Simalice Construction Company Ltd v Arjan & another (Environment & Land Case E010 of 2022) [2022] KEELC 15416 (KLR) (21 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15416 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE E010 OF 2022

CG MBOGO, J

DECEMBER 21, 2022

BETWEEN

SIMALICE CONSTRUCTION COMPANY LTD ..... APPLICANT

AND

NARAN V ARJAN ..... 1ST RESPONDENT

JYOTI N HIRANI ..... 2ND RESPONDENT

RULING

1. Before this court for determination is a notice of motion application dated October 5, 2022 expressed to be brought under order 40 rule 1 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* seeking the following orders: -

    1. Spent.

    2. That an urgent injunction do issue forthwith restraining the respondents by themselves, their agents, servants and /or employees or any other person or group purporting to act on their behalf from alienating, entering into, subdividing, altering, taking possession and/or interfering with the suit premises known as L R's Cis-Mara/Siana "A"/4641 and Cis-Mara/ Siana "A"/2385 in any manner whatsoever pending the hearing and determination of the applicant's suit.

    3. That the costs of this application be provided for.

    4. That such other order and/or further relief be granted as this honourable court may deem fit and just to grant.

2. The application is premised on the grounds *inter alia* that the applicant was the registered owner of the suit premises and having entered into an agreement of sale of the suit property with the respondents, it was agreed that the purchase price was kshs 41,500,000/-. Thereafter, the purchase price was reduced

to kshs 30,000,000/- and it was agreed that effect of transfer could take place upon payment of the full purchase price.

3. The application is supported by the affidavit of Simon Wainaina, director of the applicant sworn on October 5, 2022. In his affidavit, the applicant deposed that it entered into an agreement for sale of the suit property with the respondents on November 16, 2021 for the sum of kshs 41,500,000/- and it was later revised to kshs 30,000, 000/-.Further, that the applicant executed the subsequent agreement and sent the same to the respondents who refused and neglected to submit back to the applicant the signed copy.

4. The applicant further deposed that the terms of the said agreement was that the respondents would take possession upon paying the full purchase price and the respondents requested all the original documents to be handed over to their advocates pending the completion and payment of the purchase price which the applicant agreed to. Further, that at the point of request, the respondents had paid kshs 24,500,000/- and the balance owing is kshs 5,500,000/- and that in utter disregard of the agreement, the respondents transferred the suit properties and have completely refused to transfer the balance of the purchase price.

5. The applicant further deposed that although the respondents had orally requested for a further discount of kshs 1,000,000/- which was granted based on the friendly contractual cooperation which has since lapsed, the applicant would wish that the balance of the purchase price in the sum of kshs 5,500,000/- be paid. Further, that there is likelihood that the respondents may alienate and transfer the suit properties to a 3rd party rendering the suit nugatory.

6. The 1st respondent filed a replying affidavit in opposition to the application which was sworn on October 24, 2022.The 1st respondent deposed that the actual agreement for sale between the parties was signed on March 31, 2022 and the applicant acknowledged that kshs 5,500,000/- had already been paid before signing the agreement and that the applicant conveniently omits the fact that kshs 5,000,000/- was paid to it through the director of the applicant on November 15, 2021 in the offices of Muigai, Kemei and Associates in cash. Further, that the cash payment was made in the presence of the applicant's director, the 1st respondent, Mr Ian Maina, Advocate and Mary Muigai, Advocate and the applicant's director carried kshs 5,000,000/-in a bag from the office.

7. The 1st respondent further deposed that upon interrogation of the property, anomalies were identified and they decided to rescind the agreement and despite doing so, the applicant through its director pursued completion vehemently and did not refund kshs 5,500,000/- paid as a first deposit. Further, that in March, 2022 the parties agreed to renegotiate the contract and the balance of the purchase price was paid as enumerated in the plaint and the parties agreed for release of possession immediately the second deposit was paid. The 1st respondent further deposed that kshs 500,000/- was not paid because the applicant blocked the respondents from accessing the suit property after payment of almost all the purchase price and the application is an attempt to apply to court to further fraud.

8. The applicant filed a supplementary affidavit sworn on October 28, 2022.The applicant deposed that the first agreement was for kshs 41,500,000/-, the second agreement was for kshs 21,500,000/- with an addendum to make further payment of kshs 17,000,000/- and that in both agreements dated November 16, 2021, it was an express term of the agreement that the deposit of the purchase price was to be paid through its advocates at the time KMK Law LLP which the respondents failed to pay the said deposit and now claim that the same was paid in cash with no evidence. The applicant deposed that indeed they executed an agreement dated March 31, 2022 whose terms were altered. In addition, that the contents have been fabricated in order to deceive this court and subvert justice.

9. In response thereto, the 1st respondent filed a further affidavit sworn on November 14, 2022.The 1st respondent deposed that if indeed the agreement for sale was kshs 41,500,000/- then the applicant would be claiming kshs 12,000,000/- as opposed to kshs 5,000,000/- and the claim in paragraph 6 is false because the payments were paid directly to the applicant and none was paid to its advocates and also that the applicant went ahead and procured consent for transfer in favour of the respondents. Further, that the applicant has constructively acknowledged receipt of kshs 29,500,000/-.

10. The 1st respondent further deposed that proof of full payment has been rendered constructively through the applicant procuring a consent to transfer and allowing access of the suit property to the respondents save to bar access by a borehole drilling company. In addition, that the applicant sold the suit property for kshs 30,000,000/- which was fully paid save for kshs 500,000/- which was withheld. As such, the respondents have incurred costs of kshs 600,000/- by the water drilling company.

11. The application was disposed off by way of written submissions. The respondents filed written submissions dated November 16, 2022.The respondents submitted that both parties executed the agreement for sale and each party discharged its obligations and the applicant by executing the agreement admitted to payment of kshs 5,500,000/- as deposit. The respondents submitted that this court ought to decline grant of injunction and proceed to take evidence in the main suit so that the matter is determined once and for all for the reason that the prayers sought fail to meet the principle test in *Giella versus Cassman Brown* [1973] EA 358.

12. The respondents further submitted that there is no need for injunctive orders as there exists no risk of the owners of the suit property transferring their interest, and there is no risk that the claim by the applicant cannot be met in monetary terms.

13. The applicant did not file written submissions. Be that as it may, I have carefully considered the application, replying and further affidavits thereof as well as the written submissions filed by the respondents and the issue for determination is whether the applicant is entitled to the grant of injunction orders.

14. In the period preceding determination of a law-suit or an application; after the law-suit or the application has been heard but not yet determined; and even after a law-suit or the application has been heard and determined, there are acts or omissions which befit restraint from doing or compulsion to do, in the vote of preventing the ends of justice from being defeated, an injunction is the order appropriate in such circumstances. An injunction is a discretionary equitable remedy in the form of a court order which compels a party to do or refrain from doing specified acts and granted only in circumstances where irreparable harm is likely to occur. This was the reasoning in *Charter House Investments Ltd vs Simon K Sang and others* [2010] eKLR, per Omolo, Githinji and Visram JJ A, (as they then were).

15. The kind of injunction the applicant is seeking now is, a temporary restraining preliminary interlocutory injunction, one of the subsets of interlocutory injunctions which is granted inter-partes.

16. Order 40 rule (1) and (2) of the Civil Procedure Rules provides for the procedure deployable in applications for temporary injunctions. But what are the circumstances under which Order 40 of the Civil Procedure Rules is deployable? Order 40 is limited to restraining a party from wasting, damaging, alienating, wrongfully selling, or removing from jurisdiction property in dispute or from breaching a contract or committing any other injury, whether compensation is claimed in the suit or not. For purposes of this application, rules 1 & 2 of the Civil Procedure Rules which provide for circumstances under which an injunctive relief can be granted, are key and I deem it necessary to reproduce it here. It reads: "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. [Order 40, rule 2.] Injunction to restrain breach of contract or other injury. 2. (1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right. (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court deems fit."

17. The test for granting of a temporary injunction was considered in the *American Cyanamid Co v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely: -

    i. There must be a serious/fair issue to be tried,

    ii. Damages are not an adequate remedy,

    iii. The balance of convenience lies in favour of granting or refusing the application.

18. The important consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit, the court is in such a situation obligated to grant a temporary injunction to restrain such acts.

19. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal 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 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 later".

20. In the instant case, it is not in doubt that both parties entered into an agreement for sale of the suit property. It is also not in doubt that pursuant to the copies of search dated September 28, 2022, the 1st respondent is the registered owner of the suit properties. It cannot be said that the applicant herein has an interest in the properties as any damage or risk on the suit properties passed on to the 1st respondent. So far as it is, there is no risk of the suit property being damaged, wasted or alienated.

21. The second limb that the applicant ought to satisfy the court is that he will suffer irreparable injury if the injunction is not granted. In the case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* [2018] eKLR the court stated;

> " irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The

applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury"

22. Further in the case of *Peter Kairu Gitu versus KCB Bank Kenya Limited & another* [2021] eKLR the court held that;-

> " Having found that the applicant has not established a *prima facie* case, I find that it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted. I am guided by the decision in *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, CA NO 77 OF 2012, where the Court expressed itself on the importance of satisfying all the three requirements for an order of injunction as follows: -
>
> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a *prima facie* level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co Ltd v Afraha Education Society* [2001] Vol 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

23. In this case, it is not in doubt that the suit property was for sale and that the applicant had sold the same to the respondents and had further received almost all the purchase price for sale of the said property save for disputed amount of the balance of the purchase price. The applicant disputed that kshs 5,500,000/- remains outstanding, whereas the respondents disputed that kshs 500,000/- is the amount owing to the applicant and which is readily payable. This court finds and holds that the damages are quantifiable as the same can be recovered.

24. My analysis of this case is that the applicant has failed to meet the test as provided under order 40 rule 1 of the Civil Procedure Rules because any injury that the applicant may suffer will be compensated by way of damages and no irreparable harm or injury has been established.

25. Arising from the above, I find that the notice of motion application dated October 5, 2022 lacks merit and the same is hereby dismissed. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 21ST DAY OF DECEMBER, 2022.

HON MBOGO C G

JUDGE

21/12/2022

In the presence of:

CA:Chuma