



Saif Properties Limited v Frank Logistics Limited & another; Osundwa Sakwa T/A Osundwa & Company Advocates & 2 others (Interested Parties) (Environment & Land Case E059 of 2022) [2022] KEELC 3324 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E059 OF 2022**

LC KOMINGOI, J

JUNE 9, 2022

FRANK LOGISTICS LIMITED.....PLAINTIFF/RESPONDENT

=VERSUS=

SAIF PROPERTIES LIMITED.....DEFENDANT/APPLICANT

DANIEL ORENGE T/A DANIEL ORENGE &

COMPANY ADVOCATES.....INTERESTED PARTY

BETWEEN

SAIF PROPERTIES LIMITED PLAINTIFF TO THE COUNTERCLAIM

AND

FRANK LOGISTICS LIMITED 1ST DEFENDANT TO THE COUNTERCLAIM

DANIEL ORENGE T/A ORENGE & COMPANY ADVOCATES 2ND

DEFENDANT TO THE COUNTERCLAIM

AND

OSUNDWA SAKWA T/A OSUNDWA & COMPANY

ADVOCATES INTERESTED PARTY

GOLDEN LION ESTATE COMPANY LIMITED INTERESTED PARTY

CREDIT BANK LIMITED INTERESTED PARTY

RULING

1. This is the Notice of Motion dated March 14, 2022. It is brought by the Defendant in the main suit and who is Plaintiff in the counterclaim.



2. It is brought pursuant to Articles 10(b) and 159(2)(b) & (e) of the Constitution of Kenya, Section 3, 18, 19 of the Environment and Land Court Act No 19 of 2011, Sections 1A & 1B, 3A, 63 of the Civil Procedure Act, Order 40 Rules 1, 2, 3, 4 and 11, Section 56 of the Advocates Act Cap 16 of the laws of Kenya, Rule 9 of the Advocates Practice Rules, The Practice directions of the Environment and Land Court and all other enabling provisions of the law.
3. It seeks orders;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Spent.
 - e. The Honourable Court be pleased to issue a mandatory injunction compelling the firm of Daniel Orenge & Company Advocates to forthwith refund the sum of Kshs 21, 500,000/= paid to it by the firm of Daniel & Kenneth LLP in respect of purchase of the property L R No 1/1381(I R 200711) (Original No 1/385) together with all accrued interest to the firm of Wamae & Allen Advocates within 3 days of the order of the court.
 - f. This Honourable Court do issue an order directing the Directorate of Criminal Investigations to investigate the legality of Deed Plan No 414900 together with the certificate of title issued to the 1st Respondent over the property known as L R No 1/1381(I R 200711) (Original No 1/385) Frank Logistics Limited, their agents and/or employees were complicit in any criminal acts of forgery, perjury, obtaining by false pretense or any other criminal acts.
 - g. This Honourable court be pleased to bar Osundwa Sakwa t/a Osundwa & Company Advocates from acting in these proceedings on account of conflict of interest.
 - h. This Honourable Court be pleased to take disciplinary action in accordance with the provisions of Section 56 of the Advocates Act on the Osundwa Sakwa t/a Osundwa & Co Advocates for professional misconduct and material non-disclosure.
 - i. Costs of this application be borne by the 1st and 2nd Respondent.
4. The motion is supported by the grounds on its face and the supporting affidavit of the Applicant's director; Nurdin Mohamed sworn on March 14, 2022.
5. Mr Nurdin deponed that on December 3, 2021; after negotiations between the Defendant/Applicant and the Plaintiff, the Applicant made an offer for the sale and purchase of the property I R 200711, for Kshs 220 million. He added that he was represented by the firm of Daniel and Kenneth LLP While the Plaintiff was represented by the Interested Party in the transaction. He further deponed that terms of sale and purchase of the property known as L R No 1/1381(I R 200711) (Original No 1/385) were captured in the sale agreement dated December 21, 2021. He stated that the Applicant's Advocates transferred Kshs 21, 500,000/= to the (Interested Party) pursuant to the professional undertaking dated December 21, 2021 to refund the sum upon rescission of the contract or impossibility of performance.
6. The deponent stated that part of the purchase price was to be paid to Credit Bank Ltd to discharge the vendor's liability but the 2nd Respondent sought to have the Applicant's pay the sum of Kshs 89 million directly to the account of Rieny Distributors Limited which was held with Credit Bank Ltd and that additionally, Credit Bank Limited confirmed that it had the original title and would release



- the same upon receipt of the purchase price. He further stated that the Applicant's Advocates sought additional documentation in the form of certified copies vide its Advocate's letter dated January 28, 2022 but the Plaintiff and the Interested Party failed to provide the same and on February 3, 2022, the Applicant's Advocates issued a rescission Notice to the (Interested Party) and that the Interested Party had 7 days after receipt of the letter to return to the Plaintiff the sum of Kshs 21.5 million paid as a deposit in the transaction and mark the agreement terminated by reason of breach of warranties by the 1st Respondent.
7. The deponent stated that due diligence had unearthed existing litigation between the Plaintiff and other third parties; ELC Case No 792 of 2015 wherein an injunction was issued on January 27, 2017 against any dealing and interference of the Plaintiff's possession of all that property known as Land Reference Number 1/385(Original Number 225/5) pending hearing and determination of the suit which means any action after the date of the order is in contempt of the court orders. He added that the Applicant also discovered that the Plaintiff and the Interested Parties were party to proceedings in Nairobi Elc Case No 792 of 2015 where the Plaintiff is the 2nd Interested Party (in the counterclaim) herein.
 8. He added that in that suit, the 2nd Interested Party (in the counterclaim) who is the Plaintiff in that suit had filed an application dated December 17, 2021 wherein it sought injunctive orders against Credit Bank Limited from Selling, Auctioning or transferring the property known as L R No 1/381[I R No 200711]. He added that on a cursory look at the aforesaid deed plan, and the deed plan No.414900 dated May 17, 2017, they refer to one and the same property and that the subject matter therein is also the subject matter in ELC No 114 of 2017; Abaye Tesfu Negussie v Frank Logistics Ltd and the subject of a caveat emptor dated September 30, 2021.
 9. Mr Nurdin also deponed that the firm of Osundwa & Co Advocates filed these proceedings and acted for the Plaintiff in ELC No 792 of 2015 and were also aware of proceedings in ELC Case No 144 of 2017 and as such should have disclosed the same thus the firm should be discharged from acting herein as they are potential witnesses and that the court should find the 1st Interested Party (in the counterclaim) guilty of professional misconduct.

The Response of the Plaintiff

10. The application is opposed by the Plaintiff vide the replying affidavit sworn on March 25, 2022 by its director Francis Nyagah Njeru. He deponed that the Plaintiff is the registered owner of Land Reference Number 1/1381(Original Number 1/83). He admitted that it entered into a sale agreement dated December 14, 2021 and contended that before execution of the sale agreement and the release of 10% deposit of the purchase price, the Plaintiff gave full complete disclosure of all facts and the Defendant/ Applicant through its Advocates carried out due diligence. He further deponed that the Applicant through its Advocates wrote a letter dated February 3, 2022 purportedly rescinding the agreement and recalling the deposit and that it is looking for a short cut of bolting out of the sale agreement. He added that the Plaintiff filed suit seeking for specific performance and injunctive reliefs.
11. The deponent stated that the orders issued on January 27, 2017 did not stop alienation, change of use or sale of the suit property as alluded and that they were obtained by the 2nd Interested Party (in the counter claim) through misrepresentation of facts. He added that the orders obtained by the 2nd Interested Party (in the counterclaim) on December 17 stopping the sale by the bank were obtained after the sale had crystallized.
12. The Interested Party filed a replying affidavit sworn by Daniel Orenge on March 23, 2022.



The 1st Interested Party's (in the counter claim) response

13. Michael Osundwa Sakwa filed the replying affidavit sworn on March 22, 2022. He deponed that he was neither a party nor a stake holder in the transaction dated December 14, 2021 between the Defendant/Applicant and the Plaintiff. He further deponed that in response to the Defendant's/Applicant's prayer that he be barred from acting for the Plaintiff, effective March 17, 2022, he ceased acting for the Plaintiff in these proceedings.
14. On the Defendant/Applicant's prayer that disciplinary action be taken against him for material non-disclosure, he admitted that he represented the Plaintiff in Elc No 792 of 2015 and ceased acting on November 2, 2021. He contended that its existence has never been denied by any of the parties or their Advocates herein and even prior to filing the counterclaim, he had informed counsel for the Defendant/Applicant of this state of affairs vide his letter dated March 2, 2022.
15. He deponed that he was not aware of any aspect of the transaction between the Plaintiff and the Defendant/Applicant with respect to the sale agreement dated December 14, 2022 at any point during the contracting stage as he was instructed by the Plaintiff in the instant suit with respect to the rescission Notice communicated to it vide the letter dated February 3, 2022.

The 2nd Interested Party's (in the counterclaim) response.

16. The 2nd Interested Party filed the replying affidavit sworn on March 23, 2022 by its Manager; Jerry Guo in support of the application. He deponed that the 2nd Interested Party (in the counterclaim) is the registered proprietor of all that property known as Land Reference Number 1/835(original 225/5) situated along Argwings Kodhek Road, Kilimani next to Chaka place opposite the priory and having purchase it from Propco Limited in 2014. He further stated that on or about August 9, 2015, the property was invaded by agents of the Plaintiff prompting the 2nd Interested Party (in the counterclaim) to file ELC No 792 of 2015; Golden Lion Real Estate Company Limited v Frank Logistics Limited & Others and on January 27, 2017, it obtained a temporary injunction barring the Plaintiff and its agents from trespassing on the said property or interfering with its possession pending hearing and determination of the suit.
17. He further stated that during pendency of the suit, an entertainment spot named "Blacky'z Lounge" was erected and has been operating on the suit property to the prejudice of the 2nd Interested Party. He added that the 2nd Interested Party in the counterclaim learnt on September 20, 2021 vide the Daily Nation Newspaper that auctioneers known as Philips International Limited had been instructed by the 3rd Interested Party (in the counterclaim) who were exercising statutory power of sale, to auction land L R No 1/381[I.R No 200711] through a public auction and that the auctioneers described the physical location of the property as "the Blaky'z Lounge situated along Argwings Kodhek Road, Next to Chaka Place opposite the priory". They also gave a description that the property is registered in the name of Frank Logistics Limited. He added that a search was conducted out of caution revealing that the said property was transferred to the Plaintiff on May 9, 2018 and a charge registered to the 3rd Interested Party (in the counter claim) on February 13, 2019 during pendency of the court orders of January 27, 2017 and without the 2nd Interested Party's authority.
18. The Deponent also stated that the 2nd Interested Party placed a caveat Emptor Notice in the Daily Nation Newspaper of September 30, 2021 and also applied for the said Auctioneers and the 3rd Interested Party's herein to be joined in ELC No 792 of 2015. He stated that the 2nd Interested party obtained injunctive orders restraining the 3rd Interested Party herein from dealing with the property.



19. On March 28, 2022, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The Applicant's submissions.

20. They are dated April 5, 2022. Counsel submitted that the following issues arise for determination;
- a. Whether the Plaintiff has met the threshold for this court to issue mandatory injunction and mareva injunction.
 - b. Whether the 2nd Defendant should provide to this Honourable Court an account of funds.
 - c. Whom should bear the costs in these proceedings and whether this Court should Sanction the firms of Osundwa and Company Advocates.
21. It was counsel for the Applicant's submission that the Applicant has established exceptional circumstances to warrant grant of mandatory injunctive orders. He relied on the case of Maber Unissa Karim v Edward Oluoch Odumbe[2015] eKLR and the English case of Locabali International Finance Limited v Agro Export & Another [1986] ALL ER 901. He also placed reliance on the case of Kenya Power & Lighting Co.Ltd v Samwel Mandere Ogeto[2017]eKLR and the case of Nation Media Group & 2 others v John Harun Mwau[2014]eKLR.
22. Counsel further submitted that in proceedings wherein a party seeks injunctive relief, it is placed upon such party to disclose all pertinent facts pertaining to the matters. He cited the case of Kenleb ConsLtd v New Gatitu Services Station Ltd & Another [1990] eKLR and urged the court to find that the Plaintiff has suppressed material facts.
23. He further submitted that the Plaintiff and the 3rd Interested Party (in the counter claim) are in contempt of court orders of February 24, 2017 and February 10, 2022 which were to injunct them from dealing with the property L R No 1/835(Original Number 225/5).He put forward the case of Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others[1988] e KLR and the case of Anthony Muthumbi Wachira & Aother v Housing Finace Company of Kenay [2015] eKLR.
24. Counsel relied on the case of Beta Healthcare International Limted v Grace Mumbi Githaiga & 2 others [2016]eKLR and the case of Kanduyi HoldingsLimited v Balm Kenya Foundation & Another[2013]eKLR to urge the court to grant a mareva injunction freezing the funds or order the Interested Party to provide an account of the funds under Order 20 Rule 4 of the Civil Procedure Rules. He also urged the court to be guided by the Supreme Court's decision in Republic v Ahmad Abolfathi Mohammed & another [2019]e KLR to sanction the firm of Osundwa & Company Advocates.
25. I have considered the notice of motion and the affidavit in support. I have also considered the responses thereto, the written submissions and the authorities cited. the issues for determination are:-
- i. Whether the Defendant/applicant has made out a case for grant of interlocutory mandatory injunction.
 - ii. Who should bear costs of this application?
26. The Defendant/Applicant and the Plaintiff entered into the sale agreement dated December 14, 2021. The Applicant argues that it learnt that the Plaintiff failed to disclose a material fact being that there subsists a court order issued in ELC No 792 of 2015 barring further dealings on the suit land. It contended that the sale agreement is illegal on the basis that it was entered into while a court order was in subsistence. It rescinded the sale agreement on account of the Plaintiff's failure to disclose the



- pending suits. It now seeks a mandatory injunction against the Interested Party to refund the deposit of Kshs 21.5 million it holds as a stake holder.
27. The Plaintiff/Respondent argued that the existence of ELC No 792 of 2015 was in the Defendant's/ Applicant's knowledge. It has sued it for specific performance of the sale agreement dated December 21, 2021.
 28. In *Gusii Mwalimu Investment Company Ltd & 2 Others v Mwalimu Hotel Kisii Ltd* Civil Appeal No 160 of 1995 [1995-1998] 2 EA 100 cited in *HKM v DKO & another* [2019] eKLR, the Court of Appeal, (Lakha, JA) held that: "Whereas the court does have jurisdiction to grant mandatory injunction even on an interlocutory application, the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant. 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 it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application. On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must inter alia feel a high degree of assurance that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction. Each case must depend on its own facts."
 29. Further, in *Shariff Abdi Hassan v Nadbif Jama Adan* [2006] eKLR the Court of Appeal stated:

"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."
 30. Applying the reasoning of the Court of Appeal on mandatory injunctions at an interlocutory stage, there is an issue whether the Applicant was aware of a subsisting court order that ought to be determined in evidence. There is also the issue whether the Plaintiff is in breach of the warrants contained in the agreement dated December 14, 2021. The issue of whether the Applicant rescinded the sale agreement according to the terms therein would arise. The Applicant has demonstrated to the court that there is an exceptionally clear and strong case to warrant the grant of a mandatory order at this interlocutory stage. The ownership of the suit property is in dispute in Elc No 792 of 2015 and in Elc Case No 144 of 2017.
 31. The prayer for mareva injunction was spent since it was sought pending hearing application and not pending hearing of suit.
 32. The 1st Interested Party (in the counterclaim) was not party of the transaction dated December 14, 2021 and has ceased acting for the Plaintiff. However, his earlier conduct in this matter is unbecoming of an officer of the court. He was aware of the orders issued in ELC No 792 of 2015 as he acted for the Plaintiff in that matter and he accepted the Plaintiff's brief in this matter.
 33. In conclusion, I find merit in this application and the same is allowed.
 34. Accordingly I grant the orders sought as follows:-
 - a. The a mandatory injunction is hereby issued compelling the firm of Daniel Orange & Company Advocates to refund the sum of kshs 21, 500,000/= paid to it by the firm of Daniel



& Kenneth LLP in respect of purchase of the property L R No 1/1381(I R 200711) (Original No 1/385) together with all accrued interest to the firm of Wamae & Allen Advocates within twenty one (21) days from the date of this ruling.

- b. That an order is hereby issued directing the Directorate of Criminal Investigations to investigate the legality of Deed Plan No 414900 together with the certificate of Title issued to Plaintiff (the 1st Defendant in counterclaim) over the property known as L R No 1/1381(I R 200711) (Original No 1/385) Frank Logistics Limited, their agents and/or employees to establish if they were complicit in any criminal acts of forgery, perjury, obtaining by false pretense or any other criminal acts.
- c. That the firm of Osundwa Sakwa t/a Osundwa & Company Advocates is hereby barred from acting in these proceedings on account of conflict of interest.
- d. That costs of this application do abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED NAIROBI THIS 9TH DAY OF JUNE 2022.

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L KOMINGOI

JUDGE

In the presence of:-

Mr Kago for the Plaintiff

Mr Allen Gichuhi for the Defendant

Mr Ongeru for the Interested Party

Ms Shaunda for the 1st Interested party (in the counterclaim)

Ms Mideva for the 2nd Interested Party (In the counterclaim)

Mr Mwangi for the 3rd Interested Party (in the counterclaim)

Steve - Court Assistant

