case
E31 of 2023) [2023] KEELC 19980 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19980 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE E31 OF 2023
FM NJOROGE, J
SEPTEMBER 22, 2023**

BETWEEN

SARAH NAOMI WAIRIMU THIANI PLAINTIFF

AND

KEDONG RANCH LIMITED DEFENDANT

RULING

1. This is a ruling on an application dated 13/4/2023 filed by the plaintiff/applicant under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 rules 1a, 1b, 2 and 4 of the *Civil Procedure Rules* and all other enabling provisions of law. It seeks that this application be certified urgent and be heard ex-parte in the first instance, that pending the hearing of this application inter-partes, the court be pleased to issue an injunction restraining the defendant/respondent and its agents from making any offer for sale, accepting any offer to purchase, entering into and/or signing any agreement for sale over Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres either in whole or in part(s), that pending the hearing and determination of this application, the honourable court be pleased to issue an injunction restraining the defendant/respondent and its agents from making any offer for sale, accepting any offer to purchase, entering into and/or signing any agreement for sale over Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres either in whole or in part(s), that pending the hearing and determination of this suit, the honourable court be pleased to issue an injunction restraining the defendant/respondent and its agents from making any offer for sale, accepting any offer to purchase, entering into and/or signing any agreement for sale over Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres either in whole or in part(s), that the costs of this application to be awarded to the plaintiff/applicant.
2. On 13/4/2023 when the matter came before the court in the absence of the parties for directions, the court certified the motion as urgent and granted an order of injunction restraining the Defendant and its agents from making any offer for sale, accepting any offer to purchase, entering into and/or signing



any agreement for sale over the suit land and also ordered that the application be served forthwith on the defendant together with a copy of these directions and an affidavit of service shall be filed.

3. The Defendant/Respondent filed its Replying affidavit dated 24/4/2023 and filed on 25/4/2023. The Plaintiff/Applicant filed a Supplementary Affidavit dated 5/5/2023 and filed on 9/5/2023.
4. The background to the present application is that the defendant/respondent being the registered proprietor as lessee of the suit land offered the same for sale to its shareholders vide a general offer for sale of land dated 14/2/2023. In the offer the Defendant/ Respondent required the bidder to support the bid with a refundable deposit of 10% of the offer price.
5. The Plaintiff states that the Plaintiff/Applicant in a letter dated 15/3/2023 expressed her interest to purchase the land for an amount of Ksh 10, 200,000/= per acre making a total of Ksh 452,880,000/= for the entire land. She states that on the same day the plaintiff/applicant transferred to the defendant/respondent Ksh 45,288,000/= being a refundable deposit of 10% of the offer price and the Defendant/ Respondent was to communicate its decision within 14 days after 15/3/2023.
6. It is the Plaintiff's averment that the defendant/respondent wrote an email to the plaintiff/applicant on 4/4/2023 forwarding a letter dated 30/3/2023 and a letter of offer of even date to the plaintiff/applicant offering to sell only 2.32 acres out of the 44.4 acres of the land to the plaintiff/applicant. She states that 44.4 acres of the land was offered to Newell Holdings Ltd which has submitted a lower bid than the plaintiff/applicant.
7. The Plaintiff/Applicant states that the defendant/respondent did not disclose through the general offer that a winning bidder would not be offered the entire land; further, the offer letter did not disclose that a bidder with a lesser price offer would be allocated any part of the land. She also stated that the offer did not also disclose that any moderation and allocation of land would be made based on shareholding of parties.
8. The Plaintiff/Applicant states that she is aggrieved by the Defendant's/Respondent's unilateral decision to moderate the pricing and allocation of the land on pro-rata basis according to the shareholding of the successful bidder in the defendant company and the failure to offer the entire land to the plaintiff/applicant which made the highest offer.
9. The Plaintiff/Applicant states that the moderation and allocation of land on pro-rata basis was never anticipated, was made in bad faith and was based on an irrelevant provision of the defendant's articles of association.
10. She states that the Plaintiff/Applicant has a prima facie case with high chances of success in seeking orders to quash the defendant's/respondent's decision moderating the request for expression of interest and allocation of the land on a pro rata basis according to the qualified applicants' shares in the defendant's company. She also states that she will suffer irreparable loss that cannot be compensated by an award of damages if the orders sought are not granted. It is her statement that the balance of convenience tilts in her favor and it is in the interests of justice that the Application be allowed.
11. The Defendant/ Respondent in its Replying Affidavit dated 24/4/2023 deposed that the issues raised in the Application relate to the actions of shareholder's vis-a-vis the powers and duties of the Board of the Respondent and not to a land dispute and that no sale agreement or any other agreement has been entered into between the parties for sale of the land.
12. The Defendant/Respondent deposed that the letter of general offer clearly stated that the Board of Directors of the Respondent company would moderate and allocate the sale of the land to the shareholder(s) depending on the number of valid offers received.



13. The Defendant/Respondent further deposed that it is clear from the wording of the General Letter of Offer that the Respondent Company's Board anticipated a situation where several valid bids would be made making it necessary to allot the land to more than one shareholder and hence the need to moderate the process in accordance with the principles contained in the Respondent's Company's Articles.
14. The Defendant/Respondent further deposed that it is aware that in the request for expression of interest, no special condition or provision was made regarding the effect of the price in the expression of interest one way or the other. It is the Defendant's deposition that all an interested shareholder needed to do was to offer a price (highest or lowest notwithstanding) and make a deposit, in order to qualify for the Board's moderation before an offer could be made.
15. The Defendant/Respondent also deposes that the general offer to shareholders did not state that the highest bidder was entitled to the entire land and that it would not have been equitable for the Board to offer the highest bidder the entire land when there were other shareholders with responsive bids.
16. The court ordered the application be disposed of by way of written submissions. The submissions were to be filed by the Plaintiff/Applicant on 9/5/2023 and the Defendant/ Respondent filed its submissions on 15/05/2023.

17. Order 40 rules 1(a) and 1(b) of the *Civil Procedure Rules* provide that:

“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.”

18. Order 40 rule 2 of the *Civil Procedure Rules* provides that:

1. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.



19. Order 40 rule 4 of the *Civil Procedure Rules* provides as follows:
1. Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte.
 2. An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.
 3. In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.
 4. All applications under this order shall be heard expeditiously and in any event within sixty days from the date of filing unless the court for good reason extends the time.
20. I have considered the application by the Plaintiff/Applicant dated 13/4/2023 and her Supporting Affidavit, the Supplementary Affidavit dated 5/5/2023, the Replying Affidavit by the Defendant/Respondent dated 24/4/2023 the submissions by the Plaintiff/Applicant dated 5/5/2023 and the Defendant/Respondent's submissions dated 10/5/2023.
21. The crux of the Plaintiff's/Applicant's application is whether she has met the threshold for the grant of an injunction. A three tier test to establish that has been set in the famous case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358. It was stated as follows:
- “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.”
22. In considering the Plaintiff's/Applicants application, this court is obliged to consider the object of seeking the injunction. In the case of *Rockland Kenya Limited v Elliot White Miller* [1994] eKLR, Justice Gicheru, J.A (as he then was) held as follows:
- “The object of an interlocutory injunction is to protect the plaintiff against injury by violation of his legal right for which he could not be adequately compensated in damages recoverable in the action if the matters in dispute were resolved in his favour at the trial. However, his need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal right for which he could not be adequately compensated under the plaintiff's undertaking in damages if the subject-matter of the trial was decided in his favour. It is a remedy that is both temporary and discretionary. In cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the Court at the hearing of the application for an interlocutory injunction is given on affidavit and is therefore incomplete as it has not been tested by oral cross-examination. At that stage therefore, it is not the function of the Court to attempt to resolve conflicts of evidence



on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. Such matters are to be dealt with at the trial. Nonetheless, the Court must in the exercise of its discretionary power in this regard be satisfied that the claim in respect of which an interlocutory injunction is sought is neither frivolous nor vexatious: in other words, that there is a serious question to be tried.”

23. I have considered the application and I am satisfied that the plaintiff has established a prima facie case and that she stands to suffer irreparable injury that would not be compensated for by an order of damages. Consequently, this court is satisfied that the Plaintiff/Applicant’s application dated 13/4/2023 has meet the threshold for granting the injunctive order sought. I therefore issue the following orders:
- a. An order of injunction is hereby issued restraining the defendant/respondent, its board of directors, its committee(s), its agents, servants, employees, assigns and/or any other person acting on its instructions from making any offer for sale, accepting any offer to purchase, entering into and/or signing any agreement for sale over Land Reference Number 10854/309 Naivasha measuring approximately 44.4 acres either in whole or in part(s), that pending the hearing and determination of this suit
 - b. The costs of the application shall be in the cause.
 - c. The parties shall comply with the rules, the plaintiff within the first 15 days from the date of this order and the defendant within 15 days thereafter and suit shall be mentioned virtually on 18/10/2023 for issuance of a hearing date.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

