



Gichuhi v Essen Holdings Limited & another (Environment and Land Case Civil Suit 313 of 2019) [2022] KEELC 13595 (KLR) (18 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 313 OF 2019
SO OKONG'O, J
OCTOBER 18, 2022**

BETWEEN

CHRISTOPHER KAGEMA GICHUHI PLAINTIFF

AND

ESSEN HOLDINGS LIMITED 1ST DEFENDANT

STEPHEN NG'ANG'A MUIGAI 2ND DEFENDANT

RULING

Background

1. The Plaintiff brought this suit on 27th September 2019 seeking an injunction to restrain the Defendants from dealing with all that parcel of land known as L.R No. 209/136/104(hereinafter referred to as “the suit property”) that was already registered in the 1st Defendant’s name in any manner prejudicial to the right and interest of the Plaintiff therein, an order that the Plaintiff be allowed to access and collect the rental income from the suit property pending the resolution of the dispute between the parties, an order that the Defendants are given 21 days notice to comply by paying the balance of the purchase price plus interest thereon, an order that the Defendants pay interest on the balance of the purchase price from the date the suit property was charged and in the alternative and without prejudice, the Defendants pay general damages to the Plaintiffs.
2. The Plaintiff averred that he was at all material times the registered owner of the suit property. The Plaintiff averred that through a sale agreement dated 26th February 2019, he sold the suit property to the 1st Defendant at a consideration of Kshs. 82,500,000/= . The Plaintiff averred that upon being paid a deposit of Kshs. 8,250,000/=, he transferred the suit property to the 1st Defendant which charged the same to Equity Bank Limited to secure a loan that he sought from the said bank to enable it pay the balance of the purchase price.



3. The Plaintiff averred that despite having the property registered in its name, charging it and taking possession thereof, the 1st Defendant had failed to pay the balance of the purchase price in the sum of Kshs. 74,250,000/= . The Plaintiff averred that he issued a notice to his former tenants in the suit property on 12th September 2019 advising them of the change in the ownership of the suit property and asking them to pay rent to the 1st Defendant. The Plaintiff averred that the 1st Defendant was to pay the balance of the purchase price as soon as it took possession of the suit property in terms of the agreement the parties had reached on the question of how vacant possession was to be delivered.
4. The Plaintiff averred that the 1st Defendant had taken possession of the suit property from which it was entitled to receive rent as the owner thereof and was also keeping the balance of the purchase thereby causing him great anxiety and frustrating his intention to plan his future and that of his dependants. The Plaintiff averred that the 1st Defendant's refusal to pay the balance of the purchase price amounted to a breach of the terms of the agreement of sale between the parties.
5. The Plaintiff averred that the 1st Defendant used trickery to transfer the suit property to its name and charged the same to obtain credit facilities. The Plaintiff averred that as a result of the Defendant's trickery, the Plaintiff was left with no property, no purchase price and no tenants. The Plaintiff averred that the 1st Defendant could not have the suit property, the rental income and the balance of the purchase price at its pleasure.
6. Together with the plaint, the Plaintiff filed an interlocutory application dated 27th September 2019 seeking among others the following orders;
 1. That the Honourable Court be pleased to issue a temporary injunction restraining the Defendants, their servants, agents, creditors or otherwise howsoever from dealing with the title of the suit property by purporting to charge it, sell it, mortgage it or doing anything that will tend to further prejudice Plaintiff's interest and/or right in it pending the payment of the balance of the purchase price to the Plaintiff herein plus interest thereon.
 2. That the Defendants pay the balance of the purchase price to the Plaintiff forthwith.
 3. That the Plaintiff be allowed to collect rent from the tenants on the suit property until the balance of the purchase price is paid to him with interest thereon and/or until this suit is heard and determined.
7. In a ruling delivered on 3rd February 2022, the court dismissed the Plaintiff's application with costs to be in the cause. In the ruling, the court stated as follows in part:

“The final prayer is for the Plaintiff to be allowed by the court to collect rent from the tenants on the suit property until the balance of the purchase price is paid to him together with interest and until the suit is heard and determined. Clause 4 of the agreement for sale between the Plaintiff and the 1st Defendant provided that the 1st Defendant was not entitled to vacant possession of the suit property until the full purchase price was paid to the Plaintiff. The Defendants have denied that they have taken possession of the suit property. They have also denied receiving rent from the tenants on the suit property. The Defendants have contended that it is the Plaintiff who is collecting rent from the tenants on the suit property. The Plaintiff has not denied this allegation. The Plaintiff does not require an order from the court to continue collecting rent from the suit property. Since vacant possession has not been given to the 2nd Defendant(sic), the tenants in possession must pay rent to someone. Whether that someone should be the Plaintiff or the 2nd Defendant(sic) is a



contentious issue that the court would only be able to determine at the trial of the Plaintiff's claim and the Defendant's Counter-claim."

8. The Defendants filed a joint defence on 6th November 2019. The defence was amended on 12th November 2020 to introduce a counter-claim. In their amended defence and counter-claim, the Defendants admitted that the 1st Defendant entered into an agreement for sale with the Plaintiff in respect of the suit property. The Defendants denied that the 2nd Defendant had told the Plaintiff that he would find a solution to the issue of vacant possession of the suit property. The Defendants denied that they were obliged to pay to the Plaintiff the balance of the purchase price in the sum of Kshs. 74,250,000/- upon registration of the suit property in the name of the 1st Defendant and creation of a charge over the same in favour of Equity Bank Kenya Limited (hereinafter referred to only as "the bank"). The Defendants denied further that the Plaintiff had handed over vacant possession of the suit property to the Defendants.
9. The Defendants averred that it was the Plaintiff who had delayed in fulfilling his obligation to deliver vacant possession of the suit property to the 1st Defendant which was a condition precedent to the bank paying the balance of the purchase price. The Defendants averred that the balance of the purchase price was secured by a professional undertaking to the Plaintiff in terms of Clause 3 of the agreement for sale between the parties. The Defendants averred that the Plaintiff had not been paid the balance of the purchase price because the Plaintiff had refused, failed and/or neglected to deliver vacant possession of the suit property to the 1st Defendant. The Defendants averred that the 2nd Defendant was not a party to the agreement of sale between the Plaintiff and the 1st Defendant hence he should be removed from the proceedings.
10. In their counter-claim, the Defendants averred that that the 1st Defendant and the Plaintiff entered into an agreement for sale of the suit property dated 26th February 2019 under which the Plaintiff agreed to sell and the 1st Defendant agreed to purchase the suit property at a consideration of Kshs. 82,500,000/-. The Defendants averred that pursuant to the said agreement, the 1st Defendant paid 10% of the purchase price and the balance in the sum of Kshs. 74,250,000/- was to be financed by the bank which was to pay the same to the Plaintiff upon the Plaintiff delivering vacant possession of the suit property to the 1st Defendant on completion in terms of clause 3 of the agreement for sale. The Defendants averred that despite the fact that the completion period had expired, the Plaintiff had refused, failed and/or neglected to deliver vacant possession of the suit property to the 1st Defendant.
11. By way of a counter-claim, the Defendants sought judgment against the Plaintiff for; an order for specific performance and rental income and/or mesne profits from the suit property at the rate of Kshs. 655,300/- per month from 21st August 2019 until possession of the suit property is delivered, and in the alternative, a refund to the 1st Defendant of; Kshs. 8,250,000/- paid as a deposit, Kshs. 3,300,000/- paid for stamp duty on the transfer, Kshs. 74,250/- paid as stamp duty on the charge, Kshs. 1,855,000/- being legal costs on the transfer and the charge and Kshs. 268,900/- being the valuation fees. The Defendants also sought general damages, damages for loss of bargain and costs of the suit and the counter-claim.
12. The Plaintiff filed a reply to amended defence and defence to counter-claim on 14th December 2020. The Plaintiff denied all the allegations in the amended defence and counter-claim. The Plaintiff averred that he had no contractual relationship with the bank and that the duty to pay the balance of the purchase price was on the 1st Defendant. The Plaintiff urged the court to dismiss the Defendants counter-claim and to enter judgment for the Plaintiff as prayed in the amended plaint.



The application before the court:

13. What is now before me is the Defendants' application brought by way of Notice of Motion dated 14th February 2021 seeking the following orders;
 1. Spent.
 2. Spent.
 3. That the Plaintiff be ordered to deposit in court and/or in an interest earning joint bank account in the names of the advocates on record for the parties all the rent collected from the suit property amounting to Kshs. 655,300/- per month or such other ascertained amount and all future rent to be deposited as such.
 4. That the OCS Central Police Station does ensure compliance with the orders of the court.
14. The Defendants' application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the 2nd Defendant. The Defendants contended that the Plaintiff had for no apparent reason refused or failed to hand over the suit property to the Defendants in accordance with the terms of the agreement of sale between the parties resulting in a stalemate since the balance of the purchase price was to be paid by the bank subject to the suit property being handed over in vacant possession. The Defendants contended that despite being in breach of the said agreement, the Plaintiff had continued to collect rental income from the suit property of approximately Kshs. 655,300/- per month which were it not for the plaintiff's breach would have been payable to the 1st Defendant. The Defendants averred that the Plaintiff had continued to collect the rental income from October 2019 when he was supposed to have handed over vacant possession of the suit property.
15. The Defendants averred that the Plaintiff was not keen on fulfilling his obligations under the said agreement of sale because he was still enjoying the rental income. The Defendants averred that they had already paid substantial amount of money to the Plaintiff as a deposit towards the purchase of the suit property and as such they had suffered loss. The Defendants contended that it was in the interest of justice that the application be allowed.
16. The Plaintiff opposed the Defendants' application through a replying affidavit sworn on 18th February 2021. The Plaintiff averred that he allowed the Defendants to use the title of the suit property to obtain a loan from the bank on condition that upon registration of the charge over the suit property, the balance of the purchase price would be paid to the Plaintiff within 14 days without the Defendants insisting on vacant possession and that the Defendants and the Plaintiff would meet to discuss the best way to handover the management of the suit property to the Defendants as soon as the Plaintiff was given notice that the transfer in favour of the 1st Defendant and the charge in favour of the bank had been registered. The Plaintiff averred that this understanding between the parties was captured in the correspondence and the professional undertaking that was given by the bank. The Plaintiff averred that these arrangements were to be reduced into writing through amendments of clauses 2 and 3 of the agreement of sale but this was not done because the 2nd Defendant claimed to be an honest businessman and as such he would not renege on what the parties had agreed on.
17. The Plaintiff averred that he fully complied with the agreed mode and process of handing over the suit property and that nobody stopped the Defendants from taking possession and collecting rent from the property. The Plaintiff contended that the Defendants' application was brought in bad faith and was an abuse of the court process. The Plaintiff averred that the Defendants appeared not to have the balance of the purchase price. The plaintiff averred that the Defendants had overlooked clause 6 of



the agreement of sale that provided that the Defendants were only entitled to vacant possession upon payment of the full purchase price.

18. The 2nd Defendant swore a further affidavit on 3rd March 2022 in which he denied the allegations contained in the Plaintiff's replying affidavit. The 2nd Defendant averred that the agreement between the parties was reduced into writing and was the whole agreement and that the same superseded what the parties may have discussed or agreed on prior to the execution of the agreement. The 2nd Defendant reiterated that the granting of vacant possession by the Plaintiff to the 1st Defendant was a condition precedent to the bank releasing the balance of the purchase price. The 2nd Defendant contended that the Plaintiff was against the change in the status quo because it was favourable to him.

Determination:

19. The Defendants' application was heard by way of written submissions. The Defendants filed their submission dated 11th March 2022 on 14th March 2022 while the Plaintiff filed his submissions dated 14th October 2022 on 15th October 2022. The Defendants submitted that it was necessary to preserve the rent income accruing from the suit property pending the hearing and determination of the suit. On his part, the Plaintiff submitted that the Defendants were in breach of the agreement of sale by failing to pay the balance of the purchase price. The Plaintiff submitted that the Defendants were not entitled to possession of the suit property until they paid the full purchase price and as such they were not entitled to the rental income from the suit property. The Plaintiff submitted that since the Defendants were not entitled to rental income from the suit property, their application seeking to preserve the said rental income had no basis.
20. The Plaintiff submitted that whereas the Defendants had only paid a sum of Kshs. 8,250,000/-, the Plaintiff was losing interest on the balance of the purchase price in the sum of Kshs. 74,250,000/- running into millions of Shillings. The Plaintiff submitted that it resumed management of the suit property after the 1st Defendant which had been registered as the owner thereof abandoned the same.
21. I have considered the Defendants' application together with the affidavits filed in support thereof. I have also considered the replying affidavit by the Plaintiff filed in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. The Defendants' application was brought principally under Order 40 Rules 1(a) of the Civil Procedure Rules which provides as follows:
 - "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."
22. For the Defendants to succeed in their application, the Defendants had to bring themselves within the provisions of the Order 40 Rule 1(a) of the Civil Procedure Rules and since the orders sought are in the nature of a temporary injunction, they also had to satisfy the conditions for granting such injunction. I have noted that the Defendants in their main prayer in the counter-claim have sought judgment for



specific performance and rental income or mesne profits from the suit property. The rental income from the suit property is therefore in dispute in this suit and as such can be the subject of an order under Order 40 Rule 1(a) of the *Civil Procedure Rules*. As for the conditions for granting a temporary injunction, the same are settled. In *Giella v Cassman Brown & Co. Ltd.* [1973] E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

23. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal stated as follows:

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. ...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 threatened with violation... The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. 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."

24. I am not satisfied that the Defendants have established the conditions for granting a temporary injunction. I am not persuaded that the Defendants are entitled to the orders for preservation of the rental income from the suit property. It is common ground that the Defendants were only entitled to possession of the suit property upon payment of the full purchase price. It is common ground that the Defendants have refused to take possession of the suit property unless the property is vacant and for that reason they have not paid the balance of the purchase price. The Defendants have not offered to deposit the balance of the purchase price in court or in a joint interest earning bank account in the names of the advocates for the parties. Since the Defendants are not in possession of the property having not fulfilled the condition for obtaining such possession, they are not entitled to receive or collect rent from the property. In the ruling that I delivered herein on 3rd February 2022, I stated as follows in part:

There is however no way in which the 2nd Defendant(sic) would be able to collect rent from the suit property while it has not obtained possession and does not require the current tenants on the property. The prevailing status quo will have to be maintained pending the determination of the parties' rights at the trial."

25. Since the Defendants have not paid the balance of the purchase price either to the Plaintiff or in court in performance of their obligations under the agreement for sale dated 26th February 2019, I am not persuaded on a prima facie basis that they are entitled to the rental income from the suit property. The Defendants' application is premised on their prayer for specific performance in the counter-claim. The Defendants have not satisfied me that they have a prima facie case against the Plaintiff for specific performance. The Defendants purchased the suit property with the full knowledge that it was occupied by tenants. It was obvious that the Plaintiff was not going to succeed in removing over 12 tenants who were in occupation of the property from the premises within 90 days completion period that was agreed upon by the parties. Since the Defendants want the suit property vacant and the tenants have not moved out, there is no way the court is going to order specific performance. The suit property is



already registered in the name of the 1st Defendant. What the Defendants want the court to do is to order the Plaintiff to remove the tenants from the property and handover vacant possession to the 1st Defendant. The chances of the court giving such order is minimal. The Defendants may get damages for breach of contract if proved but not an order for specific performance which is discretionary. Since a prima facie case for specific performance and rental income claim has not been established by the Defendants, a case has not been made for the order sought for the preservation of the rental income.

26. I am also not persuaded that the Defendants stand to suffer irreparable damage or harm if the orders sought are not granted. As correctly submitted by the Plaintiff, the 1st Defendant which has had the suit property registered in its name is yet to pay the balance of the purchase price in the sum of Kshs. 74,250,000/-. Interest accruing on that amount runs into hundreds of thousands of Kenya Shillings per month. No one has also stopped the Defendants from paying the balance of the purchase price and taking possession of the suit property together with the tenants and the rental income.
27. For the foregoing reasons, the Notice of Motion application dated 15th February 2021 has no merit. The same is dismissed with costs to be in the cause.

DELIVERED AND DATED AT KISUMU THIS 18TH DAY OF OCTOBER 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Nabutete for the Plaintiff

Mr. Kamau for the Defendants

Ms. J. Omondi-Court Assistant

