



**Mahat v Poghiso (Environment & Land Case 53 of 2021)
[2022] KEELC 13544 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 53 OF 2021
JO OLOLA, J
OCTOBER 19, 2022**

BETWEEN

ISSA IBRAHIM MAHAT PLAINTIFF

AND

SAMUEL LOSURON POGHISIO DEFENDANT

RULING

1. By the notice of motion dated May 24, 2021, Issa Ibrahim Mahat (the plaintiff) prays for orders that:
 3. Pending the hearing and determination of this suit, an injunction be issued to restrain the defendant/Respondent whether by himself, his agents, servants, assigns or representatives from developing, constructing, charging, disposing off, transferring, selling or in any way or manner dealing with LR No 24880 by way of sub-lease registered under CR 42241/1 known as Plot 4116 situated in Vipingo Ridge, Kilifi;
 4. A permanent injunction be issued to restrain the defendant/ respondent whether by himself, his agents, servants, assigns or representatives from developing, constructing, charging, disposing off, transferring, selling or in any way or manner dealing with LR No 24880 by way of sub-lease registered under CR 42241/1 known as Plot A 116 situated in Vipingo Ridge, Kilifi; and
 5. Costs.
2. The application which is supported by an affidavit sworn by the plaintiff is premised on the grounds *inter alia* that:
 - (i) The plaintiff and the defendant have a valid, enforceable agreement of sale dated May 18, 2020 for the suit property;



- (ii) In compliance with the terms of the agreement, the plaintiff has duly paid deposit required of Kshs 10,000,000/- and the defendant was therefore under an obligation pursuant to clause 5.3.1 of the agreement to supply the plaintiff with copies of completion documents for purposes of conducting due diligence and enable payment of the balance of the purchase price;
 - (iii) In complete disregard of the plaintiff's rights under the agreement, the defendant has purported to rescind the agreement under the guise that the completion period had lapsed and has asserted his entitlement to the deposit paid as having been forfeited;
 - (iv) The actions on the part of the defendant were without any lawful or justifiable reason;
 - (v) As far as the plaintiff is concerned the completion period has not lapsed and he is entitled to the transfer of the property as he is still ready and willing to complete his obligations under the agreement;
 - (iv) The defendant is currently in possession of the suit property and is proceeding to construct and develop the same without any regard to the plaintiff's rights. The plaintiff is extremely apprehensive that the defendant will transfer, dispose of or deal with the property in a manner detrimental to his interests; and
 - (vii) The suit property is in danger of being wasted, damaged or alienated by the defendant. If the injunctive relief is declined, the plaintiff stands to suffer damage that may not be indemnified through an aware of damages.
3. The application is opposed. In a replying affidavit sworn on August 19, 2021 and filed herein on August 23, 2021, Samuel Losuron Poghisio (the defendant) avers that as the registered owner of the suit property, he agreed to sell the same to the plaintiff at a consideration of Kshs 30,000,000/-.
 4. The defendant avers that the sale agreement stipulated that a deposit of Kshs 10,000,000/- was to be paid and the said amount was to be paid in a single payment in full upon execution by the purchaser as is the norm. The defendant avers that he executed and dated his part of the agreement on April 2, 2020 on the understanding that the plaintiff would execute their part and disburse the Kshs 10,000,000/- deposit into his advocates account on even date and the transaction would stand initiated.
 5. The defendant further avers that his execution of the agreement on the said 2nd April 2020 was done on a purely bona fide basis notwithstanding that clause 4 of the agreement is clear that execution on his part was indicative of his acknowledgement of receipt of deposit. The defendant states that upon execution, the agreement was forwarded to the plaintiff's advocates via email on April 6, 2020 wherein they called for the deposit disbursement.
 6. The defendant avers further that after numerous enquiries which went unanswered by the plaintiff, they received a call from the plaintiff's advocate on April 16, 2020 notifying them of his intention to pay the deposit and it was then that the defendant and his advocate agreed to release the duly executed sale agreement to the plaintiff for execution.
 7. The defendant avers that contrary to clause 4 of the agreement the plaintiff only deposited a sum of Kshs 5 million on April 16, 2020. Despite protests for the breach, the plaintiff only deposited the balance of the deposit required on May 2, 2020. The defendant asserts that his advocate called for the return of the executed agreement severally since it was dispatched on April 16, 2020 for execution and that the date of May 18, 2020 inserted in the agreement by the plaintiff is not only erroneous but also a mischievous attempt aimed at extending the completion period.



8. The defendant asserts that the completion period of the transaction ran for 90 days from May 2, 2020 when the full deposit was paid and expired on August 2, 2020. Despite their issuance of a completion notice dated August 4, 2020, the plaintiff failed to demonstrate any readiness to complete and that thereafter upon the expiry of 21 days on August 25, 2020, they invoked clause 15.2 and rescinded the agreement on account of the breach by the purchaser.
9. The defendant further avers that on the said August 25, 2020 upon notification of the rescission, his advocates notified the plaintiff that they would be refunding any amounts received above the deposit which was forfeited and accordingly on August 26, 2020, they refunded the sum of Kshs 10,000,000/- to the plaintiff being the amount he had paid in instalments into the defendant's advocate's account.
10. The defendant asserts that the transaction was never reinstated and they were therefore surprised some 6 months later to get a letter dated April 12, 2021 from the plaintiff's advocates purporting to call for completion documents. The defendant avers that despite being given sufficient time, the plaintiff did not show any willingness and/or ability to complete the sale and failed to perform his obligations under the agreement.
11. The defendant further avers that he remains in lawful possession of the property and that since termination of the agreement, he has continued to develop the same and the property has since substantially and materially evolved from what it was in April, 2020 when offered for sale to the plaintiff.
12. I have carefully perused and considered the application by the plaintiff and the response thereto by the defendant. I have similarly perused and considered the rival submissions and authorities placed before me by the learned advocates representing the parties.
13. By the motion before me, the plaintiff is seeking the twin prayers of a temporary and permanent injunction. As was stated in *Kenya Power & Lighting Company Limited v Sheriff Molana Habib* (2018) eKLR:

“... A permanent injunction which is also known as a perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support and against the claim has been tendered ...

A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties ...”

14. As at now the parties herein have not been heard to enable the court make a full determination on their rights as pertains to the suit property. It follows therefore that the plaintiff's prayer for an order of a permanent injunction cannot be granted at this stage.
15. On the other hand an order of temporary injunction is equitable in nature and is issued by the court early in a matter such as this to restrain a party from continuing with certain alleged harmful actions. Order 40 rule 1 of the *Civil Procedure Rules, 2010*, sets out the law on the grant of such injunctions as follows:

“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;

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. The conditions for consideration in granting an interlocutory injunction were long settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) EA 358 where the Court expressed itself thus:

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

17. The question which therefore arises herein is whether or not the plaintiff’s application meets the threshold set for the granting of orders of a temporary injunction. As to what would amount to a *prima facie* case in a matter such as this the Court of Appeal offered guidance in *Mrao Limited v First American Bank of Kenya & 2 others* (2003) KLR 125 where the Court observed thus:

“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 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 the matter before me, it is not in dispute that the defendant is the legally registered owner of the parcel of land known as LR No 24880 by way of a sub-lease registered under CR 42241/1 being plot A 116 situate in Vipingo Ridge Kilifi. It is also not in dispute that the parties to the suit entered into an agreement for the sale thereof to the plaintiff. The dispute herein lies in the terms of that agreement, whether those terms were breached and if so, by whom.

19. According to the plaintiff, the said agreement was executed on May 18, 2020 and in compliance therewith he had duly paid a deposit required of Kshs 10,000,000/- and the defendant was therefore under an obligation pursuant to clause 5.3.1 of the agreement to supply him with copies of completion documents for purposes of conducting due diligence and to enable him pay the balance of the purchase price.

20. The plaintiff avers that in total disregard of the stipulations in the agreement, the defendant had failed to release the said documents and had instead purported to rescind the agreement and to forfeit the deposit on account that the completion date had lapsed.

21. On his part the defendant contends that he executed the agreement on April 2, 2020 on the understanding that the plaintiff would execute his part and disburse the required deposit the same day.



According to the defendant that did not happen and the plaintiff only released half of the stipulated deposit being Kshs 5 million on April 16, 2020 before topping up on May 2, 2020 after protests from the defendant. It is the defendant's case that the completion period of 90 days commenced on the date the plaintiff paid the full deposit and that when the 90 days lapsed on August 20, 2020, he gave notice of rescission which took effect some 21 days later and the contract was effectively rescinded with the deposit of Kshs 10,000,000/- forfeited as per the terms thereof.

22. As the Court of Appeal stated in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR:

“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.”

23. From the material placed before me, I was not persuaded that the plaintiff had shown a clear and unmistakable right that ought to be protected at this stage by an order of injunction. While by the agreement executed the plaintiff had expressed his commitment to purchase the suit property, he had neither been in occupation nor in possession thereof. The plaintiff had neither paid the full purchase price nor made any improvements on the suit property by the time the dispute herein erupted.

24. While it was not disputed that the plaintiff had invested Kshs 10,000,000/- as deposit towards the purchase of the property, I was not persuaded that he was likely to suffer injury that was incapable of being compensated by an award of damages where the defendant was to be found to be in breach of the agreement. In the circumstances herein, any losses likely to be incurred by the plaintiff were essentially of a pecuniary nature and the same would be adequately redressed in damages in the event this suit was successful.

25. In the premises, I was not persuaded that there was merit in the plaintiff's application. I dismiss the same with an order that the costs be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 19TH DAY OF OCTOBER, 2022.

In the presence of:

Ms Hanan holding brief for Madowo for the plaintiff/Applicant

Mrs Omote for the defendant/Respondent

Court assistant - Kendi

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J. O. OLOLA

JUDGE

