



**Kindi v Highport Merchants Limited; MM Gitonga Advocates
LLP (Interested Party) (Environment & Land Case E009 of 2023)
[2023] KEELC 21913 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21913 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E009 OF 2023
CG MBOGO, J
NOVEMBER 30, 2023**

BETWEEN

MORIASO OLE KINDI PLAINTIFF

AND

HIGHTPORT MERCHANTS LIMITED DEFENDANT

AND

MM GITONGA ADVOCATES LLP INTERESTED PARTY

RULING

1. Before this court for determination is the Notice of Motion Application dated 29th September, 2023 filed by the plaintiff/applicant expressed to be brought under Sections 1A,1B and 63 C of the [Civil Procedure Act](#), Order 40 Rule 1 & 2 and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders: -
 1. Spent.
 2. That pending the hearing and determination of this suit, a mandatory injunction be issued to compel the interested party to return the original certificate of titles of the properties known as Cis Mara/Oldonyo Rasha/ 148,357,360,361 and 365 to the plaintiff.
 3. That pending the hearing and determination of this suit, an order be issued to the defendant requiring it to initiate the removal of all restrictions that it had lodged over the properties known as Cis Mara/Oldonyo Rasha/ 148,357,360,361 and 365.
 4. That costs of this application be provided for.



2. The application is premised on the grounds inter alia that on 23rd June, 2021, the defendant/respondent entered into an agreement with the plaintiff/applicant for purchase of properties known as Cis Mara/Oldonyo Rasha/ 148,357,360,361 and 365 for a sum of Kshs. 87,000,000/- in which the plaintiff/applicant was paid a deposit of Kshs. 5,000,000/-. Further, that the plaintiff/ applicant surrendered the original title documents but that the defendant/respondent has failed to fulfil its contractual obligations and is in blatant breach of the agreement.
3. The application was supported by the affidavit of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that at all material times, he was the registered owner of the suit properties, and in the sale transaction, together with the defendant/respondent, they were represented by the interested party. He further deposed that after he received payment of the deposit of Kshs. 5,000,000/-, he duly performed his contractual obligations and gave the interested party all the original title documents and relevant discharges as a show of good faith.
4. The plaintiff/applicant further deposed that the defendant/respondent has failed to fulfil its obligation and is in breach of the agreement by failing to clear the loan amount owed to Equity Bank and remitting the balance due to him after clearing all the loan liabilities. Further, that he issued a completion notice to the defendant/respondent dated 14th August, 2023 but it has still refused to honour its contractual obligation and the contract stands rescinded due to the lapse of the 21 days period stipulated in the agreement. He further deposed that there were letters written thereof in a bid to settle the issue amicably but despite the same, the defendant/respondent has refused to respond and is continuously frustrating him despite it being in breach and as such, he suffers injury.
5. The plaintiff/applicant further deposed that he has received a letter of offer from new buyers and he risks losing the deal due to lack of cooperation by the defendant/respondent and the interested party.
6. The application was opposed by the replying affidavit of Shein Kurji the Director of the defendant/respondent sworn on 15th October, 2023. The defendant/respondent deposed that the application is riddled with material non-disclosure and misrepresentation of facts in a bid to mislead this court for the reason that at all times, it has been ready, able and willing to complete the sale transaction but for the default of the plaintiff/applicant.
7. The defendant/respondent deposed that the plaintiff had charged various parcels to various banks to secure monies owed and the parties mutually agreed to have part of the purchase price to set off the debt and discharge the properties for seamless transfer to the plaintiff/applicant. Further, that pursuant to the agreement, the defendant/respondent made payments to the interested party who remitted to the plaintiff/applicant and to the respective banks who subsequently released the discharge documents and the original title documents to the interested party. Further, that the title documents were released to the interested party by the respective banks to safeguard the interest of the parties.
8. The defendant/respondent further deposed that despite payment of Kshs. 38,246,091/-, the plaintiff/applicant embarked on a scheme to renege the agreement by introducing a claim that the transaction lacked the requisite consent of the spouse and therefore breached the warranty given under clause 9.1 of the agreement which then entitled it to terminate the agreement upon written notice and without prejudice to any other rights or remedies available. Further, that the interested party wrote a letter dated 27th August, 2021 seeking a refund of the sums paid which the plaintiff/applicant did not comply. Further, that the lack of spousal consent is a camouflaged act of fraud calculated to frustrate or stall the sale transaction.
9. It was further deposed that owing to the acts of the plaintiff/applicant, it rightly registered cautions against the properties claiming purchaser's interest in order to protect itself from fraudulent dealings in



light of its contractual interest in the properties. Further, that by virtue of part payment of the purchase price, an irrevocable trust was established in favour of the defendant/respondent and the aborted sale transaction is through the fault of the plaintiff/applicant who lacked the requisite power and capacity to enter into the agreement and perform the obligations contained therein.

10. The defendant/respondent further deposed that the plaintiff/applicant is undeserving of the orders and has engaged in illegal and fraudulent actions in bad faith in a bid to steal a march against it. Further, that the plaintiff/applicant applied to the Land Registrar for re-issuance of the title deeds on claims that the same are lost and or misplaced and further failed to disclose that the title deeds for the properties were encumbered with charges and cautions registered against them. Further, that on 6th February, 2023, the Land Registrar issued new title deeds that were unencumbered without any charges or cautions registered or disclosed thereon.
11. The plaintiff/applicant filed a supplementary affidavit in response thereto sworn on 19th October, 2023. While reiterating the averments contained in his supporting affidavit, the plaintiff/applicant further deposed that the purported letter dated 23rd May, 2022 is a sham and an afterthought which in fact, he never received. Further, that the allegations of spousal consent is pre-emptive since the contractual stage of issuance of spousal consent had not yet materialised as he was also surprised that his wife had written to the interested party and had lodged cautions which necessitated him to intervene and have his wife remove the cautions and accept the sale transaction.
12. The plaintiff/applicant further deposed that if the issue- in question was the lack of provision of a spousal consent, the defendant/respondent ought to have issued a completion notice and the agreement or sued for specific performance. Further, that in show of good faith, he surrendered the title deed to the interested party with the pending debt due which the defendant/respondent has refused to clear with Equity Bank. Further, that the interested party is conflicted as he appears to have taken side with the defendant/respondent. He further deposed that he cannot pay any interest for a contract that the defendant/respondent is liable for breach.
13. The plaintiff/applicant further deposed that he is not a party to the allegations of re-issuance of title deeds and there is no criminal case against him for the alleged fraud.
14. The application was canvassed by way of written submissions. On 23rd October, 2023, the plaintiff/applicant filed his written submissions dated 18th October, 2023 where he raised four issues for determination as follows: -
 - a. Whether the applicant has established a prima facie case;
 - b. Whether the case is a special and clear one and which the court thinks ought to be decided at once;
 - c. Whether the applicant will suffer irreparable injury that will not be adequately compensated by way of damages; and
 - d. Whether the balance of convenience lies with the applicant.
15. On the first issue, the plaintiff/applicant submitted that he has demonstrated a prima facie case by presenting material showing a valid completion notice was issued which was neither completed nor responded to. The plaintiff/applicant relied on the cases of *Mrao Limited versus First American Bank Kenya Limited & 2 Others [2003]* eKLR, *Anne Murambi versus John Munyao Nyamu & Another [2018]* eKLR and *Pius Kimaiyo Langat versus Cooperative Bank of Kenya Limited [2017]* eKLR. The plaintiff/applicant submitted that any interpretation other than the one stipulated by clause 7 of the agreement would be inimical to rewriting the contract. He further submitted that the



- defendant/respondent was not ready to complete the transaction and that since the year 2021, the defendant/respondent has never attempted to exercise its right to sue for specific performance. He further submitted that the suit properties were not matrimonial properties and are not liable to spousal consent. He relied on the cases of *Francis Kiarie Kamau & Another versus Sammy Kimemia Njuguna & Another [2021]* eKLR and *Vipingo Properties Limited versus Randolph Tindika; Registrar of Titles (Interested Party) [2022]* eKLR.
16. On the second issue, the plaintiff/applicant submitted that this is a clear and straight forward case that could have been avoided had the defendant/respondent and the interested party responded and cooperated to have the properties sold.
 17. On the third issue, the plaintiff/applicant submitted that since the year 2021, the defendant/respondent has continuously frustrated him and delayed correspondence even where he was willing to settle the matter amicably despite the defendant/respondent's breach. Further, that he has found a new buyer who is ready to purchase the property at Kshs. 130,000,000/- and there is risk of losing the buyer owing to the frustrations and delay by the defendant/respondent.
 18. On the fourth issue, the plaintiff/applicant submitted that he has undertaken to refund the respondents the amount due and, he has no objection to this court declaring and ordering that upon identification of a new purchaser and conclusion of the said transaction, to re-imburse the defendant/respondent the said sums.
 19. On the 27th October, 2023 the defendant/respondent filed its written submissions of even date where it raised two issues for determination as follows: -
 - i. Whether the mandatory injunction is merited; and
 - ii. Whether the cautions should be removed.
 20. On the first issue, the defendant/respondent submitted that the mandatory order is sought against the interested party and not the defendant/respondent who is the primary party to the suit and hence the same cannot be issued. Reliance was placed in the cases of *Methodist Church in Kenya versus Mohamed Fugicha & 3 Others [2019]* eKLR and *Victor Mabachi & Another versus Nurtun Bates Limited [2013]* eKLR. The defendant/respondent submitted that a party seeking mandatory injunction has to establish a clear case and special, exceptional or unusual circumstance to warrant the grant of such orders as was held in the cases of *Maher Unissa Karim versus Edward Oluoch Odumbe [2015]* eKLR and *Kenya Power & Lighting Co. Limited versus Samuel Mandere Ogeto [2017]* eKLR.
 21. The defendant/respondent further submitted that the plaintiff/applicant has not demonstrated the circumstances that warrant the granting of the orders. Further, that granting the orders and removal of the restrictions at this stage would effectively determine the suit at an interlocutory stage and there would be nothing left to determine. The defendant/respondent relied on the cases of *Barclays Bank of Kenya Limited versus Banking Insurance & Finance Union (Kenya) [2019]* eKLR, *Hezron Kamau Gichuru versus Kianjoya Enterprises Limited & Another [2022]* eKLR, *Macharia Mwangi Maina & 87 Others versus Davidson Mwangi Kagiri [2014]* eKLR, *Joel Mwangangi Kithure versus Priscah Mukorimburi [2022]* eKLR, *Fibrosa Spolka Akayina versus Fairbairn Lawson Combe Barbour Limited [1943] AC*, *Local Empowerment for Good Governance & 6 Others versus Community Executive Committee Member Finance & Economic Planning-County Government of Mombasa & 2 Others [2021]* eKLR, *Peter Kibika Ng'ang'a versus Amos Kimeli Chamdala [2021]* eKLR and *Esther Wanjiku Mwangi & 3 Others versus Wambui Ngarachu [2017]* eKLR.
 22. The defendant/respondent further submitted that there is no urgency that would justify the grant of the orders and the prevailing status quo has not changed since September 2021 and no drastic action



has been taken by the defendant/respondent. Further, that the material non-disclosure on the part of the plaintiff/applicant does not entitle him to the orders. Further, that a party seeking equitable remedy like an injunction must be honest and candid. Reliance was placed in the cases of *Kenleb Cons. Limited versus New Gatitu Service Station Limited & Another* [1990] eKLR and *JM versus SMK & 4 Others* [2022] eKLR.

23. On the second issue, the defendant/respondent submitted that it properly lodged the cautions against the properties in view of its interest as a purchaser and that the question as to whether the cautions should be removed is a substantive issue for trial that cannot be resolved at an interlocutory stage. The defendant/respondent relied on the cases of *Caliph Properties Limited versus Barbel Sharma & Another* [2015] eKLR and *Sabina Somoine Parteyie versus County Lands Registrar Kajiado & Another* [2021] eKLR and *Martin Nzioka Mutua & 2 Others v Mamuco Sacco Limited* [2018] eKLR.
24. I have carefully analysed and considered the application, the replying affidavit thereof and the rival submissions filed by the parties herein and, in my view, the issue for determination is whether the plaintiff/applicant is entitled to the orders of mandatory injunction.
25. The circumstances under which the court would grant a mandatory Injunction was well stated out by the Court of Appeal in the Case of *Malier Unissa Karim v Edward Oluoch Odumbe (2015)* eKLR as follows: -

“The test for granting a Mandatory Injunction is different from that enunciated in the *Giella –Versus - Cassman Brown* case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of *Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109* had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application.”

26. In *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma* [2020] eKLR the Court of Appeal reaffirmed its decision in *Kenya Breweries Limited & Another versus Washington O. Okeyo* [2002] eKLR and stated that;

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

27. The court also reaffirmed its decision in *Shariff Abdi Hassan v Nadhif Jama Adan* [2006] eKLR where it stated that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the



courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

28. It is not in dispute that the plaintiff/applicant and the defendant/respondent entered into an agreement dated 23rd June, 2021 for the sale of the suit properties for a sum of Kshs. 87,000,000/-. The said agreement was drawn and witnessed by the interested party. I have perused the agreement and note that there are terms of the agreement which the parties have contested i.e. as to the completion, default and the warranties. More importantly, the defendant/respondent deposed that the original title documents and any other completion documents are in the custody of the interested party, which fact has not been refuted by the plaintiff/applicant.
29. On removal of the cautions/restrictions, Section 73 of the Land Registration Act makes provisions on removal of a caution and stipulates thus:
- “(1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.
- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
- (5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee’s power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.
- (6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.”
30. Looking at the facts as presented by both parties, I find that the issues relating to removal of caution are substantive and ought to be determined through trial.
31. Having analysed the deposition of the plaintiff/applicant and while I place reliance on the above cited authorities, I am not convinced that special circumstances exist in this matter that may warrant the grant of a mandatory injunction. I am also not convinced that this case is so clear that it ought to be decided at once. There are competing claims by both parties and these require further interrogation. It would be necessary that both parties are afforded the chance to present their case during trial to enable this court arrive at a reasonable conclusion.
32. I do also note that the plaintiff/applicant has sought the orders of mandatory injunction together with other orders in his plaint and the defendant/respondent has also filed a counterclaim and it would only be fair that this matter proceeds to full trial to establish all the claims.



33. Arising from the above, this court finds no merit in the notice of motion application dated 29th September 2023 and the same is hereby dismissed. Costs to be in the cause. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 30TH DAY OF NOVEMBER, 2023.

HON. MBOGO C.G.

JUDGE

