



**Kagonia v Serene Valley Properties (Kenya) Ltd & another (Environment & Land Case 128B of 2022) [2023] KEELC 22136 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22136 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 128B OF 2022  
BM EBOSO, J  
NOVEMBER 28, 2023**

**BETWEEN**

**GRACE NJERI KAGONIA ..... PLAINTIFF**

**AND**

**SERENE VALLEY PROPERTIES (KENYA) LTD ..... 1<sup>ST</sup> DEFENDANT**

**THE COMPANY FOR HABITAT AND HOUSING IN AFRICA (SHELTER  
AFRIQUE) ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Falling for determination in this ruling is the notice of motion dated 11/4/2022, brought by Grace Njeri Kagonia [the plaintiff]. Through the motion, the plaintiff seeks an order of interim injunction restraining the two defendants against selling, further advertising for sale, disposing, alienating, encumbering, charging, interfering with, transferring or in any manner dealing with Land Reference Number 29324/2 Limuru [referred to in this ruling as the “suit property”]. The application is premised on the grounds outlined in the motion and in the plaintiff’s supporting affidavit sworn on 12/4/2022. It was canvassed through written submissions dated 27/5/2022, filed by M/s Clay & Associates Advocates.
2. The case of the plaintiff is that on 25/4/2012, she entered into an agreement for sale a villa/town house designated as Unit B9, with the 1st defendant. Pursuant to the said agreement, she paid to the 1st defendant a sum of Kshs 5,000,000. Receipt was duly acknowledged by the 1st defendant as being the final instalment of the purchase price of the said Unit. She adds that the completion date was to be fourteen days after receipt by her advocates of the certificate of practical completion and certificate of occupation issued by the Town Council of Kikuyu.
3. The plaintiff contends that as at August at 2019, the construction of the housing project was yet to be completed, prompting her to instruct her advocates to enquire on the status of the project from the



- 1st defendant. Upon inquiry, the plaintiff was informed that the 2nd defendant took over the project from the 1st defendant and was handling the settlement of claims made by various parties associated with the project. The plaintiff contends that in the course of her advocates' correspondence with the 1st and 2nd defendants, she discovered that the suit property was marked as unsold and that the 2nd defendant was at liberty to sell the same to a third party pursuant to a deed of settlement signed between the 1st and 2nd defendants.
4. The 1st defendant supported the application through written submissions dated 25/4/2022, filed by M/s Mutanda Law Advocates. The 1st defendant confirms that it entered into an agreement with the plaintiff for the sale of the suit property. The 1st defendant adds that it approached the 2nd defendant for financing of the housing project and subsequently entered into various agreements with the 2nd defendant including an escrow agreement dated 27/3/2013 to facilitate receipt of sale proceeds of the units to be sold in the housing project. The 1st defendant further contends that despite the 2nd defendant being well aware that the agreement between the 1st defendant and the plaintiff existed, the 2nd defendant proceeded to execute a sale agreement for the sale of the suit property with a third party, one Florence Ann Wamathwe Thairu. It is the 1st defendant's case that the interim injunction should be granted for purposes of good order in the proceedings and to enable the plaintiff prove her claim in the suit.
  5. The 2nd defendant opposes the application through its replying affidavit sworn by Kuria Njiru on 22/6/2022 and written submissions dated 12/7/2022, filed by M/s Muriu Mungai & Company Advocates LLP. Its case is that Unit B9 is part of the properties charged in its favour as security for loan facilities granted to the 1st defendant to facilitate development of the housing project. The 2nd defendant adds that clause 13 of the charge instrument registered on 28/2/2013 expressly prohibited the 1st defendant from selling, leasing, agreeing to lease, or parting with possession of the suit property without the prior written consent of the 2nd defendant. The 2nd defendant contends that it never approved the sale of the suit property to the plaintiff and that it was not privy to nor is it bound by any terms of any agreement between the plaintiff and the 1st defendant. The 2nd defendant contends that the plaintiff has not established a *prima facie* case against it.
  6. I have considered the parties' respective cases and submissions. The single question to be determined in the application is whether the plaintiff has satisfied the criteria upon which trial courts exercise jurisdiction to grant interlocutory injunctive reliefs. The relevant criteria were outlined by the Court of Appeal for East Africa in *Giella v Cassman Brown* (1973) EA 358. First, the plaintiff is required to demonstrate a *prima facie* case with a probability of success. Second, the plaintiff is required to demonstrate that if the injunction is denied, she would stand to suffer injury that may not be indemnifiable through an award of damages. Third, should the court have doubt on both or either of the above two limbs, the application is to be decided on a balance of convenience. At the stage of disposing the plea for an interlocutory injunctive relief, the court does not make conclusive or definitive findings on the key issues in the suit. Definitive and conclusive findings are reserved for judgment after trial.
  7. The plaintiff initiated this suit to ventilate a claim of a purchaser seeking an order of specific performance of a land contract. At this interlocutory stage, it does emerge from the case put forth by the 1st defendant that the 1st defendant does not contest the plaintiff's claim. The party contesting the plaintiff's claim is the 2nd defendant. The 2nd defendant is a financial institution that provided the funds that were used to develop the housing project in which Unit B9 (the suit property) is located. Unit B9 is only one of the 30 units that have been developed using loan facilities provided by the 2nd defendant. The land together with all the units constitute the security that the 1st defendant gave to



- the 2nd defendant. There exist: (i) a legal charge; (ii) a further charge; and (iii) a second further charge against the land together with all the developed units.
8. The plaintiff would not be in court now if the 1st defendant redeemed the charged properties by repaying the loan. The plaintiff is in court because the 1st defendant has failed to repay the loan. Much as the 1st defendant would want to support the plaintiff, they are doing so well aware that they are the cause of the plaintiff's predicament. Having said that, let me turn to the key issue in this ruling.
  9. Whereas the plaintiff seeks to enforce a purported land contract against the two defendants, at this interlocutory stage, no evidence of any compliant land contract between the plaintiff and the 2nd defendant has been placed before this court to demonstrate a *prima facie* case in relation to the plea for an order of specific performance of the land contract by the 2nd defendant. If the plaintiff has that evidence, she has not placed it before this court. In the absence of evidence of a compliant land contract that satisfies the requirements of Section 3(3) of the *Law of Contract Act*, between the plaintiff and the 2nd defendant, I do not think the plaintiff can be said to have demonstrated a *prima facie* case with the probability of success as against the 2nd defendant who is a chargee.
  10. The second reason why I do not think the plaintiff has established a *prima facie* case is that there was disclosure from the outset by the two defendants that Unit B9 was sold to one Florence Ann Wamathwe Thairu at Kshs 16,000,000. Despite the disclosure, the plaintiff elected not to join the said purchaser as a party to this suit. She wants the said purchaser to be condemned unheard. Kenya's civil legal system does not permit that.
  11. Thirdly, the plaintiff seeks orders of specific performance in relation to Unit B9 which is only one out of 30 units that have been developed on the parcel of land using loan facilities provided by the 2nd defendant. She, however, seeks an injunctive order in relation to the entire parcel of land on which the 30 units have been developed. I do not think the plaintiff has placed before this court evidence that would constitute a *prima facie* case in relation to the entire parcel of land together with all the 30 units so as to warrant the above relief.
  12. Fourth, the payment voucher dated 14/12/2013 which the plaintiff is waving as evidence of payment of purchase price indicates that the plaintiff paid to the 1st defendant [a limited liability company] cash amounting to Kshs 5,030,000 on 3/5/2013; 11/6/2013, and 9/12/2013. At that point in time, there existed a charge registered on the suit land on 28/2/2013 in favour of the 2nd defendant. Clause 13 of the charge dated 27/2/2013 expressly prohibited the 1st defendant against selling any part of the suit land without the written consent of the 2nd defendant. The prohibition reads thus:

“ 13. The chargor shall not sell, transfer, lease, agree to leave, accept surrenders of leave, charge or part with the possession of any part of the property without the prior written consent of Shelter Afrique”
  13. Beside the above prohibition of unauthorized sale, there was a formal requirement for remittance of purchase price into the escrow account that had been opened by the two defendants. At this point, no evidence of remittance of the above money into the escrow account has been given by the plaintiff. What is being waved is a voucher relating to cash money allegedly paid to the 1st defendant during the subsistence of the charge. On its part, the 1st defendant gave a totally contradictory version on how the alleged purchase price was paid.
  14. For the above reasons, I have no doubt that the plaintiff has failed to establish a *prima facie* case with the probability of success.



15. On the adequacy of damages, special condition (B)(d) of the agreement dated 25/4/2012 provided for refund of purchase price as the remedy available to the plaintiff in the event of non-completion by the 1st defendant. On that basis, the court takes the view that should the plaintiff's claim succeed against the 1st defendant, damages will be an adequate remedy.
16. Having found that the plaintiff has not established a *prima facie* case against the 2nd defendant, and that damages would be an adequate remedy, the principle of balance of convenience would not apply in the circumstances of this application.
17. In the end, the application dated 11/4/2022 is rejected for lack of merit. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28TH NOVEMBER 2023**

**B M EBOSO**

**JUDGE**

In the presence of: -

Mr Odari for the plaintiff

Mr Opole for the 2nd defendant

Mr Wamote for the 1st defendant

Court Assistant: Hinga/Osodo

