



**Supeyo & 2 others v Wamuyu (Environment & Land Case E015 of 2023)  
[2023] KEELC 22303 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22303 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE E015 OF 2023  
LC KOMINGOI, J  
DECEMBER 20, 2023**

**BETWEEN**

**MOSES NTIAMASAS SUPEYO ..... 1<sup>ST</sup> PLAINTIFF**

**EZEKIEL SIMITO OLE SUPEYO ..... 2<sup>ND</sup> PLAINTIFF**

**BRIAN MUTUNKEI SUPEYO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**SHAIN NJERI WAMUYU ..... DEFENDANT**

**RULING**

1. This is the Notice of Motion application dated 7<sup>th</sup> August 2023, brought under;

Article 48 of the *Constitution* of Kenya, 2020, Sections 4(2) of the *Environment and Land Court Act*, Sections 10 of the *High Court (Organization and Administration) Act* no 27 of 2015, Rules 17(1)(2)(3) *High Court (Organization and Administration) (General) Rules*, 2015 and Order 51 Rules 1 *Civil Procedure Rule*, 2010)

2. It seeks Orders that;

i. Spent

ii. Spent

iii. Spent

iv. Pending the hearing and determination of the suit a prohibitory order of injunction be issued restraining the Defendant, her agents, employees or persons claiming on her behalf or her instructions party from entering, trespassing or in any way interfering with Plaintiffs/Applicants quiet possession and title of the property known as Ngong/Ngong/22826.



- v. Pending the hearing and determination of the suit, a prohibitory order of injunction be and is hereby issued, restraining the Defendant her agents, employees or persons claiming on her behalf or her instructions party from dealing, selling, leasing or otherwise disposing the title of the property known as Ngong/Ngong/22826.
  - vi. Costs of the application to be provided for.
3. This application is supported by the grounds on the face of it, in the Affidavit and Further Affidavit of Moses Ntiamasas Supeyo. The Applicants deceased mother, Rahab Kamaso Supeyo purchased the suit property from the Defendant *vide* a sale agreement dated 28<sup>th</sup> July, 2012 for ksh 26,000,000. The full payment was made by 4<sup>th</sup> April 2013 and acknowledged by the Defendant. The Defendant then issued completion documents. However, the Applicants could not effect the transfer for lack of stamp duty funds on their part. Thereafter, their mother (the purchaser) died on 26<sup>th</sup> May, 2014 before registration of the transfer. In the year 2020, the Applicants desirous of effecting the transfer sought the Defendant to sign new completion documents but she refused on grounds that there was a balance of ksh 6,050,000 which they paid. On 27<sup>th</sup> January 2023, advocates for the Defendant once again demanded extra ksh 760,000 as balance and once again, the Plaintiffs paid the said amount. But that notwithstanding, the Defendant refused to sign the completion documents and went on to demand additional payments on 12<sup>th</sup> July 2023, registered a caution against the property on 31<sup>st</sup> July 2023 and threatened to evict the Applicants from the property . They thus averred that having undertaken their obligations, they were entitled to the orders sought.
  4. The Respondent in her Replying Affidavit dated 27<sup>th</sup> September 2023 she acknowledged the existence of the sale agreement dated 28<sup>th</sup> July 2012 at the agreed purchase price of ksh 26,000,000. She also acknowledged that the 10% deposit was paid in cash, she allowed the Applicants to take possession of the property and even deposited the completion documents with the advocate. However, upon the completion date of 30<sup>th</sup> November 2012, the purchaser had not paid the entire purchase price and it had started accruing interest at 18% p.a. She went on to depone that as of 25<sup>th</sup> March 2013, the purchaser had made payment totalling to ksh 16,000,000 and still owed her ksh 7,400,000. But because her bank questioned the source of funds in her account, her advocate advised her to sign an acknowledgement that she had received the full purchase price and trusted that the advocate would follow up on the balance which he did not. In the year 2020 she began following up on the balance of ksh 7,400,000 and even registered a caution against the property. She acknowledged that in the year 2023, the Applicant's paid an additional ksh 6,050,000 towards offsetting the balance of ksh 7,050,000 less ksh 350,000 as advocate's fees and less the 18% interest accrued over the period.
  5. She added that she was reluctant to execute new completion documents which would cause her to incur Capital Gains tax for a sale property which she had duly adhered to its terms over ten (10) years ago. She stated that failure to effect the transfer was occasioned by the Applicants. She thus sought to rescind of the contract due to breach of the terms and the death of the said Rahab Supeyo, the purchaser.
  6. In the Further Affidavit dated 13<sup>th</sup> October 2023, the Applicants reiterated that the Defendant only demanded for additional payment when they sought execution of new completion documents. Adding that the death of the purchaser could not invalidate the agreement because the term, purchaser was defined to include her personal representatives.
  7. This application was canvassed by way of written submissions.



### **The Plaintiff's/Applicants' Submissions**

8. Counsel submitted that since the issue was for specific performance the court should grant an order of injunction pending the hearing and determination of the suit because they had evidenced that they had a prima facie case as was held in *Kenya Institute of Management v Kenya Reinsurance Corporation* [2008] eKLR. The Defendant was also estopped from demanding for more money since she had acknowledged the balance was ksh 760,000 as per Section 120 of the *Evidence Act* because the Respondent made them believe that upon payment of ksh 760,000 she would sign the completion documents. Reference was made on the following cases on estoppel: *Universal Education Trust Fund v Monica Chopeta* (2012) eKLR, *Carol Construction Engineers Ltd & another v National Bank of Kenya* [2020] eKLR and *Eric Wamai Karuri & 2 others v Kinyua Nyaga Kinyua* [2018] eKLR. Counsel submitted that the court should order for specific performance since they were already in possession of the property and had been for over 10 years citing *Gitamga Mwaniki & another v Annunciata Waitihira Kibue* [2013] eKLR. Ad if the injunction is not issued, the Applicants would suffer irreparable loss and damage and it was important for the suit property to be maintained pending determination of the suit as held in *Board of Governors, Moi High School, Kabarak & another v Malcom Bell* [2013] eKLR.

### **The Defendant's/Respondent's Submissions**

9. Counsel for the Respondent submitted that the Applicants did not have a *prima facie* case because Sale Agreement marked as Annexure MNS1 was a forgery as it was witnessed by Veronica Joanne Wanyenze who was admitted in 2011 and could not have qualified to be a Commissioner for Oaths and Notary Public in 2012 as per the stamp. Counsel added that the contract was breached because the completion date passed without the full payment of the purchase price having been made and she noted that the property was yet to be transferred in 2020 when she went to register a caution against it in a quest to get the full payment of the purchase price together with interest. Counsel submitted that the Respondent adhered to her contractual obligations and their fault in effecting the transfer should not be visited upon the Respondent by seeking specific performance. They should thus not be granted an equitable remedy for wanting conduct citing *Stanley Anyamba Ageyo & another v Musa Matu Ruinga & 5 others* [2022] eKLR.
10. Counsel added that the Applicants had not shown how they would suffer irreparable loss and damage stating that the omission was their own doing and it should not be excused. Counsel also pointed out that they had been enjoying collecting rent from the suit property and had failed/ refused to pay the balance of the purchase price. And that it was the Respondent who would suffer loss for being required to pay 15% Capital Gains Tax should the court compel her to deliver new completion documents.
11. As such, the balance of convenience tilted towards the Respondent to be allowed to obtain the balance of the purchase price from the Applicants or they surrender possession. And the suit should be dismissed.

### **Analysis and determination**

12. I have considered the pleadings, evidence, the Notice of Motion, the affidavit in support and response thereto, the rival submissions and the authorities cited. The issues for determination are:
- i. Whether Applicants' are entitled to the orders sought.
  - ii. Who should bear the costs of this application?



13. The principles guiding the grant of temporary injunction were settled in *Giella v Cassman Brown & Co. Ltd* 1978 EA 358, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] and *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR.
14. The circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the *Civil Procedure Rules* requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, the Applicants claim that the suit property is in danger of being alienated as the Respondent has already issued a notice of her intention to take back the property as well as registered a caution against it.
15. The Court of Appeal in the *Nguruman* case held:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a *prima facie* level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.

16. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] the Court of Appeal defined a *prima facie* case as:

- “4. 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

17. To expound on the issue of *prima facie* case, the court of Appeal in *Nguruman’s* case (*supra*) held:

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. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.

18. The Plaintiff seeks a prohibitory injunction against the Defendant/Respondent on grounds that they are entitled to the suit property which their late mother purchased in 2012. The Defendant/Respondent while acknowledging the sale and giving them vacant possession since 2012 has contested being compelled to sign new completion documents to effect the transfer arguing that she had already signed the completion documents in 2012 and the undue delay in effecting the transfer was occasioned by the Applicants. She also added that the Applicants have not paid the full purchase price in breach of contract and they should either be compelled to pay the balance or give vacant possession of the property they have been in possession for over ten (10) years.
19. I find that the Applicants have established a *prima facie* case with a probability of success at the trial.
20. However on the issue of irreparable loss and damage, I have considered the arguments advanced by both sides and I find that in view of the rival positions taken by both sides, the same can only be determined and resolved after full hearing of the suit. The court therefore deems it necessary to issue conservatory orders in the interest of justice and to preserve the substratum of the suit.
21. In conclusion, I find merit in this application and the same is allowed in the following terms;
  - a. That a temporary injunction is hereby issued restraining the Defendant, her agents, employees or persons claiming on her behalf or her instructions from entering, trespassing or in any way interfering with the plaintiff's quiet possession and title of the property known as Ngong/Ngong/22826. Pending the hearing and determination of this suit.
  - b. That a temporary injunction is hereby issued restraining the Defendant, her agents, employees or persons claiming on her behalf or her instructions from dealing, selling, leasing or otherwise disposing of the title to the property known as Ngong/Ngong/22826 pending the hearing and determination of this suit.
  - c. That costs of this application do abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20<sup>TH</sup> DAY OF DECEMBER 2023.**

**L.KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Achoki for Mr. Githumbi for the Plaintiffs.

Mr. Waliaula for the Defendant.

Court Assistant – Mutisya.

