Obiero v Cytonn Intergrated Project LLP & another (Environment & Land Case E015 of 2022) [2022] KEELC 13334 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13334 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE E015 OF 2022

JG KEMEI, J

SEPTEMBER 29, 2022

BETWEEN

PAUL OMONDI OBIERO ..... PLAINTIFF

AND

CYTONN INTERGRATED PROJECT LLP ..... 1ST DEFENDANT

ORARO & COMPANY ADVOCATES ..... 2ND DEFENDANT

RULING

1. The plaintiff/applicant entered into an agreement for sale dated September 1, 2016 with the 1st defendant/respondent for the purchase of property known as apartment number B-804, block B, the Alma Ruaka erected on property land reference No Kiambaa/Ruaka/6667 (hereinafter the suit property) at a sum of Kshs 9,019,491/=. To that end the applicant paid the 1st respondent a sum of Kshs 1,335,000/= as deposit for the suit property on March 27, 2016. Additionally, a further sum of Kshs 1M was paid as first installment in August 2016.

2. According to the record, the applicant defaulted in the terms of paying the balance of the purchase price as outlined under clause 3.2.2 of the sale agreement necessitating the signing of a deed of variation of the agreement for sale on December 6, 2019. At the time of signing the deed of variation the outstanding balance of the purchase price was Kshs 6,659,491/= which was to be paid by the applicant's financier within 14 days of the registration of lease over the suit property and charge by way of mortgage financing. According to clause 3 of the deed of variation, all other terms of the sale agreement remained unchanged. The record shows that a dispute ensued over the 1st respondent's levy of interests on delayed or unpaid balance of the purchase price. Meanwhile the applicant elected to invoke clause 20 of the sale agreement on arbitration proceedings in vain but to his dismay the 1st respondent served a completion notice on December 20, 2021 followed by a notice of termination of sale agreement on January 11, 2022 hence this suit.

3. Vide an originating summons dated February 15, 2022, the applicant now seeks orders that;

   a. Spent.

   b. This honorable court be pleased to grant an interim injunction restraining the 1st defendant whether by itself, its agents, servants, auctioneers, recoverees or advocates from selling, auctioning, dealing, interfering, alienating or disposing, advertising for sale or in any other manner affecting the property known as apartment number B-804, Block B, the Alma Ruaka (erected on property land reference No Kiambaa/Ruaka/6667) pending the hearing and determination of the arbitral proceedings between the parties and the suit herein.

   c. This honorable court be pleased to grant an interim injunction against the 1st defendant restraining them from terminating the agreement for sale dated September 1, 2016 as varied by the deed of variation dated December 6, 2019 pending the hearing and determination of the arbitral proceedings between the parties and the civil suit herein.

   d. This honorable court do restrain the 1st defendant its agents servants or employees from affection (sic) any change of ownership over apartment number B-804, block B, the Alma Ruaka (erected on property land reference No Kiambaa/Ruaka/6667) by issuing an injunction against the same pending the hearing and determination of the arbitral proceedings between the parties and the suit herein.

   e. This honorable court be pleased to grant an injunction restraining the 1st defendant from acting in any manner to induce the breach of contract and cause the termination of the agreement for sale dated September 1, 2016.

   f. This honorable court be pleased to issue declaratory orders that the dispute between the parties arising from and relating to the agreement for sale dated September 1, 2016 as read with the deed of variation dated December 6, 2019 over the property known as apartment number B-804, Block B, the Alma Ruaka (erected on property land reference No Kiambaa/Ruaka/6667) should be subjected to the dispute resolution procedures as set out in clause 20 of the agreement dated September 1, 2016.

   g. This honorable court be pleased to issue an inhibition in the interim pending the hearing and determination of the arbitral proceedings and civil suit herein, inhibiting the registration of any dealing in the property known as apartment number B-804, Block B, the Alma Ruaka (erected on property land reference No Kiambaa/Ruaka/6667) or that in the alternative, the status quo presently prevailing between the parties be maintained pending the hearing and determination of the arbitral proceedings.

   h. This honorable court be pleased to make and grant further and/or other orders it may in the interests of justice deem necessary.

      i. The costs of this application be provided for.

4. The application is premised on the grounds on the face of it and the supporting affidavit of even date of Paul Omondi Obiero, the applicant. He averred that on September 16, 2016 he entered into a sale agreement for purchase of the suit property from the 1st respondent and to date has paid a sum of Kshs 2,360,000/=; copy of the sale agreement is annexed as Poo-1 which is dated September 1, 2016 and not September 16, 2016 as claimed. That despite obtaining financing from Standard Chartered Bank to settle the balance of the purchase price and signing Poo-4 – copy of the deed of variation of the sale agreement, a dispute on the balance of the purchase price arose due to accrued interests and attempts

to amicably settle the issue bore no fruit. That on December 20, 2021, the 1st respondent sent Poo-11 a completion notice to the applicant and later a notice of termination of the sale agreement which he now contests.

5. The 1st respondent through its principal officer Grace Weru filed a replying affidavit and conceded the particulars of the sale agreement and pointed out its salient features including that any delayed payment of any instalments would attract interests at base lending rate by SBK and where no such rate was published, the CBK rate would apply plus 5%. The 1st respondent further acknowledged that indeed the applicant only paid Kshs 2,335,000/= as at August 31, 2016 and no more payment since then yet the entire purchase price was due by October 31, 2018. Admitting the mortgage facility, the 1st respondent maintained that as at October 24, 2019 the applicant had defaulted in paying Kshs 6,659,491/= and interests thereon and prompting the parties to sign a deed of variation on December 6, 2019. That the applicant only availed a copy of the bank's undertaking to its advocates on February 18, 2020 but failed to provide an undertaking from the bank's advocates as agreed in the variation deed which in any case, did not waive the obligation to pay accrued interests which were due before signing the variation deed.

6. The 1st respondent was emphatic that the alma project is financed by a bank loan and the purchase price must be paid to its bank before partial discharge is given and therefore it has no liberty to exercise discretion on the amounts due. That therefore the 1st respondent exercised its right under the LSK Conditions of Sale, 1989 to terminate the sale and sold the suit property to a different buyer rendering the application invalid. That the said buyer has already paid the purchase price of the suit property and the 1st respondent is willing and able to refund the applicant's monies in accordance with the provisions of the sale agreement dated September 16, 2016.

7. In a brief rejoinder, the applicant's counsel Dominic Ogega Mwale swore a supplementary affidavit dated March 15, 2022. He deponed that the 1st respondent had terminated the sale agreement based on disputed facts that have been referred to arbitration. That by a letter dated March 3, 2022 the Chartered Institute of Arbitrators had appointed an arbitrator who had accepted the appointment as demonstrated by Dom1 and Dom2 in pursuance of section 7 of the *Arbitration Act*.

8. The 2nd respondent has not filed any pleadings.

9. The originating summons was canvassed by way of written submissions.

10. The applicant through the firm of Mwale Law Advocates LLP filed submissions dated May 17, 2022 whilst the firm of KN Law LLP filed submissions dated April 28, 2022 on behalf of the 1st respondent.

11. The applicant drew one issue for determination; whether he has met the threshold for granting injunctive reliefs. Applying order 40 rule 1 of the *Civil Procedure Rules*, section 13(7)(a) of the *Environment and Land Court Act* and the principles for granting an injunction as laid out in the case of *Giella v Cassman Brown* (1973) EA 358 he maintained that he had demonstrated a *prima facie* case on strength of his pleadings. That the sale agreement is not disputed but the 1st respondent has nevertheless purported to terminate it without regard to the arbitration reference to address the issue of interests. That he stands to suffer irreparable harm incapable of compensation by way of damages and denied that the suit property has been sold to a third party.

12. The 1st respondent submitted that the applicant has not satisfied the threshold for injunctive relief set out in the case of *Giella* (supra). Citing the definition of a prima facie case as was held in the case of *Mrao Limited v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, the 1st respondent argued that the applicant's case has no probability of success because he failed to pay the purchase price as initially agreed. That the deposit of Kshs 1,335,000/- paid on March 31, 2016 instead of March 16,

2016 attracted a default interest. That save for the variation deed allowing the applicant's bank to pay the balance of the purchase price, all other terms in the sale agreement were not changed. Moreover, that the applicant failed to secure a professional undertaking from the bank's advocates to secure the payment and having to complete the payments as at October 31, 2018 the default interests had also accrued.

13. The 1st respondent relied on the Court of Appeal decision in *Samuel Ngige Kiarie v Njowamu Construction Company Limited & another* [2019] eKLR to defend its right to terminate the sale agreement on account of non-payment of the full purchase price. Further that allowing the application would condemn the new buyer of the suit property unheard and since the applicant never acquired ownership thereof, the balance of convenience does not tilt in his favor.

14. The germane issue for determination is whether the originating summons is merited.

15. The legal provisions for temporary injunction is contained under order 40 rule 1 of the *Civil Procedure Rules* that;

> "
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> "1. Cases in which temporary injunction may be granted [order 40, rule 1]
> Where in any suit it is proved by affidavit or otherwise— (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

16. It is now well settled law that the granting of injunctive reliefs is a discretionary exercise predicated upon three sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the court would decide the application on a balance of convenience. See the celebrated cases of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR.

17. The starting point is to establish whether the applicant has demonstrated a *prima facie* case to grant the orders sought. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 123, defined a *prima facie* case as:

> "A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in 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."

18. In *Nguruman* (supra) the Court of Appeal went on to further state 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. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means

no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

19. The common facts of this case are not in dispute. The borne of contention sprung from the demanded accrued interests when the applicant defaulted in the initial mode of payments via installments. That attempts to amicably resolve the dispute were in vain promoting the applicant to approach the Chartered Institute of Arbitration to initiate arbitration proceedings in line with clause 20 of the sale agreement.

20. The 1st respondent also contended that the applicant failed to avail the bank's advocates' professional undertaking, an averment that is not controverted, in line with clause 3.2.3 of the variation deed which provided;

> "The purchaser shall within twenty-one (21) days of execution of this deed procure an appropriate letter of professional undertaking from the purchaser's financier's to the vendor and the purchaser's financier's advocates to the vendor's advocates in forms acceptable to both the vendor and vendor's advocates to secure payment of the of the purchase price in the manner set out in clause 3.2.2 above."

21. In addition to that, the 1st respondent maintained that the variation deed in clause 3 clearly stated that 'parties agree that save for the terms and conditions stated hereinabove, the terms of the executed agreement remain as contained herein'. Flowing from this therefore, the 1st respondent submitted that the applicant was not only in arrears in payment of the installments but had accrued default interests as well and the termination of the sale agreement was well within its rights as a commercial venture sold the suit property to another buyer.

22. Clause 3.4 of the sale agreement provided;

> "If the purchaser fails to honor his obligations under this clause 3 on the due date or if any cheque or bank draft taken for or towards the purchase price or part thereof is dishonored upon first presentation;
>
> 3.4.1 the purchaser shall pay interest at the interest rate on the amount due from the date on which it became due to the date of receipt by the vendor in cleared funds of the amount due;
>
> 3..4.2 the vendor may (but without prejudice to any other available right or remedy) if payment in cleared funds shall not have been effected within 28 days of the due date for payment elect to treat such nonpayment as a fundamental breach of the purchaser's obligations under this agreement and the provisions of clause 5.5 shall apply."

23. Indeed clause 5.5 expressly for the vendor's obligation to serve the purchaser with a completion notice and failure to honor it, entitled the 1st respondent to terminate the sale agreement.

24. Further the applicant avers that he paid Kshs 2, 360,000/= but copies of the March 27, 2016 transaction marked Poo-2 total Kshs 1,335,000/=. However, the 1st respondent's letter dated August 30, 2016 – Poo-2 confirm that the 1st instalment of Kshs 1 million was made and therefore the total is Kshs 2,335,000/= which translates to 25.9% of the suit property of the purchase price of Kshs 9,019,491/=. The applicant further annexed numerous email conversations in respect to the issue of interests which according to him were futile. There is no evidence as to why he did not invoke clause 20 of the sale agreement on arbitration as early as the year 2020 bearing in mind the variation deed he had signed in December 2019 after defaulting on payments. The applicant proposal for the parties to submit to arbitration is traced to Poo-7, letter dated October 21, 2021.

25. In the Court of Appeal case of *Charter House Investments Ltd v Simon K Sang & 3 others* (2010) eKLR, it was held that: -

> " Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties."

26. Earlier the same court in *Mureithi v City Council of Nairobi* [1979] eKLR in dismissing an appeal challenging a ruling dismissing an application for injunction Madan JA cited with approval the reasoning in *American Cynamid Co v Ethicon Ltd supra* (1975) AC 396 at pp 406 and 408 that;

> " The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial ... if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

27. It is also trite that injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure an applicant and are not issued where such an event has taken place like in this case where the subject matter of the suit has been sold to a third party. See the case of *Esso Kenya Ltd v Mark Makwata Kiya*, civil appeal No 69 of 1991 (UR) as cited in the persuasive decision in *Stanley Kirui v Westlands Pride Limtied* [2013] eKLR where a similar application for injunction against sale of two apartments was dismissed.

28. The totality of the foregoing is that the applicant has not in my view, established a prima facie case with a probability of success in his favour. On the second test, even if the applicant would have succeeded to do so, I am not persuaded that an award of damages in this case would not be an adequate remedy. The 1st respondent has submitted it willingness and ability to refund the paid monies in line with the provisions of the sale agreement.

29. Lastly on a balance of convenience, the 1st respondent deponed that the suit property has already been sold and granting the application would be an academic exercise.

30. In the end, the applicant has not satisfied the threshold for granting temporary injunction and the application dated February 15, 2022 is unmerited.

31. It is dismissed with costs to the 1st respondent.

DELIVERED, DATED AND SIGNED AT THIKA THIS 29TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mwale for Applicant

Karumba HB Mueke for 1st Respondent

2nd Respondent – Absent

Court Assistant – Phyllis Mwangi