



**Kirwera v Bando Projects (K) Ltd & 2 others (Environment & Land
Case 126 of 2021) [2022] KEELC 3685 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3685 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 126 OF 2021**

**NA MATHEKA, J
JULY 28, 2022**

BETWEEN

MARGARET WOTHAYA KIRWERA PLAINTIFF

AND

BANDO PROJECTS (K) LTD 1ST DEFENDANT

HFC LIMITED 2ND DEFENDANT

MOMBASA COUNTY LAND REGISTRAR 3RD DEFENDANT

RULING

1. The application is dated June 29, 2022 and is brought under sections 41, 46 (3) of the *Sectional Properties Act*, 1987 (now repealed); sections 13 (2) - (6), 57 (2) & 58 (3) of the *Sectional Properties Act*, 2020; sections 31(1), 54 (5) of the *Land Registration Act*, 2012; sections 3, 13 (2) (d) & (e), (7) (a) & (e), 7 8 (c) and 19 (1) of the *Environment & Land Court Act*, 2011; Order 40 Rules 1, 2, 4 (1), 10 (1) & order 51 rule 7 of the *Civil Procedure Rules*, 2010 seeking orders that pending the hearing and determination of the main suit, the court be pleased to;
 1. Compel the 1st respondent to forthwith give the applicant vacant possession of the property on apartment number A1 First Floor on subdivision number 17466 (original number 1 169/2) section 1 Mainland North;
 2. Issue an order restraining the 1st & 2nd respondents, or any persons acting on their behest, from interfering with and/or acting in any manner whatsoever which interferes with the applicant's peaceable and quiet possession and enjoyment of the property on apartment number A1 First Floor on subdivision number 17466 (original number 1 169/2) section 1 Mainland North;
 3. Compel the 1st & 2nd respondents to forthwith execute and/or caused to be registered a discharge of charge on the property known as apartment number A1 First Floor on subdivision



number 17466 (original number 1169/2) section 1 Mainland North in the prescribed form, which failing the deputy registrar, Environment & Land Court of Kenya, Mombasa shall sign one on behalf of the 1st & 2nd respondents and under the authority of this court;

4. Compel the 1st respondent to execute the sub-lease in respect of the property known as apartment number A1 First Floor on subdivision number 17466 (original number 1169/2) section 1 Mainland North to the applicant, which failing the deputy registrar, Environment & Land Court of Kenya, Mombasa shall execute the same on behalf of the 1st respondent together with any such document(s) the 1st respondent ought to execute for all intended purposes;
 5. Upon fulfilment of the foregoing, the 3rd respondent to dispense the production of all title documents regarding the apartment number A1 First Floor on subdivision number 1 7466 (original number 1 1 69/2) section 1 Mainland North and any other document in the hands of the 1st and 2nd respondents, and issue a Certificate of Lease thereof to the applicant;
 6. Pending compliance of the forgoing prayers the 1st respondent be compelled to pay, on the applicant's account, all due service charges, less the contractual initial 3 months deposit of service charge at kshs 48,300.00 to the corporation managing the apartment block on subdivision number 17466 (original number 1 169/2) section 1 Mainland North on the applicant's account.
2. It is based on grounds that on May 9, 2016, the applicant and the 1st respondent entered into an agreement for the purchase of an apartment unit known as apartment number A1 First Floor on subdivision number 17466 (original number 1 169/2) section 1 Mainland North (apartment A1). The said agreement was made under the auspices of the *Sectional Properties Act*, 1987 (now repealed) and the interest that the applicant would get over the apartment was a leasehold for the residual lease term of 99 years from the year 1972. In complete fulfilment of her contractual obligations under the sale agreement, the applicant has: duly paid to the 1st respondent all sums of money payable thereunder; and surrendered to the 1st respondent all documents and material needed to effect issuance of a certificate of lease over apartment A1 in favour of the applicant. However, on its part and in breach of its contractual obligations, the 1st respondent has failed to *inter alia*. Discharge of charge, registered in favour of the 2nd respondent, over apartment A1 entered on December 4, 2012 yet the applicant has full paid all sums of money payable under the purchase agreement to disencumber apartment A1; provide vacant possession of apartment A1 to the applicant; Issue the applicant with a duly registered sub-lease over apartment A1; cause to be transferred the Certificate of Lease over apartment A1 to the applicant; provide copies of the insurance policies to the applicant; and commence the process obtaining an approved geo-referencing of apartment A1 by Land Surveyors' Board.
3. Instead, and bereft of plausible justification, contractual and/or legal excuse, the 1st respondent has since premised fulfilment of its contractual obligation on payment of a colossal jumbled up figure of kshs 1,288,21 9.00. Further, since the lease term over apartment A1 is more than 21 years, the subject conveyance ought to comply with the newly enacted *Sectional Properties Act*, 2020 on or before 27th December 2022. Under the said *Sectional Properties Act*, 2020, it is only the owner, developer or corporation that may commence the process of conversion and the applicant thus lacks standing to do so since the 1st and 2nd respondents have refused to part with possession and ownership of apartment A1 in favour of the applicant. Failure to convert to and comply with the provisions of the new dispensation within the fast approaching deadline would not only have the applicant lose Apartment A1 without recourse, but also expose the Applicant to criminal culpability. This cannot be compensated by damages.



4. The applicant is statutorily barred from rescinding the purchase agreement as 10 days have already lapsed since the execution thereof thus damages is not a known remedy as refund of the purchase price is statutorily proscribed. The only recourse available to the applicant is enforcement of the purchase agreement which can only be done by granting of the orders she seeks herein. The said whimsical and capricious conduct of the 1st and 2nd respondents are aimed at dispossessing the applicant of her dream home without recourse. That where a developer is unwilling to perform its statutory obligations, such as in the instant case, the 3rd respondent has powers to dispense with such performance and issue a Certificate of Lease over apartment A1 to the Applicant. Thus, if the motion is not allowed as prayed, the Applicant will perpetually wallow in the brunt of injustice as the prejudice she continues to suffer cannot be remedied by an award of damages.
5. The 1st respondent/defendant in their replying affidavit stated that the applicant/plaintiff failed to adhere to the contractual timelines and conditions like failure to pay the entire purchase price on or before the contractual date of December 31, 2016 as agreed. That the applicant/plaintiff was aware that the project property was charged to the 2nd respondent/ defendant for the purposes of securing funds for the construction and completion of the project. That the applicant's advocate delayed the release of the funds to the bank and the matter went to litigation. That the amounts owing and payable included the contractual service charge, insurance rent, county government rates, deposit for electricity and water. The 2nd respondent/Defendant submitted that there is a significant dispute on the facts both as to the plaintiff's performance of the contract with the 1st defendant and payment of kshs 4,160,000.00. such a dispute can only be resolved through a trial and not contested affidavit evidence. The 3rd respondent did not wish to participate in this application. I find that the respondents have raised triable issues. I find that this application seeks final orders *inter alia* of vacant possession, injunction and execution of the sub lease which cannot be issued at this interim stage and the matter needs to go to full trial. I find that this application is not merited and I dismiss it. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JULY 2022.

N A MATHEKA

JUDGE

